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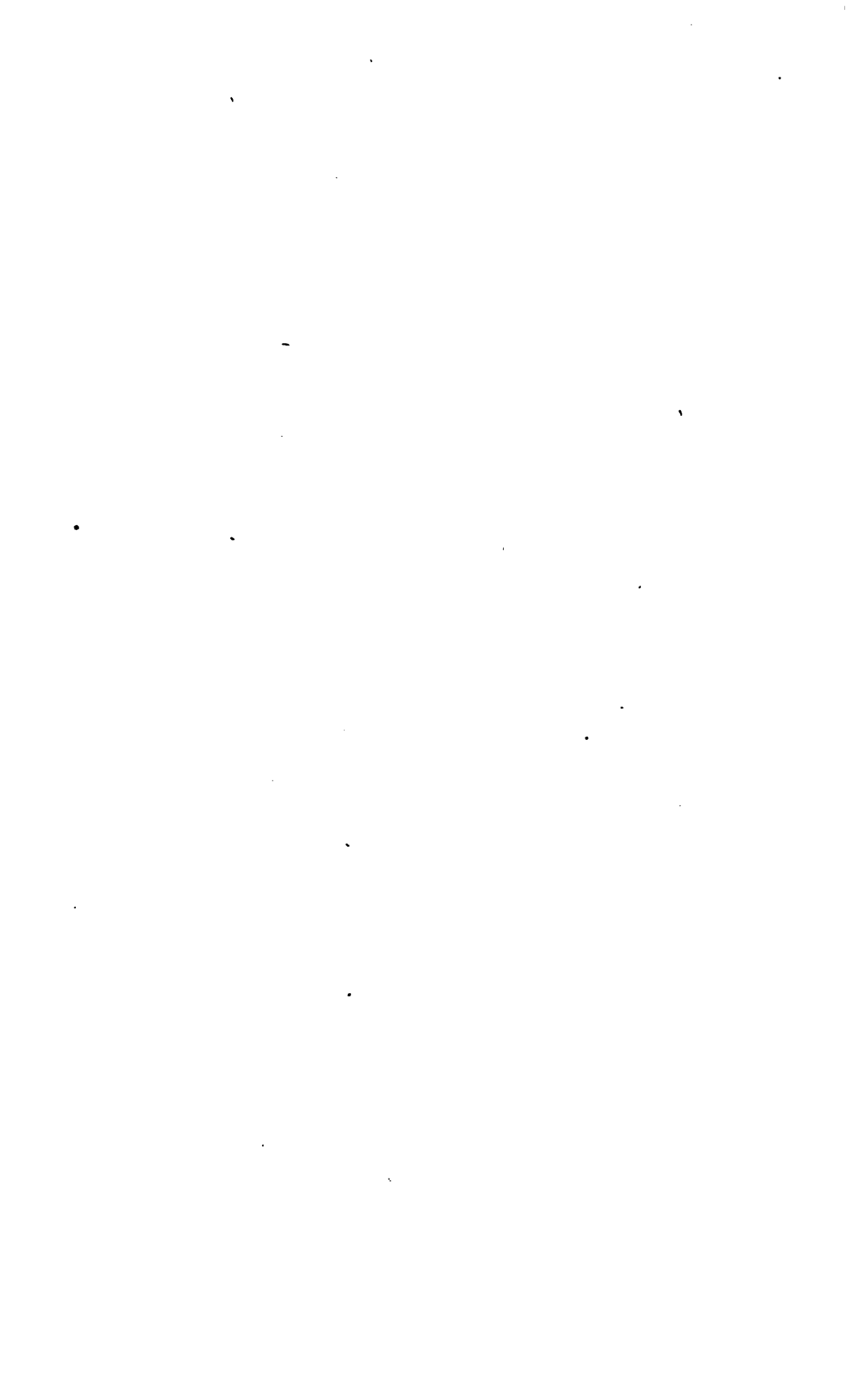
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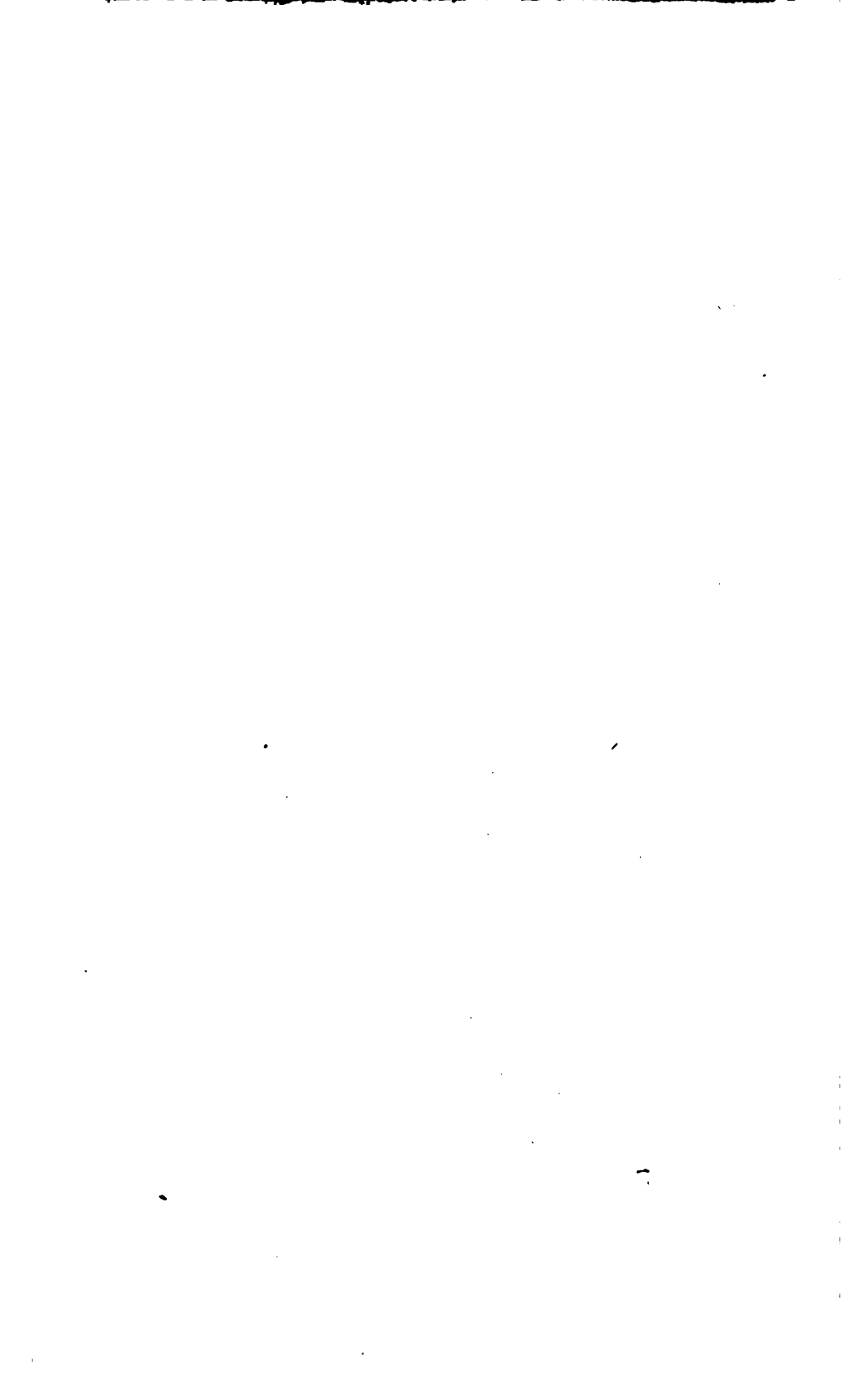
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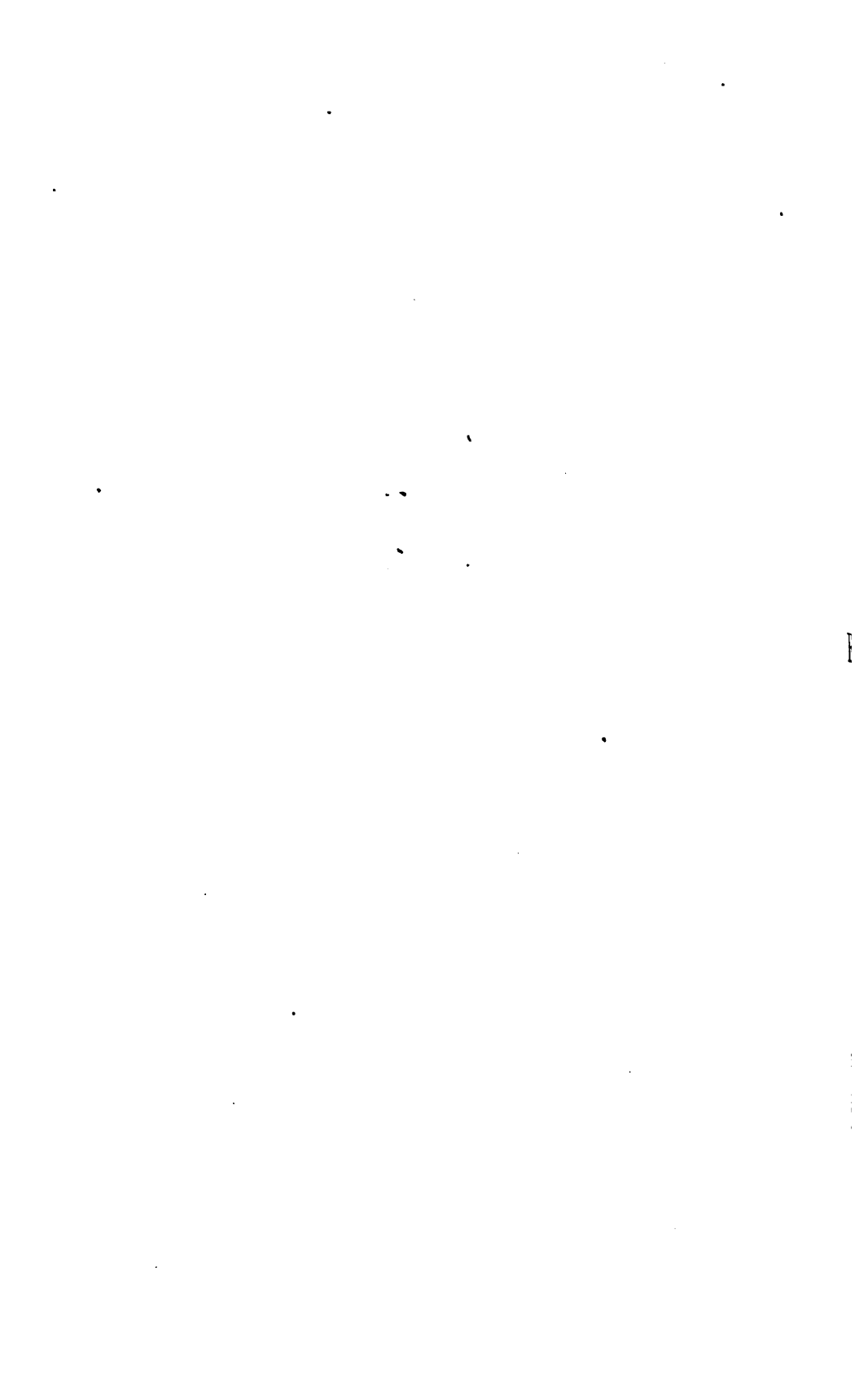
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**RIGHTS, REMEDIES, AND PRACTICE.**



RIGHTS, REMEDIES,  
AND  
PRACTICE,  
AT LAW, IN EQUITY, AND UNDER THE CODES.

A TREATISE ON  
AMERICAN LAW  
IN CIVIL CAUSES;  
WITH  
A DIGEST OF ILLUSTRATIVE CASES.

BY  
JOHN D. LAWSON,  
AUTHOR OF WORKS ON PRESUMPTIVE EVIDENCE, EXPERT EVIDENCE, CARRIERS,  
USAGES AND CUSTOMS, DEFENSES TO CRIME, ETC.

IN SEVEN VOLUMES.

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## PREFACE.

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**THIS** volume, continuing the third division — **Property Rights and Remedies** — contains the titles **Real Property, Easements, Landlord and Tenant, Fixtures, Watercourses, Nuisances, Mortgages, Liens, Descent and Distribution, Wills, and the first part of the title Remedies and Procedure, viz, Arbitration and Award.**

**J. D. L.**



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**TITLE XXVI.**  
**REAL PROPERTY.**



## TITLE XXVI.

# REAL PROPERTY.

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### CHAPTER CXXVIII.

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§ 2678. **Real Property Defined.**—The old definition of real property is that which may be held by tenure, or will pass at the death of the possessor to the heir, and not to his executor;<sup>1</sup> a more modern, and at the same time apt, definition is contained in the single word “immovable.”<sup>2</sup>

<sup>1</sup> 2 Bouvier's Law Dict. 413; 1 Atkinson on Conveyancing.

<sup>2</sup> “The leading essential quality of personal property in all systems of jurisprudence — that which serves more nearly than anything else to mark the meaning and to distinguish personal from real property — is its mobility. Things real, like lands, trees, and houses, have a fixed locality; they are immovable, so to speak. But things personal, such as money, jew-

elry, clothing, household furniture, boats, and carriages, are said to follow the person of the owner wherever he goes; they need not be enjoyed in any particular place, and hence they are movable. This fundamental division of property into immovables and movables is the primary and most obvious one; and to each class we find that a separate set of legal principles has been universally applied. The popular application of the terms ‘real’ and

Another element in real property is the duration of the time of enjoyment; it must last for an indefinite term. An estate in lands other than one forever or for life fell short of a freehold, even though it were for a thousand years.<sup>1</sup> Therefore leases for years were called chattels real. Real property, in the common law, includes lands, tenements, and hereditaments. By "land" is meant the surface of the earth and everything under it or over it.<sup>2</sup> "Tenement" is a word of greater extent than "land," and signifies everything of a permanent nature that may be holden by a tenure,<sup>3</sup> whether it be of a substantial and

'personal' in the English tongue is to the same effect. And here we may observe how frequently things which were originally immovable become, through the operations of nature or by the art of man, movable so as to change from real to personal property; and on the other hand, how things once movable, or personal property, acquire the characteristics and become subject to the law of real property. Thus a tree is real property so long as it stands in its native soil; but cut that tree down, and make a pile of wood, and you may subject it to the laws of personal property; use that wood in making a chair or a table, or deposit it in your neighbor's cellar for fuel, and it is unquestionably personal property. A mineral or metal in the earth is real property, but dig out the precious substance, and you have an article of merchandise which is personal property. There is the orchard with its hanging fruit; and here is the gathered fruit ready for sale in the market. The act of complete severance, then, is commonly what changes property from real to personal, from immovable to movable; although the thing itself which we carry from place to place may not be the result of a mere severance, like fruits, vegetables, hewn trees, and coal, but the result of a severance followed by other acts of workmanship, as in the case of money wrought up from gold and silver ore, furniture from trees, and necklaces from precious stones once imbedded in the ground. Personal property may be

changed into real property likewise; as in the very common instance where one takes building-stones, bricks, and mortar, — all personal property, — and fashions them into a house, which becomes, as it were, incorporated with the soil, and is subject to the rules which regulate real property. And yet, once more, that same house may in the lapse of time be pulled down, and the building materials may then be sold as such, and acquire again the characteristics of personal property, whatever the article be styled in its various modifications. Therefore a thing may be first real, then personal, then real again; and indeed, the changes may go on indefinitely so long as the thing itself lasts. Nor is its identity necessarily lost in this process, nor need a great variety of names be applied to an original substance undergoing the transmutation; since a growing tree might first be taken from a nursery, next pass for sale in the market as personal property, and lastly be transplanted and grow up in a new soil, where the law would regard the tree as part of the soil itself": 1 Schouler on Personal Property, secs. 3, 4.

<sup>1</sup> 1 Schouler on Personal Property, sec. 6.

<sup>2</sup> 2 Bla. Com. 17, 18; Broom's Legal Maxims, 395, 398; Green v. Armstrong, 1 Denio, 554; Mott v. Palmer, 1 N. Y. 569; Auburn etc. Road Co. v. Douglass, 9 N. Y. 444.

<sup>3</sup> Co. Lit. 6 a; 2 Bla. Com. 17; Sackett v. Wheaton, 17 Pick. 103.

sensible kind, as lands or houses,<sup>1</sup> or of an unsubstantial, ideal kind, as offices, rents, commons, and the like.<sup>2</sup> "Hereditament" is a term of still greater extent, and comprehends not only lands and tenements, but whatever may be inherited.<sup>3</sup>

§ 2679. **Corporeal and Incorporeal Hereditaments.**—The common law likewise divided real property into corporeal and incorporeal; the latter being said to lie in grant, the former in livery.<sup>4</sup> Corporeal hereditaments embrace such things as can be seen or handled by the body, such as land and water.<sup>5</sup> Incorporeal hereditaments are rights existing only in the mind, though they appertain to real estate. They are "rights issuing out of a thing corporate, or concerning, or annexed to, or exercisable within the same,"<sup>6</sup> such as an office out of land, rents, estovers, rights of way or common, easements, or licenses, or any other right or profit granted out of land.<sup>7</sup>

§ 2680. **Houses and Buildings.**—All houses and buildings standing on it are a part of the "land," and pass under that term.<sup>8</sup> They become, even when erected on the land by a person not the owner of the land, a part of the realty.<sup>9</sup> But buildings erected by one person upon the land of another with the latter's consent, express or

<sup>1</sup> Co. Lit. 6 a; *Sacket v. Wheaton*, 17 Pick. 105.

<sup>2</sup> Co. Lit. 6 a; 2 Bla. Com. 17; *Sacket v. Wheaton*, 17 Pick. 103.

<sup>3</sup> 1 Preston on Estates, 12, 13; 1 Inst. 6; 2 Bla. Com. 17; *Canfield v. Ford*, 28 Barb. 336.

<sup>4</sup> 2 Bla. Com. 17; *Williams on Real Property*, 11, 239.

<sup>5</sup> 2 Bla. Com. 18, 21; Co. Lit. 19, 20; *Caldwell v. Fulton*, 31 Pa. St. 475; 72 Am. Dec. 760; *Sudbury v. Jones*, 8 Cush. 189.

<sup>6</sup> 2 Bla. Com. 18-21.

<sup>7</sup> 2 Bla. Com. 21. See *Easements, Ways, etc.*, post.

<sup>8</sup> Co. Lit. 4 a; 2 Bla. Com. 17; *Coombs v. Jordon*, 2 Bland, 234; 22

Am. Dec. 236; *Sudbury v. Jones*, 8 Cush. 189; *Loring v. Bacon*, 4 Mass. 576; *Doe v. Burt*, 1 Term Rep. 701; *Otis v. Smith*, 9 Pick. 293; *Mott v. Palmer*, 1 N. Y. 564; *Ford v. Cobb*, 20 N. Y. 344; *Reid v. Kirk*, 12 Rich. 54; *Huebschmann v. McHenry*, 29 Wis. 655; *Lipsky v. Borgmann*, 52 Wis. 256; 38 Am. Rep. 735; *Gilliam v. Bird*, 8 Ired. 280; 49 Am. Dec. 329.

<sup>9</sup> *Washburn v. Sproat*, 16 Mass. 449; *West v. Stewart*, 7 Pa. St. 122; *Cooper v. Adams*, 6 Cush. 87; *Leland v. Gassett*, 17 Vt. 403; *Ritchmeyer v. Morris*, 5 Abb. Pr., N. S., 44; 4 Abb. App. 55; 3 Keyes, 349; *Bonney v. Foss*, 62 Me. 248.

implied, are the property of the former,<sup>1</sup> who may maintain trover or replevin for them against the owner of the land.<sup>2</sup> Where one enters into possession of land under a contract for future purchase, paying no rent, and erects substantial buildings and machinery for the prosecution of his business, and fails to fulfill the contract and acquire the title, the erections are realty, and cannot be brought within a chattel mortgage of them by the vendee.<sup>3</sup>

ILLUSTRATIONS.—A railroad having a decree for the condemnation of land, erected thereon a depot without the owner's knowledge, and subsequently the decree was declared void. *Held*, that the depot became a part of the realty, even though it was on posts, and could have been easily moved: *Hunt v. R. R. Co.*, 76 Mo. 115. A frame building, with sills resting in some places on the ground, at others on posts set into the ground, and on railroad ties and stones, with a roof made of brush, was used in connection with an adjoining dwelling and saloon as a dance-hall. *Held*, a part of the realty: *Lipsky v. Borgmann*, 52 Wis. 256; 38 Am. Rep. 735. The owner of land grants the right to add a second story to a building, the grantee "to have and own said second story" for his use perpetually. *Held*, that the latter has no proprietary interest in the corpus of the land: *Thorn v. Wilson*, 110 Ind. 325; 59 Am. Rep. 209.

§ 2681. **Trees, Crops, Fruit, etc.**—Trees while they are standing, fruit so long as it is hanging to the trees, and crops until they are gathered, are things immovable, or real estate, because they are attached to the ground.<sup>4</sup> But

<sup>1</sup> *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; *Sudbury v. Jones*, 8 Cush. 184; *Harris v. Gillingham*, 6 N. H. 9; 23 Am. Dec. 701; *Hartwell v. Kelly*, 117 Mass. 235; *Curtis v. Hoyt*, 19 Conn. 154; *Central Branch R. R. Co. v. Fritz*, 20 Kan. 430; 27 Am. Rep. 175.

<sup>2</sup> *Osgood v. Howard*, 6 Me. 452; 20 Am. Dec. 322.

<sup>3</sup> *Hinkley and Egery Iron Co. v. Black*, 70 Me. 473; 35 Am. Rep. 346. See *Title Fixtures*.

<sup>4</sup> 1 Schouler on Personal Property, sec. 100; *Warren v. Leland*, 2 Barb. 613; *McGregor v. Brown*, 10 N. Y.

114; *Wright v. Barrett*, 13 Pick. 44; *Green v. Armstrong*, 1 Denio, 550; *Williamson v. Steele*, 3 Lea, 527; 31 Am. Rep. 652; *Bennett v. Scutt*, 18 Barb. 347; *Jones v. Flint*, 10 Ad. & E. 753; *Bank v. Cary*, 1 Barb. 542; *Vorebeck v. Roe*, 50 Barb. 302; *Kinsman v. Kinsman*, 1 Root, 180; 1 Am. Dec. 37; *Goodyear v. Vosburgh*, 39 How. Pr. 377; *Osburn v. Rabe*, 67 Ill. 108. A sale of a certain number of timber-trees growing upon land to be chosen by the vendee passes an interest which may be assigned before an election is made: *McCoy v. Herbert*, 9 Leigh, 548; 33 Am. Dec. 256.

when the trees are cut down, or the grass is cut, or the fruit or crops are gathered, they become movables, or chattels personal, because they are no longer attached to the soil.' When the severance takes place, either by the act of God, as by tempest, or by the tenants' wrongful act, or by a trespasser, it becomes personal property, and belongs to him who has the first estate of inheritance, and he may bring trover for it.<sup>2</sup> Corn, ripe but standing uncut in the field, passes by deed of the freehold.<sup>3</sup> Unharvested

<sup>1</sup> 1 Schouler on Personal Property, sec. 100; *Johnson v. Barber*, 5 Gilm. 425; 50 Am. Dec. 416.

<sup>2</sup> *Bewick v. Whitfield*, 3 P. Wms. 268; *Mowat v. Wart*, 3 Wend. 104; *Brock v. Smith*, 14 Ark. 431. In a recent English case (*In re Ainslie*, 22 Cent. L. J. 378) several severe storms had blown down and shaken a number of trees on the testator's estate, which, at the date of the death of the testator, were either prone or blown out of the perpendicular, and were more or less attached to the ground by a greater or less proportion of their roots. The question was, whether these trees were realty to go to the devisee, or personalty to go to the executors. The trial judge held that all the trees blown down to such an extent that they could not grow as trees usually grow were severed, and belonged to the executors; that the proceeds of the trees which were simply lifted, and would have to be cut for the sake of allowing the other trees to grow properly, and for the proper cultivation of the estate, belonged to the devisee. On appeal this was held wrong. The only question to consider, said the court of appeal, was whether or not the trees were affixed to the soil; if they were, they were realty, if not, they were personalty. The Lord Chancellor said: "If a thing were fixed to the ground so that in the ordinary course of things you would have to apply some new forces to remove it from the ground, then it would be fixed to the ground. If the roots were broken in the soil so that the tree and its roots were in truth and in fact severed from each other, although some of the broken

parts of the tree still remained covered with earth, I should think it would be in truth and in fact severed, although to the casual observer it would seem to have some of the roots fixed in the ground. So with reference to what one calls the roots, substantially, one can understand what the root of a tree is; but of course you may refine upon that word until you make every minute filament that grows from the tree a root. If I were sitting as a judge of fact, I should say that if the only connection between the soil and the root was the minute filament, the tree was not fixed to the soil at all. But beyond that, I decline to attempt to draw the intermediate line which Mr. Cookson invited us to draw between something that is not fixed to the soil and something that looks like it, and which may one of these days become fixed to the soil. I do not know how to do that. The broad proposition is, that if the tree is severed, it belongs to the executors, but if the tree is not severed, it belongs to the inheritance. That is the only direction that I will acquiesce in giving. Now, I am quite unable to accept what the learned judge below has said, even as a criterion. A tree may grow, not in the way that trees ordinarily grow, and yet be as firmly fixed in the soil as ever it was in the course of its tree-life. On the other hand, a tree may be absolutely dead, and yet undoubtedly form part of the soil. The question of the life of the tree becomes immaterial."

<sup>3</sup> *Tripp v. Hasceig*, 20 Mich. 254; 4 Am. Rep. 388.

crops go to the devisee of the land, and not to the executor, but as against the heirs at law, they go to the executor.<sup>1</sup> Where timbers, posts, and a round log were cut on the land for the purpose of erecting a fence and a granary there, but the idea was abandoned, it was held that these articles did not pass by a deed of the land.<sup>2</sup> Growing crops planted by the owner are a part of the realty, and a sale of the land carries them to the purchaser,<sup>3</sup> and this, notwithstanding a parol reservation of them by the grantor.<sup>4</sup> The growing crops pass to the purchaser on an execution sale of the land.<sup>5</sup> Crops planted after an action of ejectment is commenced belong to the one recovering possession.<sup>6</sup> Not so, however, if the crops are harvested before judgment.<sup>7</sup> Crops sowed on land by one having no ownership therein, nor having permission from the owner of the land, belong to the latter.<sup>8</sup> Wine-plants growing upon land, as between landlord and tenant, are personal property, and a mortgage of them by the tenant gives the mortgagee by foreclosure and sale the same right to remove them that the tenant had as against the landlord.<sup>9</sup> A grant by the owner of land of all the trees growing thereon to another and his heirs, with free liberty to cut and carry them away at pleasure, forever, conveys an

<sup>1</sup> *Dennet v. Hopkinson*, 66 Me. 350. 18 Am. Rep. 227; *Smith v. Barham*, 2 Dev. Eq. 420; 25 Am. Dec. 721.

<sup>2</sup> *Cook v. Whiting*, 16 Ill. 480.

<sup>3</sup> *Foote v. Colvin*, 3 Johns. 222; 3 Am. Dec. 478; *Burnside v. Weightman*, 9 Watts, 47; overruling *Smith v. Johnston*, 1 Penr. & W. 471; 21 Am. Dec. 404; *Kittredge v. Woods*, 3 N. H. 503; 14 Am. Dec. 393; *Tripp v. Hasceig*, 20 Mich. 254; 4 Am. Rep. 388.

<sup>4</sup> *Gibbons v. Dillingham*, 10 Ark. 9; 50 Am. Dec. 233; *Austin v. Sawyer*, 9 Cow. 39; *Wintermute v. Light*, 46 Barb. 278. *Contra*, *Backenstoss v. Stahler*, 33 Pa. St. 251; 75 Am. Dec. 592.

<sup>5</sup> *Bittinger v. Baker*, 29 Pa. St. 66; 70 Am. Dec. 154; *Porche v. Bodin*, 28 La. Ann. 761; *Brittain v. McKay*, 1

Ired. 265; 35 Am. Dec. 738; *Howell v. Schenck*, 24 N. J. L. 89; *Sherman v. Willett*, 42 N. Y. 146; *Lane v. King*, 8 Wend. 584; 24 Am. Dec. 105; *Crews v. Pendleton*, 1 Leigh, 297; 19 Am. Dec. 750. And an injunction lies to protect the interest of the purchaser at a foreclosure sale before it has been confirmed as against the execution sued out by creditors of the mortgage: *Crews v. Pendleton*, 1 Leigh, 297; 19 Am. Dec. 751. *Contra* in Ohio: *Houts v. Showaller*, 12 Ohio St. 124; *Cassidy v. Rhodes*, 12 Ohio, 88.

<sup>6</sup> *McLean v. Bovee*, 24 Wis. 295; 1 Am. Rep. 185.

<sup>7</sup> *Page v. Fowler*, 39 Cal. 412; 2 Am. Rep. 462.

<sup>8</sup> *Freeman v. McLennan*, 26 Kan. 151.

<sup>9</sup> *Wintermute v. Light*, 46 Barb. 278.

estate of inheritance in the trees, with a right in the soil necessary for their support and growth, while the fee in the soil itself remains in the grantor.<sup>1</sup> Crops planted by the owner of the soil, if mature, and to be gathered immediately, may be sold by him as personalty;<sup>2</sup> and the fact that the crop was still growing, and immature, makes no difference.<sup>3</sup> Trees and shrubs, in land demised to be used as a nursery garden, are personal chattels, as between the lessor and the lessee and his assigns, and may be severed and removed.<sup>4</sup>

§ 2682. **Emblements.**—The doctrine of emblements is the right of a tenant to enter and carry away after his tenancy has terminated such annual products of the land as have resulted from his labor.<sup>5</sup> This privilege is allowed to tenants for life, at will, or from year to year, on account of the uncertainty of their estates, and to encourage husbandry.<sup>6</sup> The right to emblements includes the right to the land to cultivate and harvest them.<sup>7</sup> Emblements can be claimed in respect only of such crops which ordinarily repay the labor by which they are produced within

<sup>1</sup> Growing timber trees excepted by the grantor in a conveyance of the fee are real and not personal estate, and the grantor in such a case has only a life estate in the trees, unless the reservation be to him and to his heirs, but his estate is not only in the trees, but also in so much of the soil as is necessary to sustain them, and the grantee cannot terminate such estate by a notice to the grantor to remove the trees: *Knotts v. Hydrick*, 12 Rich. 314; *Clap v. Draper*, 4 Mass. 266; 3 Am. Dec. 215.

<sup>2</sup> *Parker v. Stainland*, 11 East, 362; *Evans v. Roberts*, 5 Barn. & C. 829.

<sup>3</sup> *Jones v. Flint*, 10 Ad. & El. 753; *Austin v. Sawyer*, 9 Cow. 42; *Cradock v. Riddlesberger*, 2 Dana, 206.

<sup>4</sup> *Miller v. Baker*, 1 Met. 27; *Whitmarsh v. Walker*, 1 Met. 313; *Coombs v. Jordon*, 3 Bland, 284; 22 Am. Dec. 236.

<sup>5</sup> *Stewart v. Doughty*, 9 Johns. 121; *Reiff v. Reiff*, 64 Pa. St. 134. Em-

blements upon land not devised are personal assets, and as such belong to the executor: *Bradshaw v. Ellis*, 2 Dev. & B. Eq. 20; 32 Am. Dec. 686.

<sup>6</sup> Co. Lit. 55b; 1 Bouvier's Dict. 523; *Chandler v. Thurston*, 10 Pick. 205; *Wintermute v. Light*, 46 Barb. 278; *Pfanner v. Sturmer*, 40 How. Pr. 401; *Stewart v. Doughty*, 9 Johns. 112; *Hunt v. Watkins*, 1 Humph. 498; *Bittinger v. Baker*, 29 Pa. St. 66; 70 Am. Dec. 154. So as to one who is let into possession under a parol contract to purchase: *Harris v. Frink*, 49 N. Y. 24; 10 Am. Rep. 318. But the doctrine does not apply to a person cultivating public lands, and a purchaser of the United States is entitled to all crops growing upon the land at the time: *Boyer v. Williams*, 5 Mo. 335; 32 Am. Dec. 324.

<sup>7</sup> 1 Washburn on Real Property, sec. 102; *Humphries v. Humphries*, 3 Ired. 362.

the year in which the labor is expended. Thus the following—because they yield an annual profit produced by labor—are the subject of emblements, viz.: Beans, corn, flax, hemp, melons, pease, potatoes, tares, hops,<sup>1</sup> artificial grasses which are annually renewed.<sup>2</sup> But the following, for the same reason, are not emblements, viz.: Grass, clover, fruit-trees, timber-trees.<sup>3</sup> The crop must be one which grows, not spontaneously, but by the industry of man.<sup>4</sup> It must have been actually planted during the time of the tenant; by merely preparing the ground, he gains no right over crops planted subsequently.<sup>5</sup> It must be the very crop which was growing at the end of the term; one sprung up afterwards will not be subject to the right.<sup>6</sup> The estate must have terminated unexpectedly by the act of God or of the grantor; the tenant is not allowed to take the crops, where he knew before planting them that the estate would terminate before they were ripened.<sup>7</sup> But more than a century ago, in England, in a leading case, a custom that a tenant, whether by parol or deed, shall have the way-going crop after the expiration of his term, if not repugnant to the lease, was held good.<sup>8</sup> A similar custom has been judicially recognized in this country.<sup>9</sup> In Pennsylvania it

<sup>1</sup> 1 Washburn on Real Property, sec. 102; *Evans v. Roberts*, 5 Barn. & C. 832; 1 Schouler on Personal Property, sec. 105.

<sup>2</sup> 1 Schouler on Personal Property, sec. 105.

<sup>3</sup> 1 Washburn on Real Property, sec. 102; Co. Lit. 55b; *Reiff v. Reiff*, 64 Pa. St. 134. But trees which are planted by a nursery-man, to be taken up and sold as young trees, may be emblements: *Penton v. Robert*, 2 East, 88; *Miller v. Baker*, 1 Met. 27.

<sup>4</sup> *Graves v. Weld*, 2 Nev. & M. 725; 1 Williams on Executors, 782, 783.

<sup>5</sup> 1 Washburn on Real Property, sec. 103; *Stewart v. Doughty*, 9 Johns. 108; *Price v. Pickett*, 21 Ala. 741.

<sup>6</sup> *Graves v. Weld*, 5 Barn. & Adol. 105; 2 Nev. & M. 725.

<sup>7</sup> 1 Schouler on Personal Property, sec. 106; 1 Washburn on Real Property, sec. 103; 4 Williams on Executors, 673; 4 Kent's Com. 73, 110; *Chesley v. Welch*, 37 Me. 106; *Whitmarsh v. Cutting*, 10 Johns. 360; *Debon v. Colfax*, 10 N. J. L. 128. Where premises are rented for a year, with the privilege of three additional years, and the land is sold, and the lessee voluntarily leaves before the expiration of the first year, he is not entitled, in the absence of any agreement or custom, to the growing crops of rye and wheat: *Dircks v. Brant*, 56 Md. 500.

<sup>8</sup> *Wigglesworth v. Dallison*, 1 Doug. 201.

<sup>9</sup> Lawson on Usages and Customs, 268; *Shaw v. Bowman*, 91 Pa. St. 414.

was early recognized.<sup>1</sup> In Delaware it was held that the way-going tenant is entitled, by the custom of the state, to the wheat crop; not so, however, as to the oat crop,<sup>2</sup> though it seems that an incoming tenant may enter to fill his ice-house, "necessity and custom" requiring it, "as much as that the way-going tenant shall return to reap his wheat crop."<sup>3</sup> The English custom has been followed in New Jersey,<sup>4</sup> Ohio,<sup>5</sup> and Maryland;<sup>6</sup> but not in Virginia,<sup>7</sup> nor in Canada.<sup>8</sup> Therefore the tenant may dispose of the way-going crop as he may of any article of personal property.<sup>9</sup> Where the tenant voluntarily abandons or forfeits possession to the premises, he has no right to emblements.<sup>10</sup>

ILLUSTRATIONS.—Plaintiff, under a verbal contract of purchase, entered upon defendant's land and sowed crops, with defendant's consent. Afterwards defendant refused to complete sale, and ejected plaintiff. *Held*, that plaintiff was entitled to the crops: *Harris v. Frink*, 49 N. Y. 24; 10 Am. Rep. 318. A tenant, under a lease for an indefinite period, but which was terminated September 1, 1873, having sowed a crop of oats in November, 1872, and harvested it in June, 1873, had plowed in the stubble in the latter month, and the crop was growing when he left, in November, 1873. *Held*, that he could not afterwards enter and harvest that crop: *Henderson v. Cardwell*, 9 Baxt. 389; 40 Am. Rep. 93. A testator devised to his wife a life interest in his real estate. The wife leased the property; at her death a crop of grass was standing ready for cutting. *Held*, that the grass was not emblements, and went

<sup>1</sup> *Stulz v. Dickey*, 5 Binn. 285; 6 Am. Dec. 411; *Iddings v. Nagle*, 2 Watts & S. 22; *Biggs v. Brown*, 2 Serg. & R. 14; *Clark v. Harvey*, 54 Pa. St. 142; *Craig v. Dale*, 1 Watts & S. 509; 37 Am. Dec. 477; *Forsythe v. Price*, 8 Watts, 282; 34 Am. Dec. 465; *Hunter v. Jones*, 3 Brewst. 370; *Comfort v. Duncan*, 1 Miles, 229.

<sup>2</sup> *Templeman v. Biddle*, 1 Harr. (Del.) 523.

<sup>3</sup> *State v. McClay*, 1 Harr. (Del.) 520.

<sup>4</sup> *Van Doren v. Everitt*, 5 N. J. L. 460; 8 Am. Dec. 615; *Howell v. Schenck*, 24 N. J. L. 89; *Society v. Haight*, 1 N. J. Eq. 393.

<sup>5</sup> *Foster v. Robinson*, 6 Ohio St. 90.

<sup>6</sup> *Dorsey v. Eagle*, 7 Gill & J. 321.

<sup>7</sup> *Harris v. Carson*, 7 Leigh, 632; 30 Am. Dec. 510; *Mason v. Moyers*, 2 Rob. (Va.) 606. And see *Kelley v. Todd*, 1 W. Va. 197.

<sup>8</sup> *Burrowes v. Caines*, 2 U. C. Q. B. 288.

<sup>9</sup> *Shaw v. Bowman*, 91 Pa. St. 414.

<sup>10</sup> *Debon v. Colfax*, 10 N. J. L. 128; *Bulwer v. Bulwer*, 2 Barn. & Adol. 470; *Hawkins v. Skegg*, 10 Humph. 31; *Gee v. Young*, Hayw. (N. C.) 17; *Whipple v. Foote*, 2 Johns. 418; 3 Am. Dec. 442; *Pfanner v. Sturmer*, 40 How. Pr. 401; *Whitmarsh v. Cutting*, 10 Johns. 360.

to the executors of the testator: *Reiff v. Reiff*, 64 Pa. St. 134. Plaintiff entered upon lands in the spring, under a parol lease for two years, with the privilege of harvesting a crop of wheat, to be sown in the second fall, and not ripen until the expiration of the two years. In the second summer the owner contracted to sell the premises to the defendant, who had notice of the plaintiff's rights. Before receiving his deed, the defendant notified the plaintiff to quit at the end of the second year. Subsequently the plaintiff sowed the crop of wheat, and the defendant appropriated it. *Held*, that defendant was liable for the conversion, notice to quit by the vendee being ineffectual: *Reeder v. Sayre*, 70 N. Y. 180; 26 Am. Rep. 567. A person in possession of land under claim of title, but against whom an action was pending to recover it, let it to a tenant, who, with notice of the action, entered and sowed crops. Judgment was recovered against the lessor, and he surrendered possession. *Held*, that the tenant was not entitled to the crops: *Rowell v. Klein*, 44 Ind. 290; 15 Am. Rep. 235.

§ 2683. **Mines and Minerals.**—The owner of land is entitled to all the minerals which are in it; for all minerals which are “in place,” or in other words, unsevered from the soil, are a part of the freehold, and are real estate.<sup>1</sup> But minerals are capable of a possession distinct from that of the surface, and may form a separate corporeal hereditament, and the subject of a distinct inheritance. The title of the soil, as such, including the surface, may be vested in one person, and that of the mines and minerals in it in another.<sup>2</sup> Unopened beds or veins of minerals may be demised as though they were separate pieces of land.<sup>3</sup> It is only when the minerals are severed from the soil that they become personal chattels, and it is only where the right to dig or to mine them

<sup>1</sup> 2 Bla. Com. 18; *Townley v. Gibson*, 2 Term Rep. 705; *Grey v. Northumberland*, 17 Ves. 282; *Bourne v. Taylor*, 10 East, 205; *Kier v. Peterson*, 41 Pa. St. 362; *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Caldwell v. Fulton*, 31 Pa. St. 475; 72 Am. Dec. 760; *Brown v. Beecher*, 120 Pa. St. 590.

<sup>2</sup> *Adams v. Briggs Iron Co.*, 7 Cush.

361; *Green v. Putnam*, 8 Cush. 21; *Canfield v. Ford*, 28 Barb. 336; *Harris v. Ryding*, 5 Mees. & W. 60; *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305; *Hartwell v. Camman*, 10 N. J. Eq. 128; 64 Am. Dec. 448; *Caldwell v. Copeland*, 37 Pa. St. 427; 78 Am. Dec. 436.

<sup>3</sup> *Massot v. Meesa*, 3 S. C. 168; 16 Am. Rep. 697.

is not exclusive that it may be classed as an incorporeal right or easement merely in the nature of a license.<sup>1</sup>

"Mining claim" is the name given to that portion of the public mineral land which the miner takes up and holds in accordance with mining laws, local and statutory, for mining purposes, and the term includes the vein specifically located, all the surface ground located on each side of it, and all other veins or lodes having their apex inside the surface lines.<sup>2</sup> Where a miner gives up his claim, and goes away without any intention of repossessing it, an abandonment takes place, and it is open to location by the first comer. No subsequent sale by the former locator, after other rights have intervened, will convey any right or title.<sup>3</sup>

ILLUSTRATIONS.—A granted to B the right to enter upon his land, and to mine and remove coal and other minerals therefrom "during the continuance of the agreement," and to erect all needful buildings for that purpose, paying to A a certain price per ton for the minerals taken; and it was agreed that B should have the right to cease mining and to remove his building at any time. *Held*, that B took an estate at will, determinable at the will of either party: *Knight v. Indiana Coal and Iron Co.*, 47 Ind. 105; 17 Am. Rep. 692.

§ 2684. **Grants of Minerals—Construction of.**—The express grant of all the minerals or mineral rights in a tract of land necessarily implies the right to work them by penetrating the surface of the soil for the minerals, and by using such means and instrumentalities for the purpose of mining and removing them as may be reason-

<sup>1</sup> Bainbridge on Mines, Am. ed., \*3, \*261; *Massot v. Moses*, 3 S. C. 168; 16 Am. Rep. 697; *Caldwell v. Fulton*, 31 Pa. St. 476; 72 Am. Dec. 760; *Melton v. Lombard*, 51 Cal. 258; *Ryckman v. Gillis*, 57 N. Y. 68; 15 Am. Rep. 464.

<sup>2</sup> *Mount Diablo Mill Co. v. Callison*, 5 Saw. 439. A vein, lode, or ledge, within the federal statutes, is a mineral body of rock with defined boundaries in the general mass of the

mountain. The top or apex of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein. If a vein, at its highest point turns over and pursues its course downwards, then such point is merely a swell in the mineral matter, and not a true apex: *Stevens v. Williams*, 1 McCrary, 210.

<sup>3</sup> *Derry v. Ross*, 5 Col. 295.

able in the light of modern inventions and of the improvements in the arts and sciences, but without injury to the support of the surface or superincumbent soil in its natural state. All the necessary means of obtaining the minerals follow the grant.<sup>1</sup> "The right to work mines is so inseparable from the grant of them that it has been expressly decided, not only that the right to enter and work mines is necessarily incident to the grant of mines, without any express authority for that purpose, but that this power cannot be restrained by a special power given in the affirmative, which would authorize more acts than would be implied by law, but which will in no wise exclude the full operation of the law."<sup>2</sup> This right is not limited by a special grant of certain timber and water privileges, and of the right of way to and from the mines.<sup>3</sup> The grantee can enter and penetrate the surface and use all the instrumentalities necessary to successfully prosecute the working of the mine.<sup>4</sup> But this implied right of the grantee will warrant nothing beyond what is strictly necessary for the convenient working of the minerals. It will allow no use of the surface, no deposit upon it, to a greater extent or for a longer duration than will be necessary, and no attendance upon the land of unnecessary persons.<sup>5</sup> But where one grants the surface of land, and reserves the mines beneath, the implied right of support to the surface, which passes with said grant, may, by apt words in a deed, be excepted from said grant, and where such exception has been made, the grantor, or those claim-

<sup>1</sup> 1 Shep. Touch. 89; *Marvin v. Mining Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Chest. Co. v. Lucas*, 112 Mass. 424; *Adams v. Briggs Co.*, 7 Cush. 361; *Cranch v. Puryear*, 1 Rand. 258; *Williams v. Gibson*, 27 Cent. L. J. 498; *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Wilms v. Jess*, 94 Ill. 464; 34 Am. Rep. 242; *Collier on Mines*, 58; *Doud v. Kingscote*, 6 Mees. & W. 164; *Rogers v. Taylor*, 1 Hurl. & N. 706; *Elliot v. R. R. Co.*, 10 H. L. Cas. 333; *Turner*

*v. Reynolds*, 23 Pa. St. 199; *Clark v. Duval*, 15 Cal. 85; *Bainbridge on Mines*, 34; *Railroad Co. v. R. R. Co.*, 75 Ala. 524. As to subjacent support, see *post*, Easements.

<sup>2</sup> *Bainbridge on Mines*, 34, 35.

<sup>3</sup> *Williams v. Gibson*, 27 Cent. L. J. 498 (Ala., May 30, 1888).

<sup>4</sup> *Rogers v. Taylor*, 1 Hurl. & N. 706; *Hext v. Gill*, L. R. 7 Ch. App. 699.

<sup>5</sup> *Marvin v. Iron Mining Co.*, 55 N. Y. 538; 14 Am. Rep. 322.

ing through him, may mine all the coal, even though by such mining the surface should fall in.<sup>1</sup> A grant for a term of years of the exclusive right to search for, take, sell, and dispose of, to the grantee's use, all phosphates found during the term in a designated tract of land, is a demise of the beds or veins of phosphates contained in the land.<sup>2</sup> A conveyance of a tract of land with "the full right, title, and privilege of digging and taking away stone-coal to any extent" the grantee might think proper, from under an adjoining tract owned by the grantor, is a conveyance of the entire ownership of the coal in place beneath the adjoining tract.<sup>3</sup> When a grantor gave a deed in which was reserved "the entire privilege of all ore on said premises," with permission to enter upon said premises to mine, clean, and take away the same without let or hindrance from the grantee, it was held that the reservation was an exception, and that, as a consequence, the fee of the reserved mineral remained in the vendor.<sup>4</sup> The term "minerals," in a grant or in a reservation in a deed of land, is construed in its popular sense.<sup>5</sup> Everything, except the surface which is used for agricultural purposes, passes, whether gravel, marble, or merely fire-clay.<sup>6</sup> China-clay is included in the word "miner-

<sup>1</sup> *Scranton v. Phillips*, 94 Pa. St. 15.

<sup>2</sup> *Massot v. Moses*, 3 S. C. 168; 16 Am. Rep. 697.

<sup>3</sup> *Caldwell v. Fulton*, 31 Pa. St. 475; 72 Am. Dec. 760.

<sup>4</sup> *Thompson v. Mattern*, 115 Pa. St. 501; *Whitaker v. Brown*, 46 Pa. St. 197.

<sup>5</sup> *Gibson v. Tyson*, 5 Watts, 34.

<sup>6</sup> *Midland R. R. Co. v. Checkley*, L. R. 4 Eq. 19. In *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448, the court say: "By the use of the terms 'mines' and 'minerals,' it is clear the grantor did not intend to include everything embraced in the mineral kingdom, as distinguished from what belongs to the animal or vegetable kingdoms. If he did, he parted with the soil itself. Such a construction would be inconsistent with and repugnant to the whole tenor of the

grant. Nor can I see any more propriety in confining the meaning of the term used to any one of the subordinate divisions into which the mineral kingdom has been subdivided by chemists, either earthy, metallic, saline, or bituminous minerals. By his bill, the complainant endeavors to confine the terms to a more restricted sense or definition than either one of these subordinates; for he claims a construction should be put upon the words by the aid of circumstances surrounding the parties and relating to the subject-matter of the grant at the time the grant was made; and by a construction thus derived, he confines the terms not to the metallic ores, but, more limited still, to copper ore alone. . . . If the terms 'mines' and 'minerals,' used in the deed, could, by any fair construc-

als.”<sup>1</sup> So are stones cut from quarries,<sup>2</sup> and paint-stone.<sup>3</sup> Extrinsic evidence is inadmissible to show that by grant of mines and minerals the grantor intended to confine the grant to a right to take copper ore only.<sup>4</sup>

**ILLUSTRATIONS.** — A grantee acquired the right of mining and removing at pleasure coal and other mineral from under the surface of certain land, the surface of which belonged to the grantor. The grantee entered upon the surface of the land, sunk a shaft, built a barn, stables, blacksmith-shop, and made a pond or reservoir to receive water for running his machinery. He was careful to occupy no more of the surface than was necessary in the successful prosecution of his business. *Held*, that although the grantee of the minerals owned no portion of the surface of the land, he had a right to occupy part of the surface and sink a shaft, and erect hoisting machinery at a convenient place: *Wardell v. Watson*, 93 Mo. 107. A deed conveyed a lot in fee-simple, “also the right of digging for coal under the adjoining land lying east of said lot,” with *habendum* corresponding (though reserving a certain right of ferry), and covenants of warranty of the lot conveyed, “with the right of digging for coal as aforesaid.” *Held*, to convey an absolute property in the coal, and an exclusive right to mine and remove the same: *List*

tion, be confined to metallic substances, the question involved would be of easy solution; for the metallic property found in this paint-stone is so small that for the purpose of extracting the metal it is of no value. But I do not think the terms should be confined to the metals or to metallic ores. I cannot doubt if a strata of salt, or even a bed of coal, had been found, they would have passed under this grant. Can this stone-paint, then, be fairly and naturally embraced in the term ‘mineral’? It is a body which is destitute of organization, and which naturally exists within the earth. It is below the surface, distinct from the ordinary earth. It is in strata, and is worked by the ordinary means of mining. And although Professor Doremus says that it is not in veins, but in strata, and that he would not call the mode of extracting it mining, yet this test of his would exclude salt from the class of minerals; for salt, too, is found in strata, and not in veins, and is obtained by shafts, and by the same mode of operation by which this material is extracted

from the earth. It is valuable for its mineral properties, and by a cheap and easy process of grinding is converted into a merchantable article, adapted to the mechanical and ornamental arts. It is embraced in the definition given by men of science to the term ‘mineral.’ In Bakewell’s *Mineralogy*, page 7, it is said: ‘The term “minerals,” in common life, is generally applied to denote substances dug out of the earth or obtained from mines.’ In Cleaveland’s *Mineralogy*, page 1, the definition is given thus: ‘Minerals are those bodies which are destitute of organization, and which naturally exist within the earth or at its surface.’ My conclusion is, that this paint-stone passed by the grant, and that the defendants have a right to excavate and remove it, and to convert it to their own use.”

<sup>1</sup> *Hext v. Gill*, L. R. 7 Ch. App. 699.

<sup>2</sup> *Micklethwait v. Winter*, 5 Eng. L. & Eq. 526.

<sup>3</sup> *Hartwell v. Camman*, 10 N. J. Eq. 128; 64 Am. Dec. 448.

<sup>4</sup> *Hartwell v. Camman*, 10 N. J. Eq. 128; 64 Am. Dec. 448.

*v. Cotts*, 4 W. Va. 543. Land was leased for the sole purpose of mining and taking therefrom carbon oil. *Held*, that the tenant was not accountable to the landlord for the value of natural gas, which issued by its own force from the oil-well sunk by the tenant, and which was by him conducted in pipes beyond the leased premises, and appropriated to his own use: *Wood County Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 210; 57 Am. Rep. 659. A leased to B all good No. 1 fire-clay on A's land for a term of years, B to mine or pay for not less than two thousand tons each year, and to pay twenty-five cents monthly for each ton taken away. *Held*, that this was not a lease of the land itself, but of a right to mine; that if the quantity named was in the land, B was bound to pay for it; and that the burden of proof was on B to show that it was not in the land: *Scioto Fire Brick Co. v. Pond*, 38 Ohio St. 65.

§ 2685. **Gold and Silver Mines.**—In England, mines of gold and silver, by the royal prerogative, belong to the crown, though found in the land of an individual proprietor.<sup>1</sup> In an early case in California it was held that the state was sole owner, by virtue of its sovereignty, of all the gold and silver mines on public lands within its limits, to the exclusion of the United States.<sup>2</sup> This doctrine, however, was short-lived, and it is now settled that the ownership of such mines is incident to the ownership of the soil, and that they do not belong to the government as an incident of sovereignty.<sup>3</sup> They pass by a grant of the land, unless expressly reserved in the grant;<sup>4</sup> and this applies to the case of patentees claiming under the United States, in respect to lands belonging to the United States within the limits of California.<sup>5</sup> The statutes of New York reserve to the state all gold and silver mines, permitting the discoverers of such mines to enjoy their produce for twenty-one years only; and the right is extended

<sup>1</sup> 1 Bla. Com. 294; *Regina v. Northumbreland*, 1 Plow. 310.

<sup>2</sup> *Hicks v. Bell*, 3 Cal. 219. See note to *McClintock v. Bryden*, 5 Cal. 97, in 63 Am. Dec. 91-110, for an exhaustive discussion of the law of the Pacific states concerning mining for gold and silver.

<sup>3</sup> *Moore v. Smaw*, 17 Cal. 199; 79 Am. Dec. 123; *Ah Hee v. Crippen*, 19 Cal. 491.

<sup>4</sup> *Moore v. Smaw*, 17 Cal. 199; 79 Am. Dec. 123.

<sup>5</sup> *Moore v. Smaw*, 17 Cal. 199; 79 Am. Dec. 123.

to all mines of other metals found in lands of persons not citizens of the United States, and also to all mines of other metals on lands of citizens of the United States the ore of which contains less than two thirds in value of copper, tin, iron, or lead.<sup>1</sup>

**§ 2686. Rights and Liabilities as to.**—A covenant to work a mine with diligence runs with the land,<sup>2</sup> and is implied in a lease for a royalty.<sup>3</sup> Equity will not specifically enforce an agreement to work a mine,<sup>4</sup> nor will it relieve from a forfeiture for a breach of such a covenant.<sup>5</sup> The lessee is not bound to work at a loss,<sup>6</sup> though the burden is on him to show that there is no minable quantity.<sup>7</sup> The lessee is not bound to work continuously, or to produce more than the minimum required.<sup>8</sup> If an excess of production in one year may be applied to a deficiency in other years, it may be applied to subsequent years, and extinguish the whole obligation.<sup>9</sup> The quantity to be mined must be ascertained and paid for in the mode prescribed in the lease.<sup>10</sup> If the lessor is to select a place of working, neither he nor his grantee can change

<sup>1</sup> 1 Rev. Stats., p. 281, secs. 1, 4.

<sup>2</sup> Gear on Landlord and Tenant, sec. 95.

<sup>3</sup> *Brainerd v. Arnold*, 27 Conn. 627; *Peters v. Phillips*, 63 Iowa, 550; *Watson v. O'Hern*, 8 Watts, 362.

<sup>4</sup> *Kook's Appeal*, 93 Pa. St. 434.

<sup>5</sup> *Munroe v. Armstrong*, 96 Pa. St. 307; *Kinsman v. Jackson*, 42 L. T., N. S., 558.

<sup>6</sup> *Walker v. Tucker*, 70 Ill. 527; *Carl v. Granger Coal Co.*, 69 Iowa, 519; *Cook v. Andrews*, 36 Ohio St. 174; *Fire Brick Co. v. Pond*, 38 Ohio St. 65; *Jones v. Shears*, 7 Car. & P. 346; *Newton v. Nock*, 43 L. T., N. S., 197. See *Eaton v. Wilcox*, 4 Hun, 61; *Quarrington v. Arthur*, 10 Mees. & W. 335. The lessee may bind himself stringently to work the mine at all events, even at a loss: *Jervis v. Tomkinson*, 1 Hurl. & N. 195; *Morris v. Smith*, 3 Doug. 279. And he

is bound to procure materials for working from other premises, if necessary to make the mine available: *Foley v. Addenbrooke*, 13 Mees. & W. 174. When the lease stipulates to mine a specific quantity of ore, or pay a stipulated rent, non-existence of the ore is no defense to rent: *Wharton v. Stoutenburgh*, 46 N. J. L. 151; *Gilmore v. Ontario Iron Co.*, 22 Hun, 391; 86 N. Y. 455.

<sup>7</sup> *Gilmore v. Ontario Iron Co.*, 22 Hun, 391; 86 N. Y. 455; *Cook v. Andrews*, 36 Ohio St. 174; *Fire Brick Co. v. Pond*, 38 Ohio St. 65.

<sup>8</sup> *McIntyre v. McIntyre Coal Co.*, 105 N. Y. 264.

<sup>9</sup> *McIntyre v. McIntyre Coal Co.*, 105 N. Y. 264.

<sup>10</sup> *Gilmore v. Ontario Iron Co.*, 22 Hun, 391; 86 N. Y. 455; *Tod v. Stambaugh*, 37 Ohio St. 469.

a place once selected.<sup>1</sup> The lessor is liable for a trespass of the lessee in mining under adjoining property pursuant to the lease,<sup>2</sup> and cannot treat the lessee as a trespasser for accidentally working across an imaginary line, if he does not protect himself by covenant.<sup>3</sup> Where one, in mining coal, encroaches on land adjoining his own, but inadvertently, equity, in fixing damages, will give only the value of the mineral *in situ* before the trespass, and the measure of the incidental injury to the land.<sup>4</sup>

Miners have authority to prescribe rules governing the acquisition and divesture of titles to mining claims and their extent, subject only to the general laws of the state.<sup>5</sup>

§ 2687. **Money.**—Money is frequently treated as real estate.<sup>6</sup> Thus on the death of one who has insured his house against fire, the insurance money will go to his heirs as real estate.<sup>7</sup> The word “money,” in a will, has been held to pass the testator’s estate, both real and personal.<sup>8</sup>

§ 2688. **Money—The Doctrine of Equitable Conversion.**—In accordance with the maxim that equity looks on that as done which ought to have been done, money by deed covenanted or by will directed to be laid out in land is treated as already land, in equity, from the moment that the deed and will respectively take effect.<sup>9</sup> “Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever

<sup>1</sup> *Smith v. Palmer*, 13 N. Y. Week. Dig. 201.

<sup>2</sup> *Dundas v. Muhlenberg*, 35 Pa. St. 351.

<sup>3</sup> *Freck v. Locust Mountain Coal and Iron Co.*, 86 Pa. St. 318.

<sup>4</sup> *Coal Creek Mining etc. Co. v. Moses*, 15 Lea, 300; 54 Am. Rep. 415.

<sup>5</sup> *English v. Johnson*, 17 Cal. 197, 73

Am. Dec. 574; *Flaherty v. Gwinn*, 1 Dak. 509.

<sup>6</sup> *Houghton v. Hapgood*, 13 Pick. 154.

<sup>7</sup> *Wyman v. Wyman*, 26 N. Y. 253.

<sup>8</sup> *In re Miller*, 48 Cal. 165; 17 Am. Rep. 422.

<sup>9</sup> *Foreman v. Foreman*, 7 Barb. 215; *Craig v. Leslie*, 3 Wheat. 563.

manner the direction is given, whether by will, or by contract, or in marriage articles, or marriage settlement, or otherwise, and whether the money is actually paid or only covenanted to be paid."<sup>1</sup> Money directed to be turned into land descends to the heir,<sup>2</sup> and land directed to be converted into money goes to the personal representatives.<sup>3</sup> An heir's interest in the land of his father is an interest in realty, even after an order of probate to sell the same, until the sale has taken place; and no parol agreement can convert it into personalty so as to affect the lien of a third person.<sup>4</sup> Conversion into real of personal estate, necessary to perfect improvements of an intestate's real estate, does not take place where the improvements were not intended to be made as an investment, but merely incident to an object which ceased to exist upon the death of the intestate.<sup>5</sup> Money arising from the sale of an infant's real estate is treated as realty in equity, for the purpose of distribution, where the sale is made by the infant's guardian, under an order of court, with the object of reinvesting the proceeds in other real estate.<sup>6</sup> Where executors exercise a power to sell land, there is an equitable conversion, and the testator having directed a division of the proceeds, they are to be divided as personalty.<sup>7</sup> A provision in a will that, upon the occurrence of a certain event, the executors shall sell the real estate, but that a son may take it, if he chooses, at an appraisal, works a conversion.<sup>8</sup>

<sup>1</sup> *Fletcher v. Ashburner*, 1 Smith's Lead. Cas. 898; *Tazewell v. Smith*, 1 Rand. 313; 10 Am. Dec. 533; *Burr v. Simm*, 1 Whart. 252; 29 Am. Dec. 48; *Kane v. Gott*, 24 Wend. 641; 35 Am. Dec. 641; *Smilie v. Biffle*, 2 Pa. St. 52; 44 Am. Dec. 156; *Baker v. Copenbarger*, 15 Ill. 103; 58 Am. Dec. 600; *Lorillard v. Coster*, 5 Paige, 172; *Drake v. Pell*, 3 Edw. Ch. 251; *Tuner v. Davis*, 41 Ark. 270; *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117.

<sup>2</sup> *Scudamore v. Scudamore*, Prec. Ch. 543; *Hawley v. James*, 5 Paige,

318; *Tayloe v. Johnson*, 63 N. O. 381.

<sup>3</sup> *Ashby v. Palmer*, 1 Mer. 296; *Elliott v. Fisher*, 12 Sim. 506; *In re Dobson*, 11 Phila. 81.

<sup>4</sup> *Wither's Appeal*, 14 Serg. & R. 185; 16 Am. Dec. 488.

<sup>5</sup> *Gray v. Hawkins*, 8 Ohio St. 449; 72 Am. Dec. 600.

<sup>6</sup> *Collins v. Champ*, 15 B. Mon. 118; 61 Am. Dec. 179.

<sup>7</sup> *Kouvalinka v. Gaibel*, 40 N. J. Eq. 443.

<sup>8</sup> *Pyle's Appeal*, 102 Pa. St. 317.

The direction to convert either money into land, or land into money, must be imperative; for if the direction to convert be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found.<sup>1</sup> Where a will directs, not that land shall be sold, but that it may be sold if the devisee chooses, there is no conversion.<sup>2</sup> Where a power to sell requires the consent of parties interested, there is no equitable conversion until the consent is given. So where the sale is dependent on a contingency, there is no conversion until the happening of the contingency.<sup>3</sup> Nevertheless, where it is clear that a testator, whatever may be the language he has used, intended that a conversion should take place at all events, equity, holding the doctrine that the intent rather than the form is to be considered, will direct that the property should be converted in accordance with the testator's wishes.<sup>4</sup> Subject to the general principle that the terms of each particular instrument must guide in the construction and effect of that instrument,<sup>5</sup> the rule is, that, in regard to wills, conversion takes place as from the death of the testator,<sup>6</sup> and as to deeds or other instruments *inter vivos*, that it takes place as from the date of execution.<sup>7</sup> Where a conversion is directed or agreed upon, whether by will or by settlement, or other instrument *inter vivos*, whether of money into land or of land into money, if the objects and purposes for which that conversion was intended have totally failed before the instrument directing the conversion comes into operation, no conversion will take

<sup>1</sup> Snell's Equity, 170; Peterson's Appeal, 88 Pa. St. 397; Hood v. Hood, 85 N. Y. 561; Hobson v. Hale, 95 N. Y. 588; Shaw v. Chambers, 48 Mich. 355.

<sup>2</sup> Taylor v. Maria, 90 N. C. 619; Hunt's Appeal, 105 Pa. St. 128.

<sup>3</sup> Keller v. Harper, 64 Md. 74; Evans v. Kingsberry, 2 Rand. 120; 14 Am. Dec. 779.

<sup>4</sup> Power v. Cassidy, 79 N. Y. 602; 35

Am. Rep. 550; Dodge v. Williams, 46 Wis. 70; Thornton v. Hawley, 10 Ves. 129; Hancox v. Wall, 28 Hun, 214.

<sup>5</sup> Ward v. Arch, 15 Sim. 389.

<sup>6</sup> Beaucherk v. Mead, 2 Atk. 167; Fisher v. Banta, 66 N. Y. 468; Jones v. Caldwell, 97 Pa. St. 42; Cook v. Cook, 20 N. J. Eq. 375; Brothers v. Cartwright, 2 Jones Eq. 113; 64 Am. Dec. 563.

<sup>7</sup> Snell's Equity, 171.

place, but the property so directed or agreed to be converted will remain in its original state, or rather, will result to the testator or settlor with its original form unchanged.<sup>1</sup> Where the conversion partially fails, there is a distinction between the case of a will and the case of a deed. In the case of conversion directed by will, if there has been any partial failure of the purposes for which the conversion has been directed, to that extent it will result to the testator's representatives, real or personal, who would have been entitled to take it had no conversion been directed.<sup>2</sup> But when by an instrument *inter vivos* realty is directed to be converted into personalty,<sup>3</sup> or personalty into realty,<sup>4</sup> for certain specified purposes or objects, and a part of those purposes or objects fail, the property to that extent results to the settlor, and through him, if it is land, directed to be converted into money, it goes to his personal representatives,<sup>5</sup> and if it is money directed to be converted into land, it goes to his heir;<sup>6</sup> and its subsequent further devolution, if any, will depend upon its actual character at the time that further devolution arises.<sup>7</sup>

Where real estate is devised on trust to sell and pay the proceeds to A, by virtue of the direction, A becomes absolutely entitled from the moment of the testator's death to the property as personalty, whether an actual sale has taken place or not. But A has a right to elect in what form he will take the property. He has a right to tell the trustees, "I prefer the land instead of the purchase-money of the land." And according to his election, the property

<sup>1</sup> Snell's Equity, 179; *Slocum v. Slocum*, 4 Edw. Ch. 613; *Morrow v. Brenzier*, 2 Rawls, 184; *McCarty v. Deming*, 4 Lans. 440; *Clarke v. Franklin*, 4 Kay & J. 257.

<sup>2</sup> Snell's Equity, 188.

<sup>3</sup> *Clarke v. Franklin*, 4 Kay & J. 263.

<sup>4</sup> See *Pulteney v. Darlington*, 1 Brown Ch. 223; *Lechmere v. Lechmere*, Cas. t. Talb. 80.

<sup>5</sup> *Griffith v. Ricketts*, 7 Hare, 299.

<sup>6</sup> *Wheldale v. Partridge*, 8 Ves. 236.

<sup>7</sup> Snell's Equity, 188. The surplus remaining after the sale of partnership land, for the settlement of the partnership estate, is, in equity, land, and not money: *Martin v. Morris*, 62 Wis. 418.

will vest in him, as land or as money. This, in equity, is called reconversion.<sup>1</sup> A slight expression of intent will be considered sufficient to show an election by parties of lawful age to take lands and prevent the actual conversion thereof into personalty, as directed in a will, provided the rights of others are not affected thereby. No positive act is required therefor.<sup>2</sup> One dealing with land as land cannot afterwards be heard to contend that it is personalty, the option of a conversion having been conferred, and clearly not having been exercised.<sup>3</sup>

ILLUSTRATIONS.—D.'s land was sold for partition, in a partition suit. One third of the proceeds was set apart for D.'s widow. D.'s adult unmarried daughter, A., was a party to the suit. Afterwards she married, and died without issue. *Held*, that her share, as to her husband's rights therein, was realty, and not personalty, she never having elected that it should be personalty: *Turner v. Dawson*, 80 Va. 841. A testator, in his will, said: "I desire all my other estate, real, personal, or mixed, shall, as soon after my decease as practicable, be sold, and the proceeds arising therefrom be invested in first bonds and mortgages." *Held*, a direction to sell, and an equitable conversion: *Philadelphia's Appeal*, 112 Pa. St. 470. A provision in a will directing that the testator's real estate be sold and converted into money when his youngest child came of age or married, *held*, to create an equitable conversion of the realty into personalty, though not to take effect till the realty can be sold: *Massey v. Modawell*, 73 Ala. 421.

§ 2689. **Heir-looms.**—In England what are known as "heir-looms," though chattels, are treated as realty, and descend to the heir.<sup>4</sup> They consist of such things as cannot be taken away without injury to the inheritance;<sup>5</sup> as, for example, a horn by which tenure the estate is held;<sup>6</sup>

<sup>1</sup> Snell's Equity, 190; *Proctor v. Ferebee*, 1 Ired. Eq. 143; 36 Am. Dec. 34; *Hannah v. Swarner*, 3 Watts & S. 223; 38 Am. Dec. 754. Where the same persons receive the bequest, whether it remain in the form of realty, or be sold and converted into money, those persons may elect to take either. No other person can have any interest in

the question: *Beadle v. Beadle*, 2 McCrary, 586.

<sup>2</sup> *Prentice v. Janssen*, 79 N. Y. 478.

<sup>3</sup> *Sterr's Estate*, 13 Phila. 239.

<sup>4</sup> 1 Schouler on Personal Property, sec. 94.

<sup>5</sup> 2 Bla. Com. 427.

<sup>6</sup> *Pusey v. Pusey*, 1 Vern. 273.

or public documents of a peer;<sup>1</sup> or deer in a park, fishes in a pond, rabbits in warren, or doves in a dove-house;<sup>2</sup> or the ancient jewels of the crown;<sup>3</sup> or charters, court rolls, deeds, and other evidences of the land, together with the chests and boxes containing them;<sup>4</sup> or family pictures.<sup>5</sup> But this branch of property is of not much importance in the United States, and has received no attention from our courts.<sup>6</sup>

§ 2690. **Water.**—Water is a real property, and a corporeal hereditament, not an easement.<sup>7</sup> It is not, however, capable of being sued for by the name of water, but the suit must be brought for the land that lies at the bottom covered with water.<sup>8</sup>

§ 2691. **Other Kinds of Realty.**—Manure made in the course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it passes as appurtenant to the realty.<sup>9</sup> The rule is applicable between vendor and vendee,<sup>10</sup> mortgagor and mortgagee,<sup>11</sup> and landlord and tenant.<sup>12</sup> The fact that a farm is used as a "milk-farm," and not strictly for agricultural purposes in the general sense of that term, does not vary the rule.<sup>13</sup> But where

<sup>1</sup> Upton v. Lord Ferriss, 5 Ves. 806.

<sup>2</sup> Co. Lit. 8; Ford v. Tynte, 2 Johns. & H. 150.

<sup>3</sup> Co. Lit. 18.

<sup>4</sup> 2 Bla. Com. 428.

<sup>5</sup> Liford's Case, 11 Coke, 50.

<sup>6</sup> 1 Schouler on Personal Property, secs. 95, 99.

<sup>7</sup> Cary v. Daniels, 5 Met. 236. See post, Title Waters and Watercourses. As to ice, see *supra*, Personal Property—Ice.

<sup>8</sup> 2 Bla. Com. 18; Green v. Armstrong, 1 Denio, 554; Mitchell v. Warner, 5 Conn. 497.

<sup>9</sup> Kittredge v. Woods, 3 N. H. 503; 14 Am. Dec. 393; Haslem v. Lock-

wood, 37 Conn. 500; 9 Am. Rep. 350; Hill v. De Rochemont, 48 N. H. 88; Fay v. Muzzey, 13 Gray, 53; 74 Am. Dec. 619. But see Ruckman v. Outwater, 28 N. J. L. 581.

<sup>10</sup> Kittredge v. Woods, 3 N. H. 503; 14 Am. Dec. 393; Goodrich v. Jones, 2 Hill, 142.

<sup>11</sup> Chase v. Wingate, 68 Me. 204; 28 Am. Rep. 36; Vehue v. Mosher, 76 Me. 469.

<sup>12</sup> Daniels v. Pond, 21 Pick. 367; 32 Am. Dec. 269; Lassell v. Reed, 6 Me. 222; Middlebrook v. Corwin, 15 Wend. 167; Lewis v. Jones, 17 Pa. St. 262; 55 Am. Dec. 550.

<sup>13</sup> Waln v. Connor, 5 Pa. L. J. Rep. 164.

the manure is made from produce obtained elsewhere than on the land, or if the lands are not agricultural, as in the case of livery-stables, the manure so made is personal property, and may be removed by the tenant at the close of his term.<sup>1</sup> Manure not made in the course of husbandry, but made in the business of raising hogs not fed upon the products of the land, and the manure being mixed with loam drawn from other lands, is no part of the realty.<sup>2</sup> So manure may be removable by custom, as in the case of a way-going crop.<sup>3</sup> Sea-weed which has been thrown upon land by the sea is considered an accretion, and belongs to the owner of the soil.<sup>4</sup> Shares in stock of corporations were formerly treated as real estate.<sup>5</sup> But they are now, both by decision and legislation, regarded as personal property.<sup>6</sup> Pews in churches are a species of real property.<sup>7</sup> The road-bed, rails, and right of way of a railroad are real property.<sup>8</sup> So is the property of an aqueduct company, consisting of ponds, springs, a reservoir, and pipes.<sup>9</sup> So are ore rights, where severed from the land, and owned by tenants in common.<sup>10</sup> Slabs, sawdust, shaving, and other refuse used to fill up low or

<sup>1</sup> *Carroll v. Newton*, 17 How. Pr. 189; *Needham v. Allison*, 24 N. H. 355; *Corey v. Bishop*, 48 N. H. 146; *Proctor v. Gilson*, 49 N. H. 62; *Lassell v. Reed*, 6 Me. 222; *Daniels v. Pond*, 21 Pick. 367; 32 Am. Dec. 269. See *Ruckman v. Outwater*, 28 N. J. L. 581.

<sup>2</sup> *Snow v. Perkins*, 60 N. H. 493; 49 Am. Rep. 333.

<sup>3</sup> *Smithwick v. Ellison*, 2 Ired. 326; 38 Am. Dec. 697; *Sanders v. Ellington*; 77 N. C. 255.

<sup>4</sup> *Emans v. Turnbull*, 2 Johns. 313; 3 Am. Dec. 427. See *Waters and Water-courses*, post.

<sup>5</sup> *Weekley v. Weekley*, 2 Younge & O. 281, note; *Buckeridge v. Ingraham*, 2 Ves. 652; *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Meason's Estate*, 4 Watts, 341; *Price v. Price*, 6 Dana, 107; *Howe v. Starkweather*, 17 Mass.

240; *Welles v. Cowles*, 2 Conn. 567.

<sup>6</sup> 1 Schouler on Personal Property, sec. 9; *Johns v. Johns*, 1 Ohio St. 350; *Huntzinger v. Philadelphia Coal Co.*, 11 Phila. 609; *Ashton v. Langdale*, 4 De Gex & S. 402; *Arnold v. Ruggles*, 1 R. I. 165; *Griffith v. Watson*, 19 Kan. 23; *Gilpin v. Howell*, 5 Pa. St. 41; 45 Am. Dec. 720; *Union Bank v. State*, 9 Yerg. 490; *Isham v. Iron Co.*, 19 Vt. 230; *Edwards v. Hall*, 6 De Gex, M. & G. 74; *Bradley v. Holdsworth*, 3 Mees. & W. 422; *Tippetts v. Walker*, 4 Mass. 595; *Bligh v. Brent*, 2 Younge & O. 294; *Blake v. Jones*, 1 Bail. Eq. 141; 21 Am. Dec. 530.

<sup>7</sup> See *ante*, Religious Corporations.

<sup>8</sup> *Hart v. R. R. Co.*, 7 Mo. App. 446.

<sup>9</sup> *Willard v. Pike*, 59 Vt. 202.

<sup>10</sup> *Hartford etc. Ore Co. v. Millar*, 41 Conn. 112.

marshy ground are realty, but slabs and pieces of lumber suitable for fire-wood, piled upon land, and intended to be used and removed as fire-wood, are personalty.<sup>1</sup> Saw-mills and grist-mills are not necessarily real estate. Whether they are or not depends on circumstances and on the intentions of the parties.<sup>2</sup>

<sup>1</sup> *Jenkins v. McCurdy*, 48 Wis. 628;    <sup>2</sup> *Price v. Malott*, 85 Ind. 266.  
33 Am. Rep. 841.

## CHAPTER CXXIX.

## TITLE TO REAL PROPERTY.

- § 2692. Title in general.
- § 2693. Title by accession.
- § 2694. Escheat.
- § 2695. Eminent domain.
- § 2696. Public grant or patent.
- § 2697. Pre-emption.
- § 2698. Land warrant or certificate.
- § 2699. Conveyance.
- § 2700. Prescription — Adverse possession.
- § 2701. Estoppel.
- § 2702. Judicial sale.

§ 2692. **Title in General.**—Title is the means whereby the owner of lands or other real property<sup>1</sup> has the just and legal possession and enjoyment of it.<sup>2</sup> Title is acquired either by descent or purchase; the former covering the single case of inheritance of property by operation of law,<sup>3</sup> and the latter including every mode of acquisition known to the law, except that by which a person, upon the death of his ancestor, acquires his estate by right of representation as his heir at law.<sup>4</sup> But title passes by descent, and not by purchase, the former being the worthier title, where the same quantity and quality of estate is devised that the devisee would have acquired by descent.<sup>5</sup> A more modern division of the subject is made when we say that title may be acquired by occupancy, accession, transfer, will, or succession.<sup>6</sup>

§ 2693. **By Accession.**—Title to real property may be acquired by accession. Instances of this kind of title are present in the right to accretions and to alluvion on rivers

<sup>1</sup> As to title or property in chattels, see *ante*, Title Personal Property.

<sup>2</sup> 2 Bla. Com. 175; Co. Lit. 345 b.

<sup>3</sup> Donahue's Estate, 36 Cal. 329.

<sup>4</sup> 2 Bla. Com. 201. As to title by de-

scend and will, see *post*, Titles Descent, Wills.

<sup>5</sup> Gilpin v. Hollingsworth, 3 Md. 190; 56 Am. Dec. 737.

<sup>6</sup> See Cal. Civ. Code, sec. 1000.

or other waters;<sup>1</sup> or in the right which the landlord has in the fixtures placed upon his land during his term by a tenant.<sup>2</sup>

§ 2694. **By Escheat.** — Where a person dies intestate, leaving real property, and no heir or person entitled to take it by descent, it escheats (subject to the payment of his debts and costs of administration) to the state.<sup>3</sup> But the state takes, not as heir, but because there are no heirs.<sup>4</sup> An interest in remainder cannot be escheated until the expiration of the life estates.<sup>5</sup> An estate held in trust may be escheated when the trust has expired, and the trustee has no further active duties to perform.<sup>6</sup> Though it is held in some cases that the lands of one dying intestate and without heirs vest at once in the state,<sup>7</sup> yet usually a process known as an "inquest of office," or "office found," must be instituted and carried on in the name of the state to complete its title.<sup>8</sup> An inquisition of escheat should find that the person died seised, as well as the fact that he died without heirs, devisees, or known kindred.<sup>9</sup> Otherwise it is a nullity, and a transcript of such finding is not a lien on the lands of him in whose hands the estate is found to be.<sup>10</sup> The statutes of most of the states provide that when an heir or other person entitled is found, he may claim the estate or its proceeds at

<sup>1</sup> See *post*, Title Watercourses.

<sup>2</sup> See *post*, Title Landlord and Tenant.

<sup>3</sup> 1 Stimson's American Statute Law, sec. 1151; *Doe v. Bates*, 6 Blackf. 533; *Bent v. St. Vrain*, 30 Mo. 268. In Vermont and Rhode Island it goes to the town in which it lies; in Illinois to the county; in Kansas to the county where administration is had. The proceeds of the estate go to the school fund in several states: 1 Stimson's American Statute Law, sec. 1153.

<sup>4</sup> *State v. Ames*, 23 La. Ann. 69.

<sup>5</sup> *Commonwealth v. Naile*, 88 Pa. St. 429. *Contra*, *People v. Conklin*, 2 Hill, 67.

<sup>6</sup> *Commonwealth v. Naile*, 88 Pa. St. 429.

<sup>7</sup> *Sands v. Lyndham*, 27 Gratt. 295; 21 Am. Rep. 348; *Holliman v. Peebles*, 1 Tex. 673; *Farrar v. Dean*, 24 Miss. 16; and see note in 29 Am. Dec. 234.

<sup>8</sup> 2 Washburn on Real Property, 444. See *French v. Com.*, 5 Leigh, 512; 27 Am. Dec. 613; *Com. v. Hite*, 6 Leigh, 588; 29 Am. Dec. 226, and note 232-235.

<sup>9</sup> *Matter of Desilver*, 5 Rawle, 111; 28 Am. Dec. 645.

<sup>10</sup> *Rainsey's Appeal*, 2 Watts, 228; 27 Am. Dec. 302.

any time without limitation.<sup>1</sup> There is a presumption of law that every person dying leaves heirs. This presumption must be rebutted by one who would claim under an alleged escheat.<sup>2</sup> A title subsequently acquired by the state by escheat from an elder patentee will not inure to the benefit of a junior patentee. The commonwealth may convey this title to another, who will have all the rights of the elder patentee.<sup>3</sup>

**ILLUSTRATIONS.**—An antenuptial contract gave the wife everything on her husband's death without issue. The husband died without issue, seised of mortgaged land. The mortgage was foreclosed, and there was a surplus. The wife died intestate and without heirs. *Held*, that this surplus belonged to the state: *Johnston v. Spicer*, 107 N. Y. 185.

§ 2695. **By Eminent Domain.**—Title to real property may also be derived by the state, or its agents acting through its power of eminent domain.<sup>4</sup>

§ 2696. **By Public Grant or Patent.**—The title to property held by an individual may be acquired by public grant.<sup>5</sup> The grant may be made by an act of the legislature,<sup>6</sup> or by a treaty.<sup>7</sup> The grant from the state takes effect from its date, and not from the time of its delivery.<sup>8</sup> The public grant may likewise be evidenced by an instrument called a patent, which, when regularly and properly issued, invests the party with a complete perfect title.<sup>9</sup> A patent is of itself presumptive evidence that the previous proceedings have been regular.<sup>10</sup> In an action

<sup>1</sup> 1 Stimson's American Statute Law, sec. 1154.

<sup>2</sup> *North Carolina University v. Harrison*, 90 N. C. 385; *Bank v. Trustees*, 83 Ky. 219.

<sup>3</sup> *Elmendorff v. Carmichael*, 3 Litt. 472; 14 Am. Dec. 87.

<sup>4</sup> See *post*, Division V., Constitutional Law.

<sup>5</sup> 2 Washburn on Real Property, 525.

<sup>6</sup> 2 Washburn on Real Property, 525; *Boatner v. Ventress*, 8 Martin, N. S., 644; 20 Am. Dec. 266; *Koenig v. R. R.*

*Co.*, 3 Neb. 373; *Enfield v. Permit*, 8 N. H. 512; 31 Am. Dec. 207.

<sup>7</sup> *Stockton v. Williams*, 1 Doug. (Mich.) 546.

<sup>8</sup> *Ex parte Kuhlman*, 3 Rich. Eq. 257; 55 Am. Dec. 642.

<sup>9</sup> 2 Washburn on Real Property, 526; *Boatner v. Ventress*, 8 Martin, N. S., 644; 20 Am. Dec. 266.

<sup>10</sup> *Barry v. Gamble*, 8 Mo. 88; *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Pet. 328; *Winter v. Broumell*, 18 How. 87; *Dodson v. Cocke*, 3 Am. Dec. 755.

for ejectment the patent is itself evidence of title, which it is incumbent upon the defendant to rebut.<sup>1</sup> The patent is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey and its conformity with the confirmation, and of the relinquishment to the patentee of the title in the government.<sup>2</sup> Unless fraud or mistake appear on its face, the patent is not void, but voidable only, even where it has been issued fraudulently.<sup>3</sup> It cannot be impeached collaterally.<sup>4</sup>

The action of the land officers in the land department of the general government in issuing a patent for any of the public land subject to sale by pre-emption, or otherwise, in the absence of fraud or imposition, is conclusive of the legal title, in all courts, and in all forms of judicial proceedings, where the legal title must control.<sup>5</sup> But an error committed by those officers in a matter of law may

<sup>1</sup> *Bagnell v. Broderick*, 13 Pet. 436; *Hill v. Miller*, 36 Mo. 182; *Steiner v. Coxe*, 4 Pa. St. 28.

<sup>2</sup> *Smith v. Winton*, 1 Over. 230; 3 Am. Dec. 755; *Dodson v. Cocke*, 1 Over. 314; 3 Am. Dec. 757; *Parkinson v. Bracken*, 1 Pinn. 174; 39 Am. Dec. 296; *Jenkins v. Gibson*, 3 La. Ann. 203.

<sup>3</sup> *Jackson v. Lawton*, 10 Johns. 23; 6 Am. Dec. 311. Fraud or other irregularity must appear on the face of the patent, to render it void in a court of law. When the fraud or other defect arises on circumstances *dehors* the patent, it is voidable only in a suit in equity: *State v. Bachelder*, 5 Minn. 223; 80 Am. Dec. 411.

<sup>4</sup> *Sykes v. McRory*, 10 Ga. 465; 54 Am. Dec. 402; *Jackson v. Hart*, 12 Johns. 77; 7 Am. Dec. 280; *Norvell v. Camm*, 6 Munf. 233; 8 Am. Dec. 742; *Overton v. Campbell*, 5 Hayw. (Tenn.) 165; 9 Am. Dec. 780; *State v. Bachelder*, 5 Minn. 223; 80 Am. Dec. 410; *Sherman v. Buick*, 93 U. S. 209; *Boggs v. Merced Mining Co.*, 14 Cal. 365; *St. Louis etc. Co. v. Green*, 4 McCrary, 232; *Wells v. Francis*, 7 Col. 396; *Gibson v. Chouteau*, 13 Wall. 92; *St. Louis etc. Co. v. Kempf*, 104 U. S. 636;

*Turner v. Donnelly*, 70 Cal. 597; *Parks etc. Co. v. Kerr*, 3 Utah, 235; *Carter v. Spencer*, 4 How. 42; 34 Am. Dec. 107; *Lassly v. Fontaine*, 4 Hen. & M. 146; 4 Am. Dec. 510; *Chever v. Horner*, 11 Col. 68; 7 Am. St. Rep. 217. But a patent on its face void because issued under acts repealed may be attacked collaterally: *Schwenke v. Union Depot & R. R. Co.*, 7 Col. 512; so may a patent for land already disposed of by the government: *Mantle v. Noyes*, 5 Mont. 274; *Silver Bow Mining etc. Co. v. Clark*, 5 Mont. 378; *Hit-tuk-ho-mi v. Watts*, 7 Smedes & M. 363; 45 Am. Dec. 308.

<sup>5</sup> *Boatner v. Ventress*, 8 Martin, N. S., 644; 20 Am. Dec. 266; *Johnson v. Towsley*, 13 Wall. 72; *Garland v. Wynn*, 20 How. 6; *Moore v. Robbins*, 96 U. S. 535; *Powers v. Leith*, 53 Cal. 712; *Lamont v. Stimson*, 3 Wis. 545; 62 Am. Dec. 696; *Boyce v. Dunn*, 29 Mich. 146; *State v. Bachelder*, 7 Minn. 121; 80 Am. Dec. 410; *Shepley v. Cowan*, 91 U. S. 340; *Quinby v. Conlan*, 104 U. S. 426; *Henry v. Welch*, 4 La. 547; 23 Am. Dec. 490; *Lewis v. Lewis*, 9 Mo. 182; 43 Am. Dec. 540; *Vance v. Burbank*, 101 U. S. 514; *State v. Smelting Co.*, 106 U. S. 447;

be corrected by the courts, and the proper relief granted.<sup>1</sup> And a patent is not evidence of title where it is issued without authority of law, or by an officer not authorized to grant it,<sup>2</sup> or where it is issued fraudulently to fictitious grantees,<sup>3</sup> or to a deceased person.<sup>4</sup> The land officers or the executive cannot recall or cancel a patent for lands which has been duly issued, delivered, and accepted, or issue another one upon the same lands. If the patent issued ought to be rescinded, e. g., because procured by fraud, the remedy is by a bill in equity in the name of the government.<sup>5</sup> An order of the executive correcting a grant after the rights of third parties have intervened is inoperative and void.<sup>6</sup> Courts of equity have power to reform or correct patents, or to cancel them in case of fraud, accident, or mistake.<sup>7</sup> So one who receives a patent to which another is entitled may be declared a trustee of it for the latter.<sup>8</sup>

<sup>1</sup> *Johnson v. Towseley*, 13 Wall. 72; *Warren v. Van Brunt*, 19 Wall. 646; *Shepley v. Cowan*, 91 U. S. 330; *Danforth v. Morrical*, 84 Ill. 456; *Bird v. Ward*, 1 Mo. 398; 13 Am. Dec. 507; *Hess v. Bolinger*, 48 Cal. 349; *Quinby v. Conlan*, 104 U. S. 420.

<sup>2</sup> *Todd v. Fisher*, 26 Tex. 237; *McGarrahan v. New Idria Co.*, 49 Cal. 332; *Alexander v. Greenup*, 1 Munf. 134; 4 Am. Dec. 541.

<sup>3</sup> *United States v. Coal Co.*, 18 Fed. Rep. 273; *United States v. White*, 17 Fed. Rep. 561; *Thomas v. Wyatt*, 31 Mo. 188; 77 Am. Dec. 640; 25 Mo. 24; 69 Am. Dec. 446.

<sup>4</sup> *Galloway v. Finley*, 12 Pet. 264. See *Trimble v. Boothby*, 14 Ohio, 109; 45 Am. Dec. 526.

<sup>5</sup> *Moore v. Robbins*, 96 U. S. 530; *Bicknell v. Comstock*, 113 U. S. 149.

<sup>6</sup> *Sykes v. McRory*, 10 Ga. 465; 54 Am. Dec. 402.

<sup>7</sup> *Johnson v. Towseley*, 13 Wall. 72; *United States v. Throckmorton*, 98 U. S. 61; *Moore v. Robbins*, 96 U. S. 530; *Bliss v. Curry*, 35 Iowa, 72; *Tison v. Yawn*, 15 Ga. 491; 60 Am. Dec. 708. See *Walker v. Wells*, 17 Ga. 547; 63 Am. Dec. 252. The United States has the same remedy in equity

to set aside or annul a patent for land on the ground of fraud in procuring its issue which an individual would have in regard to his own deed procured under similar circumstances: *United States v. Rose*, 24 Fed. Rep. 196.

<sup>8</sup> *Stark v. Mather*, Walk. (Miss.) 181; 12 Am. Dec. 553; *Heenen v. Wood*, 16 La. Ann. 263; *Garland v. Wynn*, 20 How. 8; *Lytle v. Arkansas*, 22 How. 203; *Shepley v. Cowan*, 91 U. S. 340; *Johnson v. Towseley*, 13 Wall. 72; *Stephenson v. Smith*, 7 Mo. 610; *Estrada v. Murphy*, 19 Cal. 272; *Aulick v. Colvin*, 6 B. Mon. 289; 43 Am. Dec. 164; *Lewis v. Lewis*, 9 Mo. 182; 43 Am. Dec. 540; *Groves v. Fulsome*, 16 Mo. 543; 57 Am. Dec. 247; *Carman v. Johnson*, 20 Mo. 108; 61 Am. Dec. 593; *Hayner v. Stanley*, 8 Saw. 214; *Wheat v. Owens*, 15 Tex. 241; 65 Am. Dec. 164. The addition of the word "trustee" to the patentee's name, without mention of any trust on which he is to hold the land, does not prevent the legal title from passing by the patentee's conveyance: *Cowell v. Colorado Springs Co.*, 100 U. S. 55. To charge the holder of a patent as a trustee, it is not enough to show that

In sales of land by the United States, the law gives the right, and the patent is considered, not the title itself, but the evidence by which it is shown that the prerequisites to a legal sale have been complied with.<sup>1</sup> But the issuance of the patent vests the legal title in the patentee. Until the patent is issued the party is not invested with a complete perfect title.<sup>2</sup> The record of a United States patent for land in the government office at Washington has the same force as the patent.<sup>3</sup> Confirmation of a title by act of Congress is equivalent to a patent, and can only be defeated by a prior title out of the government.<sup>4</sup> Grants by the government are construed favorably for the grantor, and pass nothing by implication.<sup>5</sup> But a patent should be so construed as to reconcile all its parts, and to give effect to every word in it, if possible.<sup>6</sup> United States patents pass to the patentee all interest of the United States, whatever it may have been, in everything connected with the soil,—everything which is embraced within the term

the patent should not have been issued to him; it must also appear that it should have been awarded to the plaintiff: *Bohall v. Dilla*, 114 U. S. 47.

<sup>1</sup> *Goodlet v. Smithson*, 5 Port. 245; 30 Am. Dec. 561; *Singiner v. Pad-dock*, 31 Ark. 521. He who has made an entry and has received a certificate is vested with the equitable estate in the lands, which becomes a perfect legal estate upon the issuance to him of the patent, the final act by which the government parts with its interest. Prior to the issuance of the patent the purchaser could sell and convey the land as completely as he can afterwards. The patent is simply better evidence of his right to do so: *Baguett v. Broderick*, 13 Pet. 450; *Carroll v. Safford*, 3 How. 460; *Frisbie v. Whitney*, 9 Wall. 187; *Hutchings v. Low*, 15 Wall. 88; *Dickinson v. Brown*, 9 Smedes & M. 130; *Sweatt v. Corcoran*, 37 Miss. 516; *Forbes v. Hall*, 34 Ill. 167. Until the patent issues, the legal estate is in the government: *Brouson v. Kukuk*, 4 Dill. 490; *Le Beau v. Armitage*, 40 Mo. 138. And ejectment cannot be

maintained upon an entry in a land office; it will only lie upon a patent: *Hooper v. Scheimer*, 23 How. 235.

<sup>2</sup> *Roads v. Synmes*, 1 Ohio, 281; 13 Am. Dec. 621; *Teschemacher v. Thompson*, 18 Cal. 11; 79 Am. Dec. 152; *McAfee v. Keirn*, 7 Smedes & M. 780; 45 Am. Dec. 331. It is conclusive against all whose rights commence subsequently to its date: *Hoofnagle v. Anderson*, 7 Wheat. 212.

<sup>3</sup> *Sands v. Davis*, 40 Mich. 14.

<sup>4</sup> *Boatner v. Walker*, 11 La. 582; 30 Am. Dec. 723; *Jackson v. Stanley*, 10 Johns. 133; 6 Am. Dec. 319; *Jackson v. Astor*, 1 Finn. 137; 39 Am. Dec. 281.

<sup>5</sup> *Wilcoxon v. McGhee*, 12 Ill. 381; 54 Am. Dec. 409; *Hagan v. Campbell*, 8 Port. 9; *Miners' Bank v. United States*, 1 Greene, 553; *McManus v. Carmichael*, 3 Iowa, 1; *Green's Estate*, 4 Md. Ch. 349; *Townsend v. Brown*, 24 N. J. L. 80. *Contra*, *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112.

<sup>6</sup> *Budd v. Brooke*, 3 Gill, 198; 43 Am. Dec. 321; *Alexander v. Lively*, 5 T. B. Mon. 159; 17 Am. Dec. 50.

"land."<sup>1</sup> This includes all improvements, and crops growing thereon, whether severed or unsevered.<sup>2</sup> But title derived from the government is no better than title from an individual owning the fee, and is governed by the same rules.<sup>3</sup> A patent of the United States to ceded lands formerly belonging to another government is not only the deed of the United States, but is a solemn record of the action and judgment of the government with respect to the validity of the title of the claimant existing at the date of the cession.<sup>4</sup> Congress has absolute power over the disposal of the public domain. No state legislation can interfere with this subject.<sup>5</sup> But the moment the patent is issued and the title secured to the purchaser, the land enters into the general mass of the property of the state, relieved from all control of the federal government.<sup>6</sup> Acceptance of a patent for lands is essential to its taking effect. But acceptance is presumed, in the absence of express dissent, where no personal obligations are imposed on the grantee; and is presumed from the time when the patent is placed in condition for acceptance.<sup>7</sup> And delivery of the patent for public land is not essential to its validity.<sup>8</sup>

§ 2697. By Pre-emption.—Title to land may be acquired by pre-emption, which is a right secured by law to *bona fide* settlers on the public lands, giving them a

<sup>1</sup> Moore v. Smaw, 17 Cal. 199; 79 Am. Dec. 123; Sawyer v. Cox, 63 Ill. 130. But not timber cut thereon prior to his purchase: Wincher v. Shrewsbury, 2 Scam. 283; 35 Am. Dec. 106. A patent for agricultural lands does not pass title to known deposits of precious metals: Gold Hill Quartz Min. Co. v. Ish, 5 Or. 104.

<sup>2</sup> Floyd v. Ricks, 14 Ark. 286; 58 Am. Dec. 374. An official survey of government lands prevails over a private survey: Billingsley v. Bates, 30 Ala. 376; 68 Am. Dec. 126; or a subsequent survey after the patent is issued: Slack v. Orillion, 13 La. 56; 33 Am. Dec. 551.

<sup>3</sup> Rogers v. Brent, 5 Gilm. 573; 50 Am. Dec. 423; Tymannus v. Williams, 7 Humph. 80; 46 Am. Dec. 69.

<sup>4</sup> Teschemacher v. Thompson, 18 Cal. 11; 79 Am. Dec. 151.

<sup>5</sup> Farrington v. Wilson, 29 Wis. 383; Union Mill Co. v. Ferrie, 2 Saw. 176; Bromsall v. Kukuk, 3 Dill. 490; State v. Bachelder, 5 Minn. 223; 80 Am. Dec. 411.

<sup>6</sup> State v. Bachelder, 5 Minn. 223; 80 Am. Dec. 411.

<sup>7</sup> Leroy v. Jamison, 3 Saw. 369; Fazende v. Morgan, 31 La. Ann. 549; Mackinnon v. Barnes, 66 Barb. 91.

<sup>8</sup> Houghton v. Hardenberg, 53 Cal. 181; Cruz v. Martinez, 53 Cal. 239.

preference over others in the purchase of such land.<sup>1</sup> A mere entry by a settler upon land, with continued occupancy and improvement thereof, gives no vested interest in it.<sup>2</sup> His settlement protects him from intrusion or purchase by others, but confers no right against the government.<sup>3</sup> The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement, and has paid the purchase-money.<sup>4</sup> State courts have no jurisdiction in regard to pre-emption of public lands, unless the case is affected with fraud or trust.<sup>5</sup> Where an act of Congress vests the officers of the government with absolute discretion in determining the rights of claimants of land, the courts cannot interfere. But where a contest arises after titles have emanated, the courts must determine the validity of the titles, and decide upon the legality of the acts of the officers.<sup>6</sup> A pre-emptor has no title or estate in the land which he can sell or encumber;<sup>7</sup> nor is a pre-emption right an estate of which a widow can be endowed,<sup>8</sup> but it may descend

<sup>1</sup> Boone on Real Property, sec. 259; *Bruner v. Manlove*, 3 Scam. 339; 36 Am. Dec. 551; *Shepley v. Cowan*, 91 U. S. 330. To constitute this right, a personal settlement by the claimant upon the land is necessary, followed by occupancy of the land as the home of the settler, the erection of a dwelling-house thereon, and the cultivation and improvement of the land: *Kelly v. Wallace*, 14 Minn. 236; *Hosmer v. Duggan*, 56 Cal. 257; *Hosmer v. Wallace*, 97 U. S. 575; *Gambrell v. Steele*, 58 Tex. 582. One is entitled to only one pre-emption right: *Baldwin v. Stark*, 107 U. S. 463. And he cannot intrude upon lands in the actual possession of others: *Davis v. Scott*, 56 Cal. 165; *Trenouth v. U. S.*, 100 U. S. 251; *Kendall v. Waters*, 68 Cal. 26; *Bird v. Ward*, 1 Mo. 398; 13 Am. Dec. 506. Nor can one enter land in the name of another: *Higgins v. Higgins*, 55 Mo. 346.

<sup>2</sup> *Whitney v. Frisbie*, 9 Wall. 189.

<sup>3</sup> *Coleman v. Allen*, 75 Mo. 332;

*Whitney v. Frisbie*, 9 Wall. 189; *Villey v. Janeau*, 35 La. Ann. 542; *Yosemite Valley Case*, 15 Wall. 77; *Gibson v. Hutchins*, 12 La. Ann. 545; 68 Am. Dec. 772.

<sup>4</sup> *Brown v. Throckmorton*, 11 Ill. 529; *Busch v. Donohue*, 31 Mich. 492; *Grand Gulf R. R. Co. v. Bryan*, 8 Smedes & M. 268; *Hutton v. Frisbie*, 37 Cal. 475; *Bower v. Higbee*, 9 Mo. 261; *Whitney v. Frisbie*, 9 Wall. 189, 195; *Yosemite Valley Case*, 15 Wall. 77; *Henry v. Welch*, 4 La. 547; 23 Am. Dec. 490.

<sup>5</sup> *Lewis v. Lewis*, 9 Mo. 182; 43 Am. Dec. 541.

<sup>6</sup> *Perry v. O'Hanlon*, 11 Mo. 585; 49 Am. Dec. 100.

<sup>7</sup> *Craig v. Tappan*, 2 Sand. Ch. 78; *McElyea v. Hayter*, 2 Port. 148; 27 Am. Dec. 645; *Ratcliff v. Bridger*, 1 Rob. (La.) 57; 36 Am. Dec. 683; *Stevens v. Hays*, 1 Ind. 247; 48 Am. Dec. 359; *Kellom v. Easley*, 1 Dill. 281.

<sup>8</sup> *Davenport v. Farrar*, 2 Ill. 314.

to his heirs.<sup>1</sup> But contracts made by actual settlers on the public lands, concerning their possessory rights, and concerning the title to be acquired in future from the United States, are, unless forbidden by some positive law, valid as between the parties.<sup>2</sup> And after the issue of a patent, assignments and transfers of the pre-emption right will not be inquired into.<sup>3</sup> When the purchase-money has been paid, and the receipt of the proper land-officer has been given to the purchaser, he obtains a vested right in the land.<sup>4</sup> Where the pre-emptor has done everything in his power to comply with the requirements of an act of Congress which fixes a limit to the period within which he may avail himself of the benefit of the act in which the limitation is made, the delay of the officers of the government, by which he is prevented from obtaining his certificate of pre-emption within the time limited, will not defeat his right, but the certificate may be granted to him after the expiration of the time so limited by law.<sup>5</sup> The validity of a certificate of pre-emption may be impeached in ejectment brought by the pre-emptor against a party in possession under the authority of the United States, by evidence of fraud and collusion between the pre-emptor and the officers granting the certificate, the latter knowing the land not to be subject to pre-emption.<sup>6</sup> The legal representative of one who had settled on land in anticipation of the time when it would be opened for pre-emption, and lived and died on it, may, upon pre-emption becoming possible, have the title to such land made complete in him, and his rights cannot be affected by a stranger who meantime occupies the land for the purpose of defeating him.<sup>7</sup> An entry of public land gives no title to timber cut and lying upon it

<sup>1</sup> Johnson v. Collins, 12 Ala. 322.

<sup>2</sup> Lamb v. Davenport, 18 Wall. 307.

<sup>3</sup> Morgan v. Curtenius, 4 McLean, 366.

<sup>4</sup> Frisbie v. Whitney, 9 Wall. 187;  
Nelson v. Sims, 23 Miss. 383; 57 Am.  
Dec. 145.

<sup>5</sup> Perry v. O'Hanlon, 11 Mo. 585;

49 Am. Dec. 100.

<sup>6</sup> Jamison v. Beaubien, 3 Scam. 113;

36 Am. Dec. 534.

<sup>7</sup> Quinn v. Chapman, 111 U. S.  
445.

at the time the entry is made.<sup>1</sup> A pre-emptor planting a crop which matures after his pre-emption right expires, because of his failure to purchase during the time allowed him by law, may be dispossessed of it by one who, after the expiration of the right, purchases from the government.<sup>2</sup>

§ 2698. **By Land Warrant or Certificate.**—In some of the states where there are still unoccupied public lands, the statutes give power to the proper officers to sell the lands. On the payment of a portion of the purchase-money a certificate or warrant is issued to the purchaser, to be followed by a deed when full payment is made.<sup>3</sup> Until the deed is issued the fee remains in the state.<sup>4</sup> But these certificates are not mere chattels; they are an inchoate title to land; they are assignable, and descend to the heirs of their owner.<sup>5</sup> A certificate of purchase of public lands issued by the register and receiver does not constitute evidence of title. Such certificate is evidence that the applicant was then in possession, and that he had cultivated the land in the time and manner required by law.<sup>6</sup> When the law gives preference in the purchase of government land to a particular person, and he in the exercise of his right pays the money, and receives from the public officer a receipt for it and a certificate that he is entitled to purchase, the sale is complete, although the evidence of it cannot be made out in a prescribed form.<sup>7</sup> A certificate of purchase from a United States land-office issued prior to a patent conveys the absolute title, and a patent subsequently acquired relates back to the date of

<sup>1</sup> *Keeton v. Audsley*, 19 Mo. 362; 61 Am. Dec. 561.

<sup>2</sup> *Razor v. Qualls*, 4 Blackf. 286; 30 Am. Dec. 658.

<sup>3</sup> 1 *Stimson's American Statute Law*, sec. 1110.

<sup>4</sup> 1 *Stimson's American Statute Law*, sec. 1110; *Carman v. Johnson*, 20 Mo. 108; 61 Am. Dec. 593.

<sup>5</sup> 1 *Stimson's American Statute Law*,

sec. 1110; *Reeder v. Barr*, 4 Ohio, 458; *Brush v. Ware*, 15 Pet. 93; *Ross v. Early*, 39 Tex. 390. After its location, a land certificate becomes a chattel real, title to which cannot pass by parol: *Hearne v. Gillett*, 62 Tex. 23.

<sup>6</sup> *Guidry v. Woods*, 19 La. 334; 36 Am. Dec. 677.

<sup>7</sup> *Kittridge v. Breaud*, 4 Rob. (La.) 79; 39 Am. Dec. 513.

said certificate.<sup>1</sup> An entry upon land under a land-warrant can be made only in the name of the person to whom it was issued, or in the name of his assignee.<sup>2</sup> The assignee of a land-warrant fraudulently procured from the government has no higher legal rights than the warrantee;<sup>3</sup> and the government, though the warrant be regular on its face, is not estopped to deny its validity, although it be in the hands of an assignee for value, and without notice.<sup>4</sup> The proprietors of a land-warrant may pursue it into the hands of assignees and purchasers for valuable consideration having notice of their claim before they acquired legal title to the land.<sup>5</sup> A state patent purporting to convey title which is void upon its face, as where the state had no authority to convey, may be collaterally attacked in an action of ejectment. A patent issued by virtue of an unconstitutional act is void upon its face.<sup>6</sup>

§ 2699. **By Conveyance.**—The most frequent method of acquiring title to real estate is by a conveyance by way of deed.<sup>7</sup>

§ 2700. **Title by Prescription—Adverse Possession.**—Title by prescription is founded on the presumption that he who has had a quiet and uninterrupted possession of a thing for a long period of years is supposed to have a just right, without which he could not have been suffered to continue in the enjoyment of it, or that there has been a grant or conveyance or agreement giving him the right which by lapse of time has been lost.<sup>8</sup> The

<sup>1</sup> *Cavender v. Smith*, 3 G. Greene, 349; 56 Am. Dec. 541.

<sup>2</sup> *Galt v. Galloway*, 4 Pet. 332.

<sup>3</sup> *Bronson v. Keokuk*, 3 Dill. 490.

<sup>4</sup> *Bronson v. Keokuk*, 3 Dill. 490.

<sup>5</sup> *Patrick v. Marshall*, 2 Bibb, 41; 4 Am. Dec. 670.

<sup>6</sup> *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379.

<sup>7</sup> See *ante*, Title Contracts—Deeds.

<sup>8</sup> 2 Greenl. Cruise, 221; *Coolidge v. Learned*, 8 Pick. 503; *Ricard v. Williams*, 7 Wheat. 109; *Perley v. Langley*, 7 N. H. 233; *Mitchell v. Walker*, 2 Aiken, 266; 16 Am. Dec. 710; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429; 19 Am. Dec. 139; *University of Vermont v. Reynolds*, 3 Vt. 542; 23 Am. Dec. 234; *Casey v. Inloes*, 1 Gill, 430; 39 Am. Dec. 659; *Gathings v. Williams*,

time requisite to raise the presumption and to give a title by prescription is fixed in most of the states at twenty years, though in some it is shorter and in some longer.<sup>1</sup> Prescription applies more generally to incorporeal hereditaments,<sup>2</sup> but it may also apply to lands.<sup>3</sup> A right acquired by prescription is as perfect as one acquired by grant.<sup>4</sup>

Title is also acquired by adverse occupation, i. e., the actual occupation of land as one's own.<sup>5</sup> Adverse possession for the statutory time gives a good title.<sup>6</sup>

5 Ired. 487; 44 Am. Dec. 49; Wallace v. Maxwell, 10 Ired. 110; 51 Am. Dec. 380; McCulloch v. Wall, 4 Rich. 68; 53 Am. Dec. 715; Warren v. Jacksonville, 15 Ill. 236; 58 Am. Dec. 610; McCoy v. Morrow, 18 Ill. 519; 68 Am. Dec. 578; Leger v. Doyle, 11 Rich. 109; 70 Am. Dec. 240; McArthur v. Carrie, 32 Ala. 75; 70 Am. Dec. 529; Hieatt v. Morris, 10 Ohio St. 523; 78 Am. Dec. 280; Klein v. Gehrung, 25 Tex. 233; 78 Am. Dec. 565; Conger v. Weaver, 6 Cal. 548; 65 Am. Dec. 528. There is no presumption of a grant from the state: State v. Pacific Guano Co., 22 S. C. 50.

<sup>1</sup> See Stimson's American Statute Law, sec. 120; Webber v. Chapman, 42 N. H. 326; 80 Am. Dec. 111. In Pennsylvania, Louisiana, and Tennessee, it is seven years in some cases; in Colorado, five; in Mississippi, it is ten; in New Jersey, sixty in some cases, thirty in others: See 1 Stimson's American Statute Law, sec. 120.

<sup>2</sup> See *post*, Easements; Million v. Riley, 1 Dana, 359; 25 Am. Dec. 149.

<sup>3</sup> Ricard v. Williams, 7 Wheat. 107; Melvin v. Proprietors, 16 Pick. 137; Deery v. Cray, 5 Wall. 795.

<sup>4</sup> Weed v. Keenan, 60 Vt. 74; 6 Am. St. Rep. 93.

<sup>5</sup> Sumner v. Murphy, 2 Hill (S. C.), 488; 27 Am. Dec. 397; Wall v. Shindler, 47 Mo. 282.

<sup>6</sup> Grube v. Wells, 34 Iowa, 148; Musick v. Barney, 49 Mo. 458; Gayetty v. Bethune, 14 Mass. 53; 7 Am. Dec. 188; Branch v. Doane, 17 Conn. 402; Chalfin v. Malone, 9 B. Mon. 496; 50 Am. Dec. 525; Garrett v. Jackson, 20 Pa. St. 331; Munshower v. Patton, 10 Serg. & R. 334; 13 Am. Dec. 678; Camp v. Camp, 5 Conn. 291; 13 Am.

Dec. 60; Ferguson v. Kennedy, Peck, 321; 14 Am. Dec. 761; Stanley v. Earl, 5 Lit. 281; 14 Am. Dec. 66; Crockett v. Lashbrook, 5 T. B. Mon. 531; 17 Am. Dec. 98; La Frombois v. Jackson, 8 Cow. 589; 18 Am. Dec. 463; Varick v. Jackson, 2 Wend. 166; 19 Am. Dec. 571; Partee v. Badget, 4 Yerg. 174; 26 Am. Dec. 220; Union Canal Co. v. Young, 1 Whart. 410; 30 Am. Dec. 212; Wallace v. Hannum, 1 Humph. 443; 34 Am. Dec. 659; Wright v. Giner, 9 Watts, 172; 36 Am. Dec. 108; Watson v. Gregg, 10 Watts, 289; 36 Am. Dec. 176; Brown v. McKinney, 9 Watts, 565; 36 Am. Dec. 139; Berthelemy v. Johnson, 3 B. Mon. 90; 38 Am. Dec. 179; Farrow v. Edmundson, 4 B. Mon. 605; 41 Am. Dec. 250; Macklot v. Dubreuil, 9 Mo. 473; 43 Am. Dec. 550; Patterson v. Reigle, 4 Pa. St. 201; 45 Am. Dec. 684; Pitts v. Bullard, 3 Ga. 5; 46 Am. Dec. 405; Moody v. Fleming, 4 Ga. 115; 48 Am. Dec. 210; Conyers v. Kenan, 4 Ga. 308; 48 Am. Dec. 226; Alexander v. Walter, 8 Gill, 239; 50 Am. Dec. 688; Stevenson v. McReary, 12 Smedes & M. 9; 51 Am. Dec. 102; Williams v. Harrell, 8 Ired. Eq. 123; 55 Am. Dec. 442; Stearns v. Hendersass, 9 Cush. 497; 57 Am. Dec. 65; Stropmfer v. Roberts, 18 Pa. St. 283; 57 Am. Dec. 606; Armstrong v. Risteau, 5 Md. 256; 59 Am. Dec. 115; Burkhalter v. Edwards, 16 Ga. 593; 60 Am. Dec. 744; Stump v. Henry, 6 Md. 201; 61 Am. Dec. 300; Robertson v. Wood, 15 Tex. 1; 65 Am. Dec. 140; Smith v. De La Garza, 15 Tex. 1; 65 Am. Dec. 147; Holmes v. Gay, 6 Bush, 47; Den v. Wright, 7 N. J. L. 175; 11 Am. Dec. 546; Bausman v. Kelly, 38 Minn. 197; 8 Am. St. Rep. 661.

But the possession must have been open, peaceable, exclusive, continued, and notorious.<sup>1</sup> To constitute adverse possession, it is necessary the party must claim the property as his own.<sup>2</sup> Possession is not adverse unless accompanied by a claim to the entire title. The possessor must not recognize a higher title as vested in another person.<sup>3</sup> One entering, not adversely, but expressly or legally, in subservience to owner's title, cannot be permitted to treat his subsequent continued possession as adverse; but before the statute commences to run in his favor, the privity between him and the owner must have been disowned and severed by some unequivocal act.<sup>4</sup> What constitutes adverse possession depends upon the nature and situation of the property, and the uses to which it can be applied, or to which the owner or claimant may choose to apply it.<sup>5</sup> Neither actual occupation, cultivation, nor residence are necessary to constitute actual adverse possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which

<sup>1</sup> *Salle v. Primm*, 3 Mo. 529; *Rhodes v. Whitehead*, 27 Tex. 304; 84 Am. Dec. 631; *Lawton v. Rivers*, 2 McCord, 445; 13 Am. Dec. 741; *Ward v. Warren*, 82 N. Y. 265; *Jackson v. Burton*, 1 Wend. 341; *Connor v. Sullivan*, 40 Conn. 26; 16 Am. Rep. 10; *Bailey v. Appleyard*, 8 Ad. & E. 161; *Winslow v. Winslow*, 52 Ind. 8; *Gillipie v. Jones*, 26 Tex. 243; *Arrington v. Liscom*, 34 Cal. 365; 94 Am. Dec. 722; *Wilson v. Henry*, 40 Wis. 594; *Bailey v. Irby*, 2 Nott & McC. 343; 10 Am. Dec. 609; *Trotter v. Cassidy*; 3 A. K. Marsh. 365; 13 Am. Dec. 183; *Smith v. Hosmer*, 7 N. H. 436; 28 Am. Dec. 354; *Richart v. Scott*, 7 Watts, 460; 32 Am. Dec. 779; *Wafer v. Pratt*, 1 Rob. 41; 36 Am. Dec. 681; *Bailey v. Carleton*, 12 N. H. 9; 37 Am. Dec. 190; *Irvine v. McRae*, 5 Humph. 554; 42 Am. Dec. 468; *School Dist. v. Benson*, 31 Me. 381; 52 Am. Dec. 618; *Morrison v. Kelly*, 22 Ill. 610; 74

Am. Dec. 169; *Thomas v. Babb*, 45 Mo. 384; *Laramore v. Minish*, 43 Ga. 282; *Bowman v. Lee*, 48 Mo. 335; *Fugate v. Pierce*, 49 Mo. 441; *Thompson v. Pioche*, 44 Cal. 508; *Winn v. Abeles*, 35 Kan. 85; 57 Am. Rep. 139; *Ill. Cent. R. R. Co. v. Houghton*, 126 Ill. 233; 9 Am. St. Rep. 581; *Cook v. Clinton*, 64 Mich. 309; 8 Am. St. Rep. 816; *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71. See *post*, Easements.

<sup>2</sup> *Snodgrass v. Andrews*, 30 Miss. 472; 64 Am. Dec. 169.

<sup>3</sup> *Jackson v. Johnson*, 5 Cow. 74; 15 Am. Dec. 433.

<sup>4</sup> *Bannon v. Brandon*, 34 Pa. St. 263; 75 Am. Dec. 655.

<sup>5</sup> *Royall v. Lisle*, 15 Ga. 545; 60 Am. Dec. 712. The actual occupancy may be by acts suitable to the character of the land, whether by residence, cultivation, or mining; *Bell v. Denson*, 56 Ala. 444.

he claimed in his own right, and would not exercise over property which he did not claim.<sup>1</sup> To constitute adverse possession, there need not be fence, building, or other improvement made, but visible and notorious acts of ownership exercised over the premises in controversy for the statutory time are sufficient.<sup>2</sup>

The law presumes that where title is shown, the true owner is in possession until adverse possession is proved to begin;<sup>3</sup> and it does not begin until an actual entry is made, accompanied by a claim of title hostile to that of the true owner.<sup>4</sup> In order to make it a bar, strict proof is necessary that it was hostile in its inception, and had continued so for the requisite period;<sup>5</sup> for a possession originally adverse may be converted into a friendly possession by an agreement to hold under the person having right.<sup>6</sup> Possession ceases to be adverse where the owner of land for a valuable consideration agrees with the holder that suit for possession shall not be brought during the lifetime of either.<sup>7</sup> But an agreement not legally binding cannot change an adverse into a friendly possession.<sup>8</sup> Actual possession of a part of the land under a claim for the whole tract is a sufficient adverse possession of the whole.<sup>9</sup> But adverse possession of a disseisor,

<sup>1</sup> *Ford v. Wilson*, 35 Miss. 490; 72 Am. Dec. 138.

<sup>2</sup> *Royall v. Lisle*, 15 Ga. 545; 60 Am. Dec. 712.

<sup>3</sup> *Jackson v. Sharp*, 9 Johns. 163; 6 Am. Dec. 627; *Miner v. Mayor etc.*, 5 Jones & S. 171; *Carson v. Burnett*, 1 Dev. & B. 546; 30 Am. Dec. 143.

<sup>4</sup> *Jackson v. Parker*, 3 Johns. Ch. 124; *Miner v. Mayor etc.*, 5 Jones & S. 171; *Thomas v. Babb*, 45 Mo. 384; *Reed v. Bullock*, Litt. Sel. Cas. 510; 12 Am. Dec. 345.

<sup>5</sup> *Jackson v. Waters*, 12 Johns. 365; *Rung v. Shouberger*, 2 Watts. 66; 26 Am. Dec. 95; *Gay v. Moffit*, 2 Bibb, 507; 5 Am. Dec. 633.

<sup>6</sup> *Gay v. Moffit*, 2 Bibb, 506; 5 Am. Dec. 633.

<sup>7</sup> *Dietrick v. Noel*, 42 Ohio, 18; 51 Am. Rep. 789.

<sup>8</sup> *Daniel v. Ellis*, 1 A. K. Marsh. 60; 10 Am. Dec. 707.

<sup>9</sup> *Taylor v. Buckner*, 2 A. K. Marsh. 18; 12 Am. Dec. 354, and note 357; *Daniel v. Ellis*, 1 A. K. Marsh. 60; 10 Am. Dec. 707; *Carson v. Burnett*, 1 Dev. & B. 546; 30 Am. Dec. 143; *Jones v. Perry*, 10 Yerg. 59; 30 Am. Dec. 430; *Crowell v. Bebee*, 10 Vt. 33; 32 Am. Dec. 172; *Overton v. Davisson*, 1 Gratt. 211. 42 Am. Dec. 544; *Altamus v. Long*, 4 Pa. St. 254; 45 Am. Dec. 688; *McCollman v. Wilkes*, 3 Strob. 465; 51 Am. Dec. 637; *Finlay v. Cook*, 54 Barb. 9; *Fugate v. Peirce*, 49 Mo. 441; *Humphries v. Hoffman*, 33 Ohio St. 395. See *Heavner v. Morgan*, 30 W. Va. 335; 8 Am. St. Rep. 55. Possession is sufficient where a party with his tenants has occupied and resided upon the legal subdivision of land described in

or of one who enters or retains possession by wrong, cannot extend beyond the limits of his actual occupancy; he cannot resort to the metes and bounds of the tract upon which he enters.<sup>1</sup> The adverse possession of a disseisor includes only lands actually occupied by him by inclosures and improvements.<sup>2</sup>

There is no constructive possession where there is no claim of right or color of title.<sup>3</sup> An entry is by color of title when it is made under a *bona fide*, and not pretended, claim to title.<sup>4</sup> Possession which is the result of ignorance, inadvertence, misapprehension, or mistake will not work a disseisin. It is the intention to claim title which makes the possession of the holder adverse.<sup>5</sup> The tacking of successive possessions is permitted in order to raise a title by adverse enjoyment.<sup>6</sup> But several successive possessions cannot be "tacked" to make a continuous adverse possession, where there is no privity of estate or connection of title between the parties successfully entering on the land.<sup>7</sup> The presumption is in favor of a possession in subordination to the title of the true owner; an adverse possession must be strictly proved.<sup>8</sup> Adverse pos-

his patent for the period, although such party has subdivided the land into town lots. It is not necessary that he should reside upon every part and parcel of the land: *Williams v. Balance*, 23 Ill. 193; 74 Am. Dec. 187. But possession of two tracts of land adjoining the one in dispute for seven years is not such possession of the latter tract as will give the party in possession a good title under the statute of limitations, although the three tracts were conveyed by one deed as separately described: *Loftin v. Cobb*, 1 Jones, 406; 62 Am. Dec. 173.

<sup>1</sup> *St. Louis v. Gorman*, 29 Mo. 593; 77 Am. Dec. 586.

<sup>2</sup> *Hall v. Powel*, 4 Serg. & R. 456; 8 Am. Dec. 723; *Jackson v. Woodruff*, 1 Cow. 276; 13 Am. Dec. 525.

<sup>3</sup> *Riley v. Jameson*, 3 N. H. 23; 14 Am. Dec. 325; *Wells v. Jackson Mfg. Co.*, 45 N. H. 491; *Crispen v. Hannu-ven*, 50 Mo. 536; *Colvin v. Land*

*Ass'n*, 23 Neb. 75; 8 Am. St. Rep. 114. Color of title is that which in appearance is title, but which in reality is no title: *Edgerton v. Bird*, 6 Wis. 527; 70 Am. Dec. 473. Whether an adversary possession under a claim of title be under a good or bad, a legal or an equitable, title, is immaterial: *Shanks v. Lancaster*, 5 Gratt. 110; 50 Am. Dec. 108.

<sup>4</sup> *Green v. Kellum*, 23 Pa. St. 254; 62 Am. Dec. 332.

<sup>5</sup> *Riley v. Griffin*, 16 Ga. 141; 60 Am. Dec. 726.

<sup>6</sup> *Innis v. Miller*, 10 Mart. 289; 13 Am. Dec. 330, and note 331; *Beal v. Brook*, 7 J. J. Marsh. 232; 23 Am. Dec. 401.

<sup>7</sup> *Melvin v. Proprietors*, 5 Met. 15; 38 Am. Dec. 385; *Pegues v. Warley*, 14 S. C. 180; *Hammond v. Crosby*, 68 Ga. 767.

<sup>8</sup> *Jackson v. Sharp*, 9 Johns. 163; 6 Am. Dec. 267; *Den v. Webb*, 4 Dev.

session is a question of fact for the jury.<sup>1</sup> Where the possession is shown to be adverse to the true owner, it need not be adverse to the whole world.<sup>2</sup> Possession taken under a contract of purchase is not adverse,<sup>3</sup> until full payment has been made according to its terms.<sup>4</sup> Possession obtained by buying the claim of a vendee who is in possession under an executory contract to purchase is not adverse to the vendor, but is a continuation of his possession;<sup>5</sup> nor a possession originating under a mistake as to boundaries.<sup>6</sup> Possession under an entry originally made in a fiduciary capacity, to become adverse, must be evidenced by some decisive act or declaration.<sup>7</sup> The possession of a *cestui que trust* becomes adverse when the legal title is conveyed in violation of the trust.<sup>8</sup> A son may hold adversely to his parent, but the character of the possession is a question for the jury.<sup>9</sup> One who enters on land under a deed from a husband does not enter adversely to the husband's right, and hence the statute will not commence running against the wife until the husband's death.<sup>10</sup> A tenant cannot set up his possession as adverse

290; 25 Am. Dec. 711; *Rung v. Shoneberger*, 2 Watts, 23; 26 Am. Dec. 95; *Smith v. Hosmer*, 7 N. H. 436; 28 Am. Dec. 354; *Pownal v. Taylor*, 10 Leigh, 172; 34 Am. Dec. 725; *Stamper v. Griffin*, 20 Ga. 312; 65 Am. Dec. 628; *Weaver v. Wilson*, 48 Ill. 125; *Schwallback v. R. R. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740; *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 231.

<sup>1</sup> *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351; *Webb v. Richardson*, 42 Vt. 465; *Huntington v. Allen*, 44 Miss. 654.

<sup>2</sup> *Liddon v. Hodnett*, 22 Fla. 442.

<sup>3</sup> *Browning v. Estes*, 3 Tex. 462; 49 Am. Dec. 760. But after conveyance the vendee may take advantage of such possession in order to establish adverse possession: *Valentine v. Cooley*, Meigs, 613; 33 Am. Dec. 167.

<sup>4</sup> *Drew v. Towle*, 30 N. H. 531; 64 Am. Dec. 309.

<sup>5</sup> *Beal v. Brook*, 7 J. J. Marsh. 232; 23 Am. Dec. 401.

<sup>6</sup> *Howard v. Reedy*, 29 Ga. 152; 74 Am. Dec. 58; *Mills v. Penny*, 74 Iowa, 122; 7 Am. St. Rep. 474. *Contra*, *Tex v. Pflug*, 24 Neb. 665; 8 Am. St. Rep. 231. That the land was held through a mistake as to the extent of the boundaries will not destroy the adverse character of the holding, if the party has occupied and received the rents and profits as his own: *French v. Pearce*, 8 Conn. 439; 21 Am. Dec. 680.

<sup>7</sup> *Martin v. Jackson*, 27 Pa. St. 504; 67 Am. Dec. 489.

<sup>8</sup> *Scott v. Gallagher*, 14 Serg. & R. 333; 16 Am. Dec. 508.

<sup>9</sup> *Roberts v. Roberts*, 2 McCord, 268; 13 Am. Dec. 721.

<sup>10</sup> *Culler v. Motzer*, 13 Serg. & R. 356; 15 Am. Dec. 605. A widow to whom dower has been assigned cannot acquire an adverse possession as against the heir: *Malloy v. Bruden*, 86 N. C. 251.

to his landlord while the relation of landlord and tenant continues.<sup>1</sup> And no disseisin of the tenant of a particular estate, and occupation under it, however long continued, will affect the right of the reversioner.<sup>2</sup> To constitute adverse possession, the tenant must either remain permanently upon the land, or else occupy it in such a way as to leave no doubt in the mind of the true owner not only as to who the adverse claimant is, but also that it is his purpose to keep the owner out of his land.<sup>3</sup>

An entry after the recording of a deed cannot relate back to the time the deed bears date so as to make an adverse possession from such date.<sup>4</sup> No adverse possession can originate against an estate until administration is granted thereon.<sup>5</sup> The presumption of a grant from adverse user does not exist where the person against whom the presumption must operate was at the expiration of the twenty years incapable of making a grant.<sup>6</sup> No presumption of a deed or grant arises against remaindermen or reversioners by an adverse possession of twenty years or more during the continuance of a particular estate.<sup>7</sup> Possession of one having a right of possession under one title, but claiming under another, the latter being adverse, the former not, is deemed to be a possession under the title which is not adverse.<sup>8</sup> One who, under a deed purporting to convey in severalty, enters upon the possession of land, holds it adversely to the whole world, though his grantor held as a tenant in common with others.<sup>9</sup> A party having actual prior possession may recover posses-

<sup>1</sup> *Campbell v. Shipley*, 41 Me. 81; *Jackson v. Davis*, 5 Cow. 123; 15 Am. Dec. 451; *Jackson v. Harsen*, 7 Cow. 323; 17 Am. Dec. 517; *People v. Trinity Church*, 22 N. Y. 44. See *ante*, *Landlord and Tenant*.

<sup>2</sup> *Miller v. Ewing*, 6 Cush. 34; *Jackson v. Schoonmaker*, 4 Johns. 390; *Salmon v. Davis*, 29 Mo. 176.

<sup>3</sup> *Denham v. Holeman*, 26 Ga. 182; 71 Am. Dec. 198.

<sup>4</sup> *Jackson v. Andrews*, 7 Wend. 152; 22 Am. Dec. 574.

<sup>5</sup> *Miller v. Surls*, 19 Ga. 331; 65 Am. Dec. 592.

<sup>6</sup> *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156.

<sup>7</sup> *McCorry v. King*, 3 Humph. 267; 39 Am. Dec. 165.

<sup>8</sup> *Nichols v. Reynolds*, 1 R. I. 30; 36 Am. Dec. 238.

<sup>9</sup> *Culler v. Motzer*, 13 Serg. & R. 356; 15 Am. Dec. 604.

sion from a second possessor when both claim only by possession, and the suit is between the two parties only.<sup>1</sup>

§ 2701. **By Estoppel.**—Title may be acquired by estoppel, —estoppel being where a man is concluded by his own act or deed to show the truth.<sup>2</sup> It is a rule of law that a man shall always be estopped by his own deed, and shall not be allowed to aver or prove anything contrary to that which he has once solemnly alleged under seal.<sup>3</sup> If, therefore, it is manifest on the face of the conveyance, either by recital, admission, covenant, or in any other way, that the parties actually intended to convey and receive the identical estate and interest which is the subject-matter purporting to be conveyed by the instrument, they shall be held estopped from denying the operation of the deed according to its manifest intent.<sup>4</sup> So where a person conveys land which he does not own, and afterwards he obtains title to it, he will be estopped from setting it up against his grantee, or any person claiming under him,<sup>5</sup>

<sup>1</sup> *Humphreys v. McCall*, 9 Cal. 59; 70 Am. Dec. 621.

<sup>2</sup> *Piper v. Hoard*, 107 N. Y. 73; 1 Am. St. Rep. 789.

<sup>3</sup> *Douglass v. Scott*, 5 Ohio, 199; *Doe v. Dowdall*, 3 Houst. 369; 11 Am. Rep. 757; *Sinclair v. Jackson*, 8 Cow. 586; *Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449; *Taylor v. Sangrain*, 1 Mo. App. 312.

<sup>4</sup> *Byrne v. Morehouse*, 22 Ill. 603; *Denn v. Cornell*, 3 Johns. Cas. 506; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556; *Root v. Crack*, 7 Pa. St. 380; *Jefferson v. Howell*, 1 Houst. 183; *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99; *Fredericks v. Davis*, 3 Mont. 251; *McCusker v. McEvey*, 9 R. I. 528; 11 Am. Rep. 295; *Reynolds v. Cook*, 83 Va. 817; 5 Am. St. Rep. 317.

<sup>5</sup> *Brown v. McCormick*, 6 Watts, 60; 31 Am. Dec. 450; note to *Trull v. Eastman*, 3 Met. 121, in 37 Am. Dec. 129; *Bank v. Mersereau*, 3 Barb. 528; 49 Am. Dec. 189; *Blanchard v. Ellis*, 1 Gray, 195; 61 Am. Dec. 417.

A conveyance by an heir apparent estops him from recovering the property when it subsequently descends to him: *McPherson v. Cunliff*, 11 Serg. & R. 422; 14 Am. Dec. 642. Title acquired by one who has previously conveyed with warranty immediately vests in his grantee, his heirs or assigns: *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189. A conveyance by one co-tenant to another for the purposes of partition, with a special covenant of warranty, will estop the grantor from asserting a title acquired subsequent to the conveyance, and based on a tax sale made prior thereto: *Williams v. Gray*, 3 Greenl. 207; 14 Am. Dec. 234. At common law after-acquired title did not inure to the benefit of grantee, where the conveyance was by bargain and sale, or by lease and release unaccompanied with covenants of warranty. The California act concerning conveyance changes rule of common law as to effect of deeds upon subsequently acquired interests of the grantor, and gives them an operation

and the estoppel of the grantor to deny the grantee's title arising from his deed extends to all persons who claim from or under the grantor by title acquired subsequent to the grant, whether by deed or otherwise.<sup>1</sup> But a vendor of land is not estopped to assert title subsequently acquired, unless by doing so he is obliged to deny or contradict some fact alleged in his former conveyance;<sup>2</sup> and to pass an estate by estoppel, the party must have power to pass it by a direct conveyance.<sup>3</sup>

There is also an equitable estoppel or estoppel *in pais*, where a person, by his conduct or words, has induced others to act. To create an equitable estoppel, the person sought to be estopped must do some act or make some admission to influence the conduct of another, which act or admission is inconsistent with the claim he proposes now to make; and the other party must have acted on the strength of such act or admission.<sup>4</sup> And the first party must know, or have sufficient reason to believe, that the other will place himself in a different position, or subject himself to additional injury in consequence of the action or representation.<sup>5</sup> Thus if a man having a

equivalent to the most expressive covenant of warranty; *Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449. Subsequent title acquired by the grantor under a quitclaim deed does not inure to the benefit of the grantee: *Tillotson v. Kennedy*, 5 Ala. 407; 39 Am. Dec. 330.

<sup>1</sup> *Gilliam v. Bird*, 8 Ired. 280; 49 Am. Dec. 379; *McWilliams v. Nialy*, 2 Serg. & R. 507; 7 Am. Dec. 654; *McGee v. Wallis*, 57 Miss. 638; 34 Am. Rep. 484; *Doe v. Dugan*, 8 Ohio, 87; 31 Am. Dec. 432.

<sup>2</sup> *Partridge v. Patten*, 33 Mo. 483; 54 Am. Dec. 633.

<sup>3</sup> *Dougal v. Fryer*, 3 Mo. 40; 22 Am. Dec. 458.

<sup>4</sup> *New York Rubber Co. v. Rothery*, 107 N. Y. 310; 1 Am. St. Rep. 822.

<sup>5</sup> *Wheaton v. North British and M. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216; *Brett, L. J.*, in *Carr v. R. R. Co.*, L. R. 10 Com. P. 307; *Town v. Needham*, 3 Paige, 545; 24 Am. Dec. 246; *L'Amoureux v. Vandensburgh*, 7 Paige,

316; 32 Am. Dec. 635; *Barham v. Turbeville*, 1 Swan, 437; 57 Am. Dec. 782; *Smith v. Mariner*, 5 Wis. 551; 68 Am. Dec. 73; *Penn v. Heisey*, 19 Ill. 295; 68 Am. Dec. 597; *Seymour v. Lewis*, 13 N. J. Eq. 438; 78 Am. Dec. 108; *Waters's Appeal*, 35 Pa. St. 523; 78 Am. Dec. 354; *Drew v. Kimball*, 43 N. H. 282; 80 Am. Dec. 163. To constitute estoppel *in pais*, there must be, — 1. An admission inconsistent with the evidence proposed to be given, or the claim offered to be set up; 2. An action by the adverse party upon such admission; 3. An injury to him by allowing the admission to be disproved: *Taylor v. Zepp*, 14 Mo. 482; 55 Am. Dec. 113. To constitute estoppel *in pais*, it must appear that the declarations or acts relied on influenced the party's conduct: *Malloney v. Horan*, 49 N. Y. 111; 10 Am. Rep. 335; *Titus v. Morse*, 40 Me. 348; 63 Am. Dec. 665; *Alexander v. Kerr*, 2 Rawle, 83; 19 Am. Dec. 617.

title to an estate which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, the former, so standing by, will be bound by the sale.<sup>1</sup> So if one man encourages another to settle on land and expend his money in improving it, he who offers the inducement shall not afterwards allege anything against the settler's title.<sup>2</sup> So if the owner of land intentionally leads the public to believe that he has dedicated it to public use, he will be estopped from contradicting the dedication, to the prejudice of those whom he may have misled.<sup>3</sup>

But to apply the doctrine of equitable estoppel, there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud.<sup>4</sup>

<sup>1</sup> *Sherrill v. Sherrill*, 73 N. C. 8; *Gray v. Bartlett*, 20 Pick. 193; 32 Am. Dec. 208; *Engle v. Burns*, 5 Call. 463; 2 Am. Dec. 593; *Brinkerhoff v. Lansing*, 4 Johns. Ch. 65; 8 Am. Dec. 538; *Henderson v. Overton*, 2 Yerg. 394; 24 Am. Dec. 492; *Crest v. Jack*, 3 Watts, 238; 27 Am. Dec. 353; *Danley v. Rector*, 10 Ark. 211; 50 Am. Dec. 242; *Blanchard v. Allen*, 5 La. Ann. 367; 52 Am. Dec. 594; *Godeffroy v. Caldwell*, 2 Cal. 489; 56 Am. Dec. 360; *Sanderson v. Ballance*, 2 Jones Eq. 322; 67 Am. Dec. 218; *Bryan v. Ramirez*, 8 Cal. 461; 68 Am. Dec. 340; *Workman v. Guthrie*, 29 Pa. St. 495; 72 Am. Dec. 654; *Guffey v. O'Reilly*, 88 Mo. 418; 57 Am. Rep. 424. A person ignorant of his claim to property is not estopped from subsequently asserting it, although he stands by and sees the property sold as that of another: *Morrison v. Caldwell*, 5 T. B. Mon. 426; 17 Am. Dec. 84. A person is not estopped, who, having title to land depending upon the construction of a will, without any knowledge of his rights, stands by and sees another lay out money and make large investments in the property, and does not give notice of his claim: *Tongue v. Nutwell*, 17 Md. 212; 79 Am. Dec. 649.

<sup>2</sup> *McKelvey v. Trubey*, 4 Watts & S. 323; *Henderson v. Overton*, 2 Yerg. 394; 24 Am. Dec. 492; *Irwin v. Nixon*, 11 Pa. St. 419; 51 Am. Dec. 559; *McKelway v. Armour*, 10 N. J. Eq. 115; 64 Am. Dec. 445; *Rutherford v. Tracy*, 48 Mo. 325; 8 Am. Rep. 104.

<sup>3</sup> *Hobbs v. Lowell*, 19 Pick. 405; 31 Am. Dec. 145; *State v. Trask*, 6 Vt. 355; 27 Am. Dec. 554; *Noyes v. Ward*, 19 Conn. 250; *Boyce v. Kalbaugh*, 47 Md. 334; 28 Am. Rep. 464; *Gilliam v. Bird*, 8 Ired. 280; 49 Am. Dec. 379.

<sup>4</sup> *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156; *McAffery v. Conover*, 7 Ohio St. 99; 70 Am. Dec. 57; *Beaupland v. McKeen*, 28 Pa. St. 124; 70 Am. Dec. 115; *Odlin v. Gove*, 41 N. H. 465; 77 Am. Dec. 773; *Brant v. Virginia Coal Co.*, 93 U. S. 326; *Thayer v. Bacon*, 3 Allen, 163; 80 Am. Dec. 59. "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge

And two things, it is said, must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent: 1. The owner must clothe the person assuming to dispose of the property with the apparent title to or authority to dispose of it; and 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real.<sup>1</sup> Where, in a dispute concerning boundaries, one of the parties admits and yields to the claim of the other through mistake, and without consideration, he will not be estopped from asserting his right upon discovering the mistake.<sup>2</sup>

A party who at the trial argues that a certain deed vests

that the cases on this subject go to this result only: that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud": 1 Story's Eq. Jur. 391. To the same purport is the language of the adjudged cases. Thus it is said by the supreme court of Pennsylvania that "the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up": *Hill v. Epley*, 31 Pa. St. 334; *Henshaw v. Bissell*, 18 Wall. 271; *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 368; *Davis v. Davis*, 28 Cal. 23; 85 Am. Dec. 157; *Commonwealth v. Moltz*, 10 Pa. St. 531; *Copeland v. Copeland*, 28 Me. 539; *Delaplaine v. Hitchcock*, 6 Hill, 14; *Hawes v. Marchant*, 1 Curt. 136; *Zuchtmann v. Roberts*, 109 Mass. 53; 12 Am. Rep. 663. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which

will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established: *Id.*

<sup>1</sup> *Bernard v. Campbell*, 55 N. Y. 456; 14 Am. Rep. 289. It is also essential, for its application with respect to the title of real property, that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. He must not be guilty of laches. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel: *Crest v. Jack*, 3 Watts, 240; 27 Am. Dec. 353; *Knouff v. Thompson*, 16 Pa. St. 361; *Brant v. Virginia Coal Co.*, 93 U. S. 326; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Odlin v. Gove*, 41 N. H. 465; 77 Am. Dec. 773; *Tongue v. Nutwell*, 17 Md. 212; 79 Am. Dec. 649.

<sup>2</sup> *Stuart v. Luddington*, 1 Rand. 403; 10 Am. Dec. 550.

title in him is not precluded either by way of estoppel or presumption from insisting that another deed shown in evidence or presumed did so vest it.<sup>1</sup> A remainderman is not estopped by the silence of the tenant for life when remarks are made in his presence in disparagement of his title.<sup>2</sup> And the state — the sovereign power — is not estopped by its grants.<sup>3</sup>

ILLUSTRATIONS. — A tenant by the curtesy conveyed the land in fee, with full covenants of warranty, and afterwards died, leaving assets equal to the land. *Held*, that his children were not estopped by the deed to assert their title to the land by inheritance from the mother: *Russ v. Alpaugh*, 118 Mass. 369; 19 Am. Rep. 464. M. made a deed purporting to convey land, to which he had no title, to defendant, with covenants of warranty against all persons claiming under him. Afterwards M. acquired title to the land, and mortgaged it to H., under whom plaintiff claimed. In ejectment, *held*, that plaintiff was estopped to say that M. was not seised at the time of the first conveyance, and could therefore not recover: *Potts v. Doudall*, 3 Houst. 369; 11 Am. Rep. 757. Defendant, having an equitable interest in one half of a lot of land, was present when the lot was offered for sale at auction, but gave no notice of his claim, and entered the list of bidders. *Held*, that he was estopped from afterwards asserting his title against the purchaser: *Rice v. Bunce*, 49 Mo. 231; 8 Am. Rep. 129. A lessee for 999 years conveyed the premises as in fee-simple. *Held*, that the grantee was not estopped to show, as against his grantor's widow's claim of dower, that the grantor had but a leasehold estate: *Whitmire v. Wright*, 22 S. C. 446; 53 Am. Rep. 725. Parents executed and delivered a deed of premises to their child of six years. When the child became sixteen, the parents executed a conveyance of the same premises, with other real estate, to S., in trust, upon which he made large advances of money. To this conveyance the name of the mother was signed, by the child, at her request. *Held*, that the child was not thereby estopped from claiming title to the premises under the previous deed, no fraudulent intention being proved: *Spencer v. Carr*, 45 N. Y. 406; 6 Am. Rep. 112.

<sup>1</sup> *Hurley v. Morgan*, 1 Dev. & B. 425; 28 Am. Dec. 579.

<sup>2</sup> *McGregor v. Wait*, 10 Gray, 72; 69 Am. Dec. 305.

<sup>3</sup> *Taylor v. Shufford*, 4 Hawks, 116;

15 Am. Dec. 512; *Wallace v. Maxwell*, 10 Ired. 110; 51 Am. Dec. 380. But see *Proprietors of Enfield v. Permit*, 5 N. H. 280; 20 Am. Dec. 580.

§ 2702. **By Judicial Sale.**—The title to land may be acquired by a judicial sale of the property under execution on a judgment or under the power of the state to sell for unpaid taxes.<sup>1</sup> The doctrine of adverse possession does not apply to judicial sales.<sup>2</sup>

<sup>1</sup> See *post*, Part V., Constitutional Law.

<sup>2</sup> *High v. Nelms*, 14 Ala. 350; 48 Am. Dec. 103.

## CHAPTER CXXX.

## THE ESTATES IN REAL PROPERTY.

- § 2703. Meaning of "estate."
- § 2704. The different kinds of estates.
- § 2705. Estates in fee-simple.
- § 2706. How created.
- § 2707. Power of alienation — Restrictions as to alienation.
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- § 2769. Performance of conditions.
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§ 2703. **Meaning of "Estate."**—In its widest signification, the word "estate" includes both real and personal property.<sup>1</sup> Sometimes, used in a more restricted sense, the word "estate" is used to denote land, and land only.<sup>2</sup> But in the law of real property it is used to denote the degree, quantity, nature, and extent of interest which a person has in real property.<sup>3</sup> An estate in land is, therefore, the interest which the owner has therein.<sup>4</sup>

<sup>1</sup> Kellogg v. Blair, 6 Met. 322; Bulard v. Goffe, 20 Johns. 252; Keannon v. McRoberts, 1 Wash. 96; 1 Am. Dec. 428; Laing v. Barbour, 119 Mass. 523; Lambert v. Paine, 3 Cranch. 97; Lloyd v. Lloyd, L. R. 7 Eq. Cas. 458; Hawksworth v. Hawksworth, 27 Beav. 1; Doe v. Evans, 9 Ad. & E. 719; O'Toole v. Brown, 3 El. & B. 572.

<sup>2</sup> Van Rensselaer v. Poucher, 5 Denio, 40.

<sup>3</sup> Co. Lit. 345; 1 Preston on Estates, 7, 20; Walsingham's Case, Plow. 535; Estate of Coleman, 21 N. Y. Daily Reg., No. 63.

<sup>4</sup> Co. Lit. 345; 2 Bla. Com. 103; Van Rensselaer v. Poucher, 5 Denio, 40.

§ 2704. **The Different Kinds of "Estates."**—Estates in land are distinguished from each other according to their quantity or quality; the former referring to the time of the interest, the latter to the manner of the enjoyment.<sup>1</sup> They are either freehold or less than freehold; the former being those which are to last for the owner's life or longer, the latter those which are to last simply for a term of years.<sup>2</sup> Freehold estates of inheritance are divided into those absolute, or in fee-simple, and those limited.<sup>3</sup>

§ 2705. **Estate in Fee-simple.**—An estate in fee-simple is the largest and highest interest which one can have in lands.<sup>4</sup> A fee-simple is where lands are given to a man and his heirs forever, absolutely and simply, without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law.<sup>5</sup> One may have a fee-simple in any kind of hereditaments, corporeal or incorporeal.<sup>6</sup>

§ 2706. **How Created.**—At common law the word "heirs" is essential in the conveyance, in order to create an estate in fee-simple, and no other word or expression is sufficient for the purpose.<sup>7</sup> Thus the following have been held not to convey a fee: "To J. M. and his generation, to endure so long as the waters of the Delaware run."<sup>8</sup> But the following have been held to carry a fee, viz.: As

<sup>1</sup> 2 Bla. Com. 103; 1 Preston on Estates, 21.

<sup>2</sup> Id.

<sup>3</sup> 2 Bla. Com. 104.

<sup>4</sup> 2 Bla. Com. 105, 106; Co. Lit. 1.

<sup>5</sup> 2 Bla. Com. 104, 106.

<sup>6</sup> 2 Bla. Com. 106.

<sup>7</sup> Co. Lit. 8 b; Hollingsworth v. McDonald, 2 Har. & J. 230; 3 Am. Dec. 545; Jackson v. Myers, 3 Johns. 388; 3 Am. Dec. 504; Clearwater v. Rose, 1 Blackf. 137; Patterson v. Moore, 15 Ark. 222; Buffum v. Hutchinson, 1 Allen, 58; Gray v. Packer, 4

Watts & S. 17; Rector v. Waugh, 17 Mo. 13; 57 Am. Dec. 251; Bachelor v. Whitaker, 88 N. C. 350; Mercier v. R. R. Co., 54 Mo. 506; Mattocks v. Brown, 103 Pa. St. 16. In Indiana, as at common law, a deed to A "and her present heirs" does not vest the fee in A: Fountain County Coal and Mining Co. v. Beckleheimer, 102 Ind. 76; 52 Am. Rep. 645. But this rule has been changed in many states by statute.

<sup>8</sup> Foster v. Joice, 3 Wash. C. C. 498.

long as "wood grows and water runs";<sup>1</sup> "A and his heirs lawfully begotten in wedlock with B";<sup>2</sup> "bodily heirs";<sup>3</sup> a conveyance of land to "A and the heirs of her body by B";<sup>4</sup> a deed in which the grantor "assigns, transfers, and sets over all his right, title, claim, and demand to a tract of land."<sup>5</sup> The mere fact that an express estate for life in the same subject had been limited to the same person is not sufficient to prevent the subsequent words from carrying the fee.<sup>6</sup> Generally a larger estate will not be implied where a smaller one is expressly granted. Hence a power of disposition annexed to an express estate for life will not be construed as enlarging the latter into a fee, unless the power be necessarily inconsistent with an estate for life only.<sup>7</sup> Where words of inheritance appear only in one part of a deed, which is inartificially worded, but the intention to pass a fee appears from the entire instrument, it will be so construed.<sup>8</sup> An estate granted to a trustee by deed will be construed to be a fee without the use of the word "heirs," if such appears to be the intention.<sup>9</sup> An equitable estate in fee may be declared without the use of the word "heirs," if an intention to pass such estate can be gathered from the instrument.<sup>10</sup> A conveyance of land to a corporation is presumably a conveyance in fee, although the corporation is chartered for a term of years.<sup>11</sup> Where land is conveyed to a corporation and its "successors," a fee passes.<sup>12</sup>

But in the case of a devise, the strict rule of the common law is not followed, the intention of the testator being carried out, where it can be ascertained from the

<sup>1</sup> *Arms v. Burt*, 1 Vt. 303; 18 Am. Dec. 680.

<sup>2</sup> *Pooser v. Tyler*, 1 McCord Ch. 18.

<sup>3</sup> *True v. Nicholls*, 2 Duvall, 547.

<sup>4</sup> *Tipton v. La Rose*, 27 Ind. 484; *Chaffee v. Dodge*, 2 Root, 205.

<sup>5</sup> *Fash v. Blake*, 38 Ill. 363.

<sup>6</sup> *Geyer v. Wentzel*, 68 Pa. St. 84.

<sup>7</sup> *Wetter v. Walker*, 62 Ga. 142.

<sup>8</sup> *Hicks v. Bullock*, 96 N. C. 164.

<sup>9</sup> *Mackall v. Richards*, 1 Mackey, 444.

<sup>10</sup> *Holmes v. Holmes*, 86 N. C. 205.

<sup>11</sup> *Asheville Division v. Aston*, 92 N. C. 578.

<sup>12</sup> *Storr's Agr'l School v. Whitney*, 54 Conn. 342.

language used by him,<sup>1</sup> and words of perpetuity or inheritance are not essential.<sup>2</sup> Thus the following words in a will have been held to pass a fee: "All my real and personal estate";<sup>3</sup> "I devise my lands";<sup>4</sup> "all my property of every description";<sup>5</sup> to "my daughter, A, and her heir or heirs born of her body," to "have and enjoy the estate I have heretofore given her, freely and clearly, forever";<sup>6</sup> "all the real and personal estate of which I may die seised and possessed, after payment of all my just debts";<sup>7</sup> "for and during his natural life, with the right to dispose of the same as he shall think proper";<sup>8</sup> "for her own individual purposes and property, to have for her benefit, to enable her to support her three infant children";<sup>9</sup> "to my sons, A, B, and C, when they arrive at age, and to my daughter, and if she depart this life, I leave it to the

<sup>1</sup> *Cassell v. Cooke*, 8 Serg. & R. 268; 11 Am. Dec. 611; *Jackson v. Housell*, 17 Johns. 281; *Sergeant v. Towne*, 10 Mass. 300; *Webb v. Herring*, 1 Rolle, 390; *Goodtitle v. Otway*, 2 Wils. 7; *Newkirk v. Newkirk*, 2 Caines, 345; *Mayo v. Carrington*, 4 Cal. 472; 2 Am. Dec. 580; *Myers v. Myers*, 2 McCord Ch. 214; 16 Am. Dec. 648; *Merritt v. Abendroth*, 24 Hun. 218; *Wood v. Hills*, 19 Pa. St. 513; *Mably v. Stainback*, 1 Mart. (N. C.) 75; 1 Am. Dec. 545; *Turbett v. Turbett*, 3 Yeates, 187; 2 Am. Dec. 369; *Jackson v. Merrill*, 6 Johns. 185; 5 Am. Dec. 213; *Jackson v. Delancy*, 13 Johns. 536; 7 Am. Dec. 404; *Doe v. Hurrell*, 5 Barn. & Ald. 21; *Lloyd v. Lloyd*, L. R. 7 Eq. Cas. 458; *Nichols v. Butcher*, 18 Ves. 195; *Roe v. Wright*, 7 East, 268.

<sup>2</sup> *Peyton v. Smith*, 4 McCord, 476; 17 Am. Dec. 758; *Zimmerman v. Anders*, 6 Watts & S. 218; 40 Am. Dec. 552; *Jenkins v. Clement*, 1 Harp. Eq. 72; 14 Am. Dec. 698; *Pattison v. Doe*, 7 Ind. 282; *Lindsay v. McCormack*, 2 A. K. Marsh. 229; 12 Am. Dec. 387; *Russell v. Elden*, 15 Me. 193; *Jackson v. Babcock*, 12 Johns. 389; *Fox v. Phelps*, 17 Wend. 398; *Dunlap v. Crawford*, 2 McCord Ch. 171; *Johnson v. Johnson*, 1 Munf. 549; *Hall v. Goodwyn*, 4 McCord, 442; *Scanlan*

*v. Porter*, 1 Bail. 427; *Cordy v. Adams*, 1 How. 439; *Tatum v. McLellan*, 50 Miss. 1; *Lincoln v. Lincoln*, 107 Mass. 590; *Baldwin v. Bean*, 59 Me. 481; *Breckenridge v. Denny*, 8 Bush, 523; *Waterman v. Greene*, 12 R. I. 483; *Patterson v. Nixon*, 79 Ind. 251; *Edwards v. Barnard*, 84 Pa. St. 184; *Howard v. Caruse*, 109 U. S. 725; *White v. Crenshaw*, 5 Mackey, 113; 60 Am. Rep. 370; *Robinson v. Randolph*, 21 Fla. 629; 58 Am. Rep. 692; *Lyon v. Marsh*, 116 Mass. 232; *Warner v. Willard*, 54 Conn. 470; *Harper v. Bleau*, 3 Watts, 471; 27 Am. Dec. 367; *Schrivver v. Meyers*, 19 Pa. St. 87; 57 Am. Dec. 634; *Bell Co. v. Alexander*, 22 Tex. 350; 73 Am. Dec. 269; *Canedy v. Jones*, 19 S. C. 297; 45 Am. Rep. 777. By statute, in some states, a devise of lands conveys the entire estate, unless the contrary intent appears: *King v. Miller*, 11 Lea, 633; *Bell Co. v. Alexander*, 22 Tex. 530; 73 Am. Dec. 269.

<sup>3</sup> *Godfrey v. Humphrey*, 18 Pick. 537; 29 Am. Dec. 621.

<sup>4</sup> *Smith v. Berry*, 8 Ohio, 365.

<sup>5</sup> *Piatt v. Sinton*, 37 Ohio St. 353.

<sup>6</sup> *Hounslea v. Hand*, 21 Hun. 251.

<sup>7</sup> *Baldwin v. Bean*, 59 Me. 481.

<sup>8</sup> *Cummings v. Shaw*, 108 Mass. 159.

<sup>9</sup> *Davis v. Bawcum*, 10 Heisk. 406.

longest liver to have all";<sup>1</sup> "as to my worldly goods, I devise to my wife, A, all and singular my goods and effects, both real and personal, of what kind soever, after my debts and funeral expenses are paid";<sup>2</sup> "I give and bequeath to my daughter a tract of land called F."<sup>3</sup> Where there is a devise to one, in express terms, for life, and then over, without words to indicate the extent of the devise over, the latter devise carries a fee.<sup>4</sup> A devise to one "on condition that he pay" testator's debts gives a fee by implication.<sup>5</sup> A devise with power to convey carries a fee.<sup>6</sup> A devise to one "in fee-simple for life" passes an estate in fee.<sup>7</sup> A general devise, coupled with a power of sale or disposal, passes the fee, even if there is a devise of the remainder, and especially when the remainder is described as what remains.<sup>8</sup> A devise of land to certain persons, "to enjoy and hold the same as tenants in common," and which gives no right, nor use, possession, or enjoyment thereof to any other person or persons, vests a fee-simple in said devisees.<sup>9</sup> A fee given in the first part of a will may be so restrained by subsequent words as to convert it into a life estate.<sup>10</sup>

**§ 2707. Power of Alienation—Restrictions as to Alienation.**—One of the most important incidents of an estate in fee-simple at the common law is the power of alienation,<sup>11</sup> and therefore a condition against alienation generally attached to the creation of a fee-simple estate is void.<sup>12</sup> But a partial restriction is valid; such as, for ex-

<sup>1</sup> *Deveniah v. Smith*, 1 Har. & McH. 148.

<sup>2</sup> *Ferguson v. Zepp*, 4 Wash. C. C. 645.

<sup>3</sup> *Winchester v. Tilghman*, 1 Har. & McH. 452.

<sup>4</sup> *White v. Crenshaw*, 5 Mackey, 113; 60 Am. Rep. 370; *French v. Campbell*, 2 Mackey, 321.

<sup>5</sup> *Heard v. Horton*, 1 Denio, 65; 43 Am. Dec. 659.

<sup>6</sup> *Doe v. Howland*, 8 Cow. 277; 18 Am. Dec. 445; *Hasel v. Hogan*, 47 Mo. 277.

<sup>7</sup> *McAllister v. Tate*, 11 Rich. 509; 73 Am. Dec. 119.

<sup>8</sup> *State v. Smith*, 52 Conn. 557.

<sup>9</sup> *Crosky v. Dodds*, 87 Pa. St. 359.

<sup>10</sup> *Urich's Appeal*, 86 Pa. St. 386; 27 Am. Rep. 707.

<sup>11</sup> Co. Lit. 223 a.

<sup>12</sup> *McWilliams v. Nisley*, 2 Serg. & R. 513; 7 Am. Dec. 654; *Hall v. Tufts*, 18 Pick. 455; *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241; *Walker v. Vincent*, 19 Pa. St. 369; *Mandlebaum v. McDonnell*, 29 Mich. 78; 18 Am. Rep. 61; *De Peyster v.*

ample, a prohibition of alienation for a particular time or to a particular person.<sup>1</sup>

§ 2708. **Fee in Abeyance.**—A fee is said to be in abeyance when it is not at the time vested in any one, but is in expectation; as where a clergyman holding a fee resigns or dies, and his successor has not been appointed.<sup>2</sup> At common law a fee could not be in abeyance except in cases of necessity.<sup>3</sup> Thus the first estates of freehold cannot be in abeyance by the act of the owner;<sup>4</sup> hence, at common law, an estate of freehold cannot be created by deed to commence *in futuro*,<sup>5</sup> except by way of remainder.<sup>6</sup> But it has been laid down that the maxim that a fee cannot be in abeyance is a maxim of the common law that “rests upon reasons that now have no existence, and is not now of universal application.”<sup>7</sup> An estate in abeyance may be barred or destroyed by a legislative enactment.<sup>8</sup>

§ 2709. **Seisin.**—Seisin imports the having of an estate of freehold or inheritance in lands or tenements,<sup>9</sup> and the owner of such an estate is said to be seised of it.<sup>10</sup> Seisin is of two kinds,—in fact or in deed, and in law; the

Michael, 6 N. Y. 467; 57 Am. Dec. 470; Smith v. Slarr, 3 Whart. 62; 31 Am. Dec. 498; Pace v. Pace, 73 N. C. 119; Jones v. Bacon, 68 Me. 34; 28 Am. Rep. 1; Campbell v. Beaumont, 91 N. Y. 464; Turner v. Savings Inst., 76 Me. 527; Murray v. Green, 64 Cal. 363; Case v. Dwire, 60 Iowa, 442; Doeblers Appeal, 64 Pa. St. 9.

<sup>1</sup> McWilliams v. Nisley, 2 Serg. & R. 513; 7 Am. Dec. 654; McCullough v. Gilmore, 11 Pa. St. 370; Hawley v. Northampton, 8 Mass. 37; 5 Am. Dec. 66; Turner v. Johnson, 7 Dana, 438; Stewart v. Brady, 3 Bush, 623. And see *post*, Conditions and Covenants in Deeds.

<sup>2</sup> Co. Lit. 342; Pawlet v. Clark, 9 Cranch, 293; Terrett v. Taylor, 9 Cranch, 43; Weston v. Hunt, 2 Mass. 500.

<sup>3</sup> Williams on Real Property, 256; Fearne on Remainders, 351; Donovan v. Pitcher, 51 Ala. 411; 25 Am. Rep.

634; Moers v. White, 6 Johns. Ch. 360.

<sup>4</sup> Hob. 153; 1 Preston on Estates, 216; 2 Bla. Com. 165; Jackson v. Dunabagh, 1 Johns. Cas. 91. This rule has been abolished or qualified by statute in many of the states: See 1 N. Y. Rev. Stats. 723, 724; Gorham v. Daniels, 23 Vt. 600; Bell v. Scannon, 15 N. H. 381; 41 Am. Dec. 706.

<sup>5</sup> 2 Bla. Com. 165; 1 Preston on Estates, 220; Singleton v. Breinar, 4 McCord, 12; 17 Am. Dec. 699.

<sup>6</sup> Co. Lit. 49; 1 Atkinson on Conveyancing, 11.

<sup>7</sup> Strong, J., in Wallach v. Van Riswick, 92 U. S. 202.

<sup>8</sup> Orndoff v. Turman, 2 Leigh, 200; 21 Am. Dec. 608.

<sup>9</sup> Slater v. Rawson, 6 Met. 444; Fitzhugh v. Croghan, 2 J. J. Marsh. 429; 19 Am. Dec. 139.

<sup>10</sup> Towle v. Ayer, 8 N. H. 58; Van Rensselaer v. Foucher, 5 Denio, 35.

former being the actual possession of a freehold, the latter the right to the possession.<sup>1</sup> Livery of seisin, i. e., the formal delivery of a twig or a turf as part of the land conveyed, was essential at common law to vest the title in the feoffee; but this ceremony was never adopted in the United States, where a conveyance by deed duly acknowledged and recorded is equivalent to an entry on the land and the actual seisin.<sup>2</sup> According to the modern authorities, there is no difference between seisin and possession.<sup>3</sup>

§ 2710. **Disseisin.**—Disseisin is an entry into the lands or tenements of another, accompanied with expulsion, or ouster, of such other from the freehold.<sup>4</sup> Disseisin is an estate gained by wrong and injury, therein differing from dispossession, which may be by right or wrong.<sup>5</sup> “According to the modern authorities, there seems to be no legal difference between the words ‘seisin’ and ‘possession,’ although there is a difference between the words ‘disseisin’ and ‘dispossession’; the former meaning an estate gained by wrong and injury, whereas the latter may be by right or by wrong; the former denoting an ouster of the disseisin, or some act equivalent to it, whereas by the latter no such act is implied.”<sup>6</sup> The elements of actual disseisin are the fact of entering and the intention to usurp possession.<sup>7</sup> Disseisin is always a tortious act;<sup>8</sup>

<sup>1</sup> Co. Lit. 293 a; *Vanderheyden v. Crandall*, 2 Denio, 9; 1 N. Y. 491; *Durando v. Durando*, 32 Barb. 527.

<sup>2</sup> *Goodwin v. Hubbard*, 15 Mass. 214; *Ward v. Fuller*, 15 Pick. 185; *McKee v. Plout*, 3 Dall. 489; *Jackson v. Howe*, 14 Johns. 406; *Green v. Chelsea*, 24 Pick. 71; *Green v. Liler*, 8 Cranch, 229.

<sup>3</sup> *Slater v. Rawson*, 6 Met. 444.

<sup>4</sup> *Smith v. Burtis*, 6 Johns. 197; 5 Am. Dec. 218; *People v. Van Rensselaer*, 8 Barb. 189; *Jackson v. Rogers*, 1 Johns. Caa. 23; *Clarke v. McClure*, 10 Gratt. 305; *Ewing v. Burnet*, 11 Pet. 41; *Towle v. Ayer*, 8 N. H. 60; *McCall v. McNeely*, 3 Watts, 71. Entry

under hostile title, though such title is void, is a disseisin: *Melvin v. Proprietors*, 5 Met. 15; 38 Am. Dec. 384.

<sup>5</sup> Co. Lit. 153; *Doe v. Thompson*, 5 Cow. 371.

<sup>6</sup> *Slater v. Rawson*, 6 Met. 444; *Kennebec Purchase v. Laboree*, 2 Greenl. 275; 11 Am. Dec. 79.

<sup>7</sup> *Robertson v. Robertson*, 2 B. Mon. 235; 38 Am. Dec. 148; *Smith v. Burtis*, 6 Johns. 197; 5 Am. Dec. 218; *Grant v. Fowler*, 39 N. H. 101; *Magee v. Magee*, 37 Miss. 152; *Wiggins v. Holley*, 11 Ind. 2.

<sup>8</sup> *Doe v. Thompson*, 5 Cow. 371; *Bradstreet v. Huntington*, 5 Pet. 401.

yet one may become a disseisor, though entering peaceably under a void deed,<sup>1</sup> or by fraud;<sup>2</sup> and the intention to dispossess may, under some circumstances, be imputed to those who by the general rules of law are, in ordinary cases, not bound by an exercise of the will.<sup>3</sup> To constitute actual disseisin there must be an unequivocal act of ownership, open, known, exclusive, adverse, and uninterrupted.<sup>4</sup> A disseisor has good possession against everybody but the true owner.<sup>5</sup> A disseisin in fact divests the seisin of the original owner, and deprives him of all right in relation to the land, except the right of entry and of property, which may be further reduced to a mere right of action, and displaces all estates depending on the original seisin.<sup>6</sup> A disseisee having right of entry may convey title as freely as if there had been no disseisin.<sup>7</sup> But the owner of land cannot convey it to a third person while it is in the adverse possession of another; but he may convey it to the disseisor.<sup>8</sup> A disseisor purchasing from a co-tenant cannot be ousted by a co-tenant until he commits some disseisin of the plaintiff.<sup>9</sup> A demandant in a writ of right may recover under title by disseisin unless the tenant can show a better title.<sup>10</sup> Where one tenant in common conveys the common estate with covenants of seisin and warranty, an entry and exclusive holding by the grantee amounts to a disseisin of the co-tenant.<sup>11</sup>

<sup>1</sup> Bradstreet v. Huntington, 5 Pet. 401; Allyn v. Mather, 9 Conn. 114; Small v. Proctor, 15 Mass. 495; Whitney v. French, 25 Vt. 663.

<sup>2</sup> Bradstreet v. Huntington, 5 Pet. 401.

<sup>3</sup> Thus an infant or a *feme covert* may be a disseisor: 1 Roll. Abr. 658; Bradstreet v. Huntington, 5 Pet. 401.

<sup>4</sup> Taylor v. Horde, 1 Burr. 110; Slater v. Jepherson, 6 Cush. 129; Johnson v. Bean, 119 Mass. 271; Jackson v. Schoonmaker, 2 Johns. 230; French v. Pearce, 8 Conn. 440; 21 Am. Dec. 680; Clarke v. McClure, 10 Gratt. 305; Lane v. Gould, 10 Barb. 254; Coburn v. Hollis, 3 Met. 125; Winthrop v. Benson, 31 Me. 381; Jones v. Chiles, 2

Dana, 25; Calhoun v. Cook, 9 Pa. St. 226; Little v. Libby, 2 Me. 242; 11 Am. Dec. 68; Kennebec Purchase v. Springer, 4 Mass. 416; 3 Am. Dec. 227.

<sup>5</sup> Green v. Kellum, 23 Pa. St. 254; 62 Am. Dec. 332.

<sup>6</sup> Varick v. Jackson, 2 Wend. 166; 19 Am. Dec. 571.

<sup>7</sup> Pratt v. Pierce, 36 Me. 448; 58 Am. Dec. 758.

<sup>8</sup> Schwartz v. Kuhn, 10 Me. 274; 25 Am. Dec. 239.

<sup>9</sup> House v. Fuller, 13 Vt. 165; 37 Am. Dec. 588.

<sup>10</sup> Hunt v. Hunt, 3 Met. 175; 37 Am. Dec. 130.

<sup>11</sup> Kittredge v. Proprietors, 17 Pick. 246; 28 Am. Dec. 296.

§ 2711. **Tenure in the United States.**—Tenure, i. e., the mode by which an estate in lands is held, is different in this country from what it is in England. In the latter kingdom all lands are held either immediately or mediately of the crown, in consideration of certain services or burdens to be performed by the holder.<sup>1</sup> In this country, before the Revolution, every acre of land, it has been said by the supreme court of the United States, was held mediately or immediately by grants from the crown.<sup>2</sup> But with the Revolution all feudal burdens were at an end,<sup>3</sup> and now, although all titles to land in this country have arisen either from a grant from the crown, from the United States, or from a state,<sup>4</sup> yet the owner in fee in this country is an absolute owner.<sup>5</sup> In Connecticut, Georgia, Kentucky, New Jersey, and New York, it is expressly enacted by statute that all lands are allodial; and all feudal tenures are, in Connecticut, Georgia, and New York, expressly abolished.<sup>6</sup> The fee in unsold lands is either in the federal or state governments. The Indians have only a right of use, which, however, cannot be divested, except by purchase or war.<sup>7</sup>

The discovery of lands in the American continent, followed by actual possession, gave title to the government by whose subjects or by whose authority such discovery was made, not only against other European governments, but against the native Indian tribes. While the different nations of Europe respected the rights of the natives as occupants, they all asserted the ultimate dominion and title to be in themselves,<sup>8</sup> the title of the Indians being

<sup>1</sup> 2 Bla. Com. 105.

<sup>2</sup> *Chisholm v. Georgia*, 2 Dall. 470; *Tolson v. Mainor*, 85 N. C. 235.

<sup>3</sup> 4 Kent's Com. 24; 1 Story on Constitution, 160; *Cornell v. Lamb*, 2 Cow. 652.

<sup>4</sup> *Jackson v. Ingraham*, 4 Johns. 163; *Jackson v. Hart*, 12 Johns. 77; 3 Kent's Com. 307; *Sullivan v. McLennans*, 2 Iowa, 437; 65 Am. Dec. 780.

<sup>5</sup> 4 Kent's Com. 3; *Cornell v. Lamb*, 2 Cow. 652; *De Peyster v. Michael*,

6 N. Y. 467; 57 Am. Dec. 470; *Bradley v. Dwight*, 62 How. Pr. 300; *Matthews v. Ward*, 10 Gill & J. 443; *Wallace v. Harmstad*, 44 Pa. St. 500.

<sup>6</sup> 1 Stimson's American Statute Law, sec. 1100. So in Louisiana: *Xiques v. Bujac*, 7 La. Ann. 498.

<sup>7</sup> *Godfrey v. Beardsley*, 2 McLean, 412.

<sup>8</sup> *Breaux v. Johns*, 4 La. Ann. 141; 50 Am. Dec. 555.

regarded by the European and American governments as a mere possessory right.<sup>1</sup>

§ 2712. **Estates-tail.**—An estate-tail is an estate limited to some particular heirs of the person to whom it is granted, and not to his heirs generally.<sup>2</sup> An estate-tail is either general or special.<sup>3</sup> The former is where lands and tenements are given to a man and the heirs of his body generally;<sup>4</sup> the latter is where the gift is restrained to certain heirs of the donee's body, exclusive of others.<sup>5</sup> Thus if the gift be to one, and the heirs of his body begotten, it is an estate in tail general, because the donee's issue in general by any marriage is, in successive order, capable of inheriting the estate-tail;<sup>6</sup> but if the gift be to a man and the heirs of his body on M., his present wife, to be begotten, it is an estate in tail special, the issue of the donee by any other wife being excluded.<sup>7</sup> Estates, both in general and special tail, may either be in tail male or tail female.<sup>8</sup> In case of an entail male, the heirs female are not inheritable;<sup>9</sup> nor, on the other hand, are the heirs male inheritable in case of a gift in tail female.<sup>10</sup> Therefore, if the donee in tail male has issue a daughter, who has issue a son, this son cannot inherit the estate, because he cannot deduce his descent wholly by heirs male.<sup>11</sup> So if a man have two estates-tail, the one in tail male, the other in tail female, and has issue a daughter, who has issue a son, this son cannot succeed to either of the estates, for the reason that he cannot deduce his descent wholly either in the male or the female line.<sup>12</sup> To create an

<sup>1</sup> *Strother v. Cathey*, 1 Murph. 162; 3 Am. Dec. 683.

<sup>2</sup> *Wight v. Thayer*, 1 Gray, 287.

<sup>3</sup> 2 Bla. Com. 113; *Butler v. Huestis*, 68 Ill. 594; 18 Am. Rep. 589, 592.

<sup>4</sup> 2 Bla. Com. 113; 1 Greenl. Cruise, 70.

<sup>5</sup> 2 Bla. Com. 113, 114.

<sup>6</sup> 2 Bla. Com. 113; 1 Greenl. Cruise, 70; Co. Lit. 26 b.

<sup>7</sup> 2 Bla. Com. 113, 114; 1 Greenl. Cruise, 70.

<sup>8</sup> 2 Bla. Com. 114.

<sup>9</sup> Co. Lit. 25; 1 Greenl. Cruise, 70, 71; *Hulburt v. Emerson*, 16 Mass. 241; *Bernal v. Bernal*, 3 Mylne & C. 559.

<sup>10</sup> 1 Greenl. Cruise, 70, 71.

<sup>11</sup> 2 Bla. Com. 114; *Hulburt v. Emerson*, 16 Mass. 241.

<sup>12</sup> Co. Lit. 25 b; 2 Bla. Com. 114; 1 Greenl. Cruise, 71; *Williams on Real Property*, 30.

estate-tail, the limitation must be to the heirs of the body of the grantee or donee, though in wills greater latitude is allowed, where the intent of the testator is clear.<sup>1</sup> The words "natural heirs," and "heirs of the body," in a will, are considered of the same legal import.<sup>2</sup> Any species of property of a real nature may be entailed, whether corporeal or incorporeal; but not personal chattels.<sup>3</sup> Whenever the words of a bequest, if applied to realty, would create an estate-tail, if applied to personalty, they vest the entire interest in the first taker.<sup>4</sup> The rights of the tenant in tail are many. He may commit every kind of waste upon the premises; as by felling trees, pulling down houses, etc.<sup>5</sup> But he must exercise the power during his life;<sup>6</sup> and if he sells trees growing on the land, the vendee must cut them down during the life of the vendor, or they will descend with the land to the heir.<sup>7</sup> The tenant in tail is entitled to all deeds and muniments belonging to the lands,<sup>8</sup> and chancery will compel their delivery over to him;<sup>9</sup> and he is not bound to pay off outstanding charges or encumbrances affecting the estate,<sup>10</sup> though he is bound in some cases to keep down the interest.<sup>11</sup> The doctrine of merger has no application to estates-tail,<sup>12</sup> so that one may have at the same time, and in his own right, both an estate-tail and the immediate reversion in fee-simple in the same land.<sup>13</sup>

Though introduced into this country before the Revolution, estates-tail were barred whenever it was required

<sup>1</sup> Boone on Real Property, sec. 26.

<sup>2</sup> Smith v. Pendell, 19 Conn. 107; 48 Am. Dec. 146.

<sup>3</sup> Boone on Real Property, sec. 27.

<sup>4</sup> Shearman v. Angel, 1 Bail. Eq. 351; 23 Am. Dec. 166; Duncan v. Martin, 7 Verg. 519; 27 Am. Dec. 525; Roach v. Martin, 1 Harr. (Del.) 548; 27 Am. Dec. 746.

<sup>5</sup> Hales v. Petit, Plow. 259; 2 Bla. Com. 115, 116; Jervis v. Bruton, 2 Vern. 251; Attorney-General v. Duke of Marlborough, 3 Madd. 498.

<sup>6</sup> Liford's Case, 11 Rep. 50 a.

<sup>7</sup> Liford's Case, 11 Rep. 50 a; 1 Greenl. Cruise, 74.

<sup>8</sup> 1 Greenl. Cruise, 75; Harrington v. Price, 3 Barn. & Adol. 170.

<sup>9</sup> Jones v. Morgan, 1 Brown Ch. 206.

<sup>10</sup> Wharton v. Wharton, 2 Vern. 3; Partridge v. Dorsey, 3 Har. & J. 302.

<sup>11</sup> 1 Greenl. Cruise, 76.

<sup>12</sup> Roe v. Boldwere, 5 Term Rep. 110; Wiscot's Case, 2 Rep. 61 a.

<sup>13</sup> Wiscot's Case, 2 Rep. 61 a; 1 Greenl. Cruise, 75.

by the old forms of a fine or a common recovery.<sup>1</sup> In a number of the states and territories estates-tail are absolutely abolished, and a grant or a devise in tail creates an estate in fee-simple. These states are Alabama, California, Dakota, Florida, Georgia, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin.<sup>2</sup> In California, Dakota, Indiana, Michigan, and New York, any remainder on what would be at common law an estate-tail is valid as a contingent limitation upon a fee, and takes effect on the death of the first taker if he leaves no issue at death.<sup>3</sup> In Georgia, where an estate-tail would be implied at common law, a life estate is created in the first taker, with remainder over in fee to his children and their descendants, and if there are none, the remainder over takes effect according to its terms.<sup>4</sup> In Mississippi, any person may convey or devise lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and in default thereof, to the right heirs of the donor in fee-simple.<sup>5</sup> In Kentucky, West Virginia, and Virginia, a remainder over after an estate-tail is only valid if it would be valid if limited upon a fee-simple.<sup>6</sup> In some states estates-tail are made life estates in the first donee, with remainder in fee-simple absolute; in Arkansas, Colorado, Illinois, Missouri, and Vermont, to the person to whom the estate would pass at common law at the death of the first donee; in Connecticut, New Jersey, and Ohio, to the children of the first donee as tenant in common, or children of those deceased by representation.<sup>7</sup> In New Jersey, the widow of the donee has dower and the hus-

<sup>1</sup> *McGregor v. Comstock*, 17 N. Y. 162; *Jackson v. Van Zandt*, 12 Johns. 169; *Partridge v. Dorsey*, 3 Har. & J. 302; *Lyle v. Richards*, 9 Serg. & R. 330; *Allyn v. Mather*, 9 Conn. 114; *Hawley v. Northampton*, 8 Mass. 34; *Dennett v. Dennett*, 40 N. H. 503.

<sup>2</sup> 1 *Stimson's American Statute Law*, sec. 1313.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

band curtesy.<sup>1</sup> In several states the tail is good if the estate be not conveyed; but the grantee has power to convey it by an ordinary deed in Delaware, Maine, Maryland, Massachusetts, Pennsylvania, and Rhode Island, or by will in Rhode Island.<sup>2</sup> In twelve states and territories—Idaho, Iowa, Kansas, Montana, Nebraska, Nevada, New Hampshire, Oregon, South Carolina, Texas, Washington, Wyoming—the statutes are silent on the subject, and the common-law estate would seem to be in force.<sup>3</sup>

§ 2713. **Estates for Life.**—An estate for life is a freehold estate, not of inheritance, but confined to the life or lives of some particular person or persons, or to the happening of some uncertain event.<sup>4</sup> A devise and bequest in such general terms as, standing alone, would give the fee, will be deemed to give only an estate for life, where the intention so to limit them clearly appears from the will, taken as a whole.<sup>5</sup> A power of sale attached to an express life estate will not enlarge it into a fee.<sup>6</sup> General devises, with power of disposition, carry the entire estate. Devises for life, with power of disposition, carry only the life estate, with the power of disposition annexed.<sup>7</sup> A gift of the proceeds of real estate for life is a devise of the real estate itself for life.<sup>8</sup> The gift of the perpetual income of real estate is a gift of the fee; a gift of the income for life is a gift of a life estate.<sup>9</sup> A gift or bequest of personal property for life, with unlimited power of disposition superadded, creates an absolute interest.<sup>10</sup> Where an estate in fee is clearly given, and a subsequent clause directs that it be secured to the devisee by the executors, the estate is not cut down to a life estate.<sup>11</sup>

<sup>1</sup> 1 Stimson's American Statute Law, sec. 1313.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> 1 Greenl. Cruise, 101; Humphrey v. Foster, 13 Gratt. 653.

<sup>5</sup> Corby v. Corby, 85 Mo. 371.

<sup>6</sup> Dean v. Nunnally, 36 Miss. 358; Rhode Island Hospital v. Com. Bank,

14 R. I. 625; Reinders v. Koppelman, 68 Mo. 482; 30 Am. Rep. 802.

<sup>7</sup> Benesch v. Clark, 49 Md. 497.

<sup>8</sup> Wilson v. McKeehan, 53 Pa. St.

79.

<sup>9</sup> Sampson v. Randall, 72 Me. 109.

<sup>10</sup> Davis v. Richardson, 10 Yerg. 290;

31 Am. Dec. 581.

<sup>11</sup> Wicker v. Ray, 118 Ill. 472.

The following expressions have been held to carry only a life estate: A grant to K., "his legal representatives and assigns, forever";<sup>1</sup> a conveyance of land to A alone, and not to A and his heirs;<sup>2</sup> a devise of an interest subject to be terminated by the devisee's ceasing to occupy the premises;<sup>3</sup> a gift to the testator's wife of all his estate, "to her use and benefit for and during her natural life, and at her death, whatever may be left after paying all my debts, to be equally divided";<sup>4</sup> where a testatrix gave the residue of her estate to her niece R., adding, "and my will is that at the death of R. the amount given to her shall go to her children."<sup>5</sup>

ILLUSTRATIONS. — A testator bequeathed and devised property to his wife, "with the right to use, sell, or otherwise dispose of the same, and the income and increase thereof, according to her own will and pleasure, during her lifetime. And so much of said estate, with the increase, income, and proceeds thereof, as might remain unexpended and undisposed of by her at her decease," he gave to others. *Held*, that the wife took only a life estate: *Stuart v. Walker*, 72 Me. 146; 39 Am. Rep. 311. A testator devised lands to his grandson James, "to hold during his life-time," and if he should have heirs, "to them, or any of them that he may think proper," and if he should die without issue, "for the land to be equally divided among all my grandchildren." At the testator's death, James was unmarried, but he afterwards married and had children. At the date of the will the testator had other grandchildren. *Held*, that James took only a life estate, and the remainder vested in his children in fee: *Patrick v. Morehead*, 85 N. C. 62; 39 Am. Rep. 684. A testator gave and bequeathed to his wife "the farm on which we now reside, situate," etc., "also, all my personal property of every description, so long as she remains my widow; at the expiration of that time, the whole, or whatever remains, to descend to my daughter." *Held*, that the widow took only a life estate in the real, as well as in the personal, property, and that the daughter took a vested remainder in both: *Green v. Hewitt*, 97 Ill. 113; 37 Am. Rep. 102. A will contained the following clause: "To my beloved wife, P. (so long as she remains my widow), I give all the income of the home farm on which I now

<sup>1</sup> *Kearney v. Macomb*, 16 N. J. Eq. 189.

<sup>2</sup> *Hunter v. Bryan*, 5 Humph. 47.

<sup>3</sup> *Wilmarth v. Bridges*, 113 Mass. 407.

<sup>4</sup> *Pool v. Pool*, 10 Lea, 486.

<sup>5</sup> *Hollister v. Shaw*, 46 Conn. 248.

live, containing two hundred acres, more or less, with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom; also the mansion-house in which I live, together with all belonging to it, and all that is in it or about it, I give to my beloved wife, P., the same to be hers and to belong to her forever." *Held*, that the widow took an estate in the realty for life and widowhood, and an absolute estate in the personal property: *Cooper v. Pogue*, 92 Pa. St. 254; 37 Am. Rep. 681. A testator devised his whole estate to his wife, "to have and to hold or to dispose of so much of the same as she may need or wish to use during her lifetime," and provided that "after her death, if there is anything left," it should be divided in a specified way. *Held*, that the widow's power of disposal was absolute, and not limited to her life estate, but could only be exercised in case and to the extent of her need: *Henderson v. Blackburn*, 104 Ill. 227; 44 Am. Rep. 780. A testator gave to his wife certain realty in case she should survive his daughter and her children, and provided that if the daughter survived the wife and died without issue, she might devise to whom she pleased, but that if she left children they should take it. *Held*, that the daughter's estate was a life estate: *Tillett v. Ayldett*, 93 N. C. 15. A devised land to his three daughters, B, C, and D, their heirs and assigns, with a proviso that if D remained unmarried and made no disposition of her estate by will, her share should at her death be divided equally among her surviving sisters. *Held*, that D took only a life estate: *Cantine v. Brown*, 46 N. J. L. 599.

§ 2714. **Estates pur Auter Vie.**—Where the estate is for the life of another person, it is termed an estate *pur auter vie*, and he by whose life it is held is styled *cestui que vie*.<sup>1</sup> It is the lowest species of freehold, and is esteemed of less value than an estate for a man's own life.<sup>2</sup> By the California code an estate *pur auter vie* is a freehold.<sup>3</sup>

§ 2715. **Rights, Powers, and Liabilities of Tenant for Life.**—A tenant for life is entitled to estovers, that is, wood for fuel and fencing from the land, and he may cut down trees for this purpose, but not to sell the wood, or to build houses, or to repair them.<sup>4</sup> So a tenant for life is entitled

<sup>1</sup> Co. Lit. 42 a; 2 Bla. Com. 258.

<sup>2</sup> 2 Bla. Com. 120; 4 Kent's Com. 26.

<sup>3</sup> Civ. Code, sec. 766.

<sup>4</sup> *Miles v. Miles*, 32 N. H. 147, and see note to this in 64 Am. Dec. 367—370; *Dorsey v. Moore*, 100 N. C. 41.

to emblements.<sup>1</sup> He is entitled to work quarries or mines already opened on the land before the commencement of his life estate, and he may cut timber in process of clearing land, or for other purposes required in the reasonable cultivation or repair of the premises.<sup>2</sup> He has the absolute ownership of the income and increase of the estate, with full power to use such articles as are necessary for his own fire and food, or as food for the stock.<sup>3</sup> A life estate in personal property gives the donee the right to consume the same where it cannot be used without consuming it, or to wear it out where it cannot be used without so doing.<sup>4</sup> A tenant for life of certain rooms of a house may let such rooms and retain the money received as rent;<sup>5</sup> and a devise of certain rooms for life, and of a certain quantity of wood for fuel, entitles the legatee to sell the wood or to remove and burn it elsewhere.<sup>6</sup> A life-tenant has power to alienate his whole estate or any interest less than his own, unless restrained by condition.<sup>7</sup> A conveyance of a life estate must be by deed.<sup>8</sup> The tenant for life must pay the interest accruing upon existing encumbrances during his term;<sup>9</sup> and also taxes and the ordinary expenses of managing the property.<sup>10</sup> But he is not bound to pay off an encumbrance charged on the inheritance;<sup>11</sup> and if compelled to do so, he becomes a creditor

<sup>1</sup> See *ante*, Emblements; Bradley v. Bailey, 56 Conn. 374; 7 Am. St. Rep. 316.

<sup>2</sup> Lynn's Appeal, 31 Pa. St. 44; 72 Am. Dec. 721; Sayers v. Hoskinson, 110 Pa. St. 473.

<sup>3</sup> Gorham v. Billings, 77 Me. 386.

<sup>4</sup> German v. German, 27 Pa. St. 116; 67 Am. Dec. 451.

<sup>5</sup> Wiggin v. Wiggin, 43 N. H. 561; 80 Am. Dec. 192.

<sup>6</sup> Wiggin v. Wiggin, 43 N. H. 561; 80 Am. Dec. 192.

<sup>7</sup> 1 Greenl. Cruise, 108; Jackson v. Van Hoesen, 4 Cow. 325; Miles v. Miles, 32 N. H. 147; 64 Am. Dec. 363. But no community of tenure exists between a tenant for life and the re-

maindermen. Hence the latter are not bound by the former's leases: Coakley v. Chamberlain, 8 Abb. Pr., N. S., 37.

<sup>8</sup> Stewart v. Clark, 13 Met. 79; People v. Gillis, 24 Wend. 201.

<sup>9</sup> Penrhyn v. Hughes, 5 Ves. 93; Moseley v. Marshall, 22 N. Y. 200; Thomas v. Thomas, 17 N. J. Eq. 356; Barnum v. Barnum, 42 Md. 251.

<sup>10</sup> Peirce v. Burroughs, 58 N. H. 302; Clark v. Middlesworth, 82 Ind. 240; Reyburn v. Wallace, 93 Mo. 326.

<sup>11</sup> House v. House, 10 Paige, 158; Moseley v. Marshall, 27 Barb. 42; 22 N. Y. 200; Warley v. Warley, 1 Bail. 397; Barnum v. Barnum, 42 Md. 251.

of the estate for the amount so paid.<sup>1</sup> He is bound to keep in repair the improvements which are upon it at the time it comes into his possession, except where the same are destroyed by the act of God.<sup>2</sup> A remainderman cannot recover mesne profits accrued during the life estate, nor can the life tenant recover compensation for improvements made during its existence.<sup>3</sup> The court may require security from the donee for life, that the property shall be forthcoming intact at the expiration of the life estate in a case of real danger.<sup>4</sup>

§ 2716. **How Terminated.**—An estate for life terminates upon the death of the tenant for life, or on that of the person for whose life it is granted.<sup>5</sup> The absence of the tenant for life from the state for the space of seven years,<sup>6</sup> without being heard from, furnishes ground for presuming him to be dead, and the next succeeding owner may enter upon the estate.<sup>7</sup> If the estate be made to depend upon a future contingency, as if it be given to a woman during her widowhood,<sup>8</sup> or to a man and a woman during coverture, or as long as the grantee shall dwell in a particular house,<sup>9</sup> in any such case the grantee takes an estate for life, determinable upon the happening of the event on which the contingency depended.<sup>10</sup> A lease without special limitation, made by a tenant for life, will be construed as an estate for the life of the lessor;<sup>11</sup> for if it

<sup>1</sup> *Moseley v. Marshall*, 27 Barb. 42; 22 N. Y. 200.

<sup>2</sup> *Miller v. Shields*, 55 Ind. 71.

<sup>3</sup> *Pass v. McLendon*, 62 Miss. 580.

<sup>4</sup> *Sampson v. Randall*, 72 Me. 109.

<sup>5</sup> *Williams v. Caston*, 1 Strob. 130.

<sup>6</sup> See 1 N. Y. Rev. Stats., p. 749, sec. 6; *Eagle's Case*, 3 Abb. Fr. 218, 220; *McCartee v. Camel*, 1 Barb. Ch. 455, 462; *Commonwealth v. Thompson*, 6 Allen, 591; 83 Am. Dec. 563; *Newman v. Jenkins*, 10 Pick. 515; *Clarke v. Cummings*, 5 Barb. 339; *Spencer v. Roper*, 13 Ired. 333.

<sup>7</sup> *Woods v. Woods*, 2 Bay, 476; 325.

*Gerry v. Post*, 13 How. Pr. 118; *Clark v. Owens*, 18 N. Y. 434.

<sup>8</sup> *Walsh v. Matthews*, 11 Mo. 131;

*Dale v. Dale*, 13 Pa. St. 446; *Rose-*

*boom v. Van Vechten*, 5 Denio, 414;

*Craig v. Watts*, 8 Watts, 498.

<sup>9</sup> 1 Greenl. Cruise, 102; Co. Lit. 42 a;

*Jackson v. Myers*, 3 Johns. 388; 3

Am. Dec. 504.

<sup>10</sup> Co. Lit. 42 a; 4 Kent's Com. 26;

*Hurd v. Cushing*, 7 Pick. 169; *Cook v.*

*Bisbee*, 18 Pick. 527; *People v. Gillis*,

24 Wend. 201.

<sup>11</sup> *Jackson v. Van Hoesen*, 4 Cow.

should be a lease for the life of the lessee, it would be a wrong to him in reversion.<sup>1</sup>

ILLUSTRATIONS.—A will was as follows: "It is my will and order that my beloved wife, A, shall be master of my estate, both real and personal, so long as she shall remain my widow, subject to the payment of" legacies. *Held*, that the wife of the testator took a life estate in all the real and personal estate of the testator, subject to be defeated by her marriage: *Beardslee v. Beardslee*, 5 Barb. 324. A devised certain lands to his wife, for the purpose of maintaining herself and her children; directed that she should be permitted to enjoy the land and take the profits thereof during her natural life, and devised the remainder in fee, on her decease, to the child. *Held*, that her life estate was not divested by the death of the child: *Bigelow v. Barr*, 4 Ohio, 358.

§ 2717. **Forfeiture of Estate.**—Estates for life may at common law be forfeited because of certain acts done by the tenant;<sup>2</sup> as where he undertakes to convey by feoffment, with livery, a greater estate or interest than he himself owns.<sup>3</sup> So if the tenant for life levied a fine, or suffered a common recovery, a forfeiture was thereby incurred.<sup>4</sup> But in this country it is generally held that a feoffment does not create a forfeiture, the grant being held valid as far as it could go, and void for the rest.<sup>5</sup> In a number of states—Alabama, California, Dakota, Georgia, Indiana, Kentucky, Massachusetts, Maine, Minnesota, Michigan, Mississippi, New Hampshire, New York, Oregon, Texas, Vermont, Virginia, Wisconsin, Wyoming—it is provided by statute that no conveyance by a tenant for life or years shall work a forfeiture, but it shall pass to the grantee all the interest which the tenant could lawfully convey.<sup>6</sup>

§ 2718. **Merger of Estates.**—Where a greater estate and a less coincide and meet in one and the same per-

<sup>1</sup> Co. Lit. 42 b.

<sup>2</sup> Co. Lit. 251.

<sup>3</sup> 1 Greenl. Cruise, 103.

<sup>4</sup> Id.

<sup>5</sup> *Rogers v. Moore*, 11 Conn. 553; 4 Kent's Com. 193; *Stevens v. Winship*,

1 Pick. 318; 11 Am. Dec. 178; *Rosseel v. Jarvis*, 15 Wis. 571; *Hurd v. Cushing*, 7 Pick. 169; *Moore v. Luce*, 29 Pa. St. 263; 72 Am. Dec. 629.

<sup>6</sup> *Stimson's American Statute Law*, sec. 1402.

son, without any intermediate estate, the less is said to be merged; that is, sunk or drowned in the greater.<sup>1</sup> But both must be owned not only by the same person but in the same right.<sup>2</sup> In equity the question of merger is held to be one of intention of the parties;<sup>3</sup> though merger it is said is not favored in equity.<sup>4</sup> Where the mortgagor pays off the mortgage and takes an assignment to himself, the mortgage is merged in the leading title and becomes extinguished.<sup>5</sup> An estate for years becomes merged in fee when the fee is acquired by the tenant for years.<sup>6</sup> Where a tenant for life acquires the absolute property or inheritance of the lands, his estate becomes merged, or drowned, in the fee-simple.<sup>7</sup> So an estate *pur auter vie* will merge in an estate for a man's own life.<sup>8</sup> When equitable and legal estates unite in the same person, the equitable is merged in the legal estate, and ceases to be recognized in equity, but in order to merge, the equitable must be co-extensive with the legal estate.<sup>9</sup> Equity will not apply the doctrine of merger where the intention or just interest of the parties require the encumbrance to be kept alive.<sup>10</sup> Where it is a matter of indifference to the party in whom the interests are united whether the charge should subsist, it will sink, but where it is to his interest that it should be kept on foot, the court, in the absence of an expressed intention, will so decree.<sup>11</sup>

The contract to convey is generally merged in the conveyance; but there may be incidental covenants that are not so merged.<sup>12</sup> An oral agreement by the vendor of real

<sup>1</sup> 2 Bla. Com. 177; *James v. Morey*, 2 Cow. 246; 14 Am. Dec. 475; *Allen v. Anderson*, 44 Ind. 325; *Fox v. Long*, 8 Bush, 551.

<sup>2</sup> *Pool v. Harris*, 29 Ga. 374; 74 Am. Dec. 68.

<sup>3</sup> *James v. Morey*, 2 Cow. 246; 14 Am. Dec. 475.

<sup>4</sup> *Dougherty v. Jack*, 5 Watts, 456; 30 Am. Dec. 335.

<sup>5</sup> *Gardner v. Astor*, 3 Johns. Ch. 53; 8 Am. Dec. 455; *Freeman v. Paul*, 3 Me. 260; 14 Am. Dec. 237.

<sup>6</sup> *Carroll v. Ballance*, 26 Ill. 9; 79 Am. Dec. 354.

<sup>7</sup> 1 Greenl. Cruise, 104; *Allen v. Anderson*, 44 Ind. 395; *Cary v. Warner*, 63 Me. 571; *Fox v. Long*, 8 Bush, 551.

<sup>8</sup> 1 Greenl. Cruise, 104.

<sup>9</sup> *Millard v. McMullan*, 5 Hun, 572; 68 N. Y. 345.

<sup>10</sup> *Moore v. Luce*, 29 Pa. St. 260; 72 Am. Dec. 629.

<sup>11</sup> *Fowler v. Fay*, 62 Ill. 375.

<sup>12</sup> *Colvin v. Schell*, 1 Grant Cas. 226. A executed his note to secure a debt

estate, made before the execution of the deed, to procure for the vendee an outstanding title to the land conveyed, is merged in the covenants of the deed.<sup>1</sup> A note not negotiable does not merge a pre-existing demand, in consideration of which it was given.<sup>2</sup> Where, in a contract for the sale of land, there is a covenant to indemnify the vendee against all costs, charges, damages, etc., and the vendee retains possession of this contract, and no such covenant is contained in the deed of conveyance, it is not extinguished, nor merged by the deed.<sup>3</sup>

§ 2719. **Estates in Joint Tenancy.**—An estate in joint tenancy occurred, at common law, where lands or tenements were granted to two or more persons to hold in fee-simple, fee-tail, for life, for years, or at will.<sup>4</sup> All the persons named in the instrument as grantees take a joint estate, and are called joint tenants.<sup>5</sup> An equal interest is created in all the persons who take under the grant;<sup>6</sup> and a grant which defines the interest which each is to take does not create a joint tenancy, but a tenancy in common.<sup>7</sup> An estate in joint tenancy cannot arise by the act of the law; it can be created only by the act of the parties, as by purchase or grant.<sup>8</sup> Joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.<sup>9</sup> Trustees whose joint action is evidently contemplated take as joint tenants, and not as tenants in common.<sup>10</sup> In case of a devise to hus-

due B, and before it came due executed to C a deed of trust, to secure the same debt. *Held*, that the execution of the deed of trust operated to change a simple contract into a specialty, so far as it related to the trust estate: *Berry v. Bacon*, 28 Miss. 318.

<sup>1</sup> *Coleman v. Hart*, 25 Ind. 256.

<sup>2</sup> *Greenwood v. Curtis*, 4 Mass. 93; 6 Mass. 371.

<sup>3</sup> *Cox v. Henry*, 32 Pa. St. 18.

<sup>4</sup> 2 Bla. Com. 180; 1 Greenl. Cruise,

829; *Hamman v. Towers*, 3 Har. & J. 147; 5 Am. Dec. 427.

<sup>5</sup> 1 Greenl. Cruise, 829.

<sup>6</sup> Co. Lit. 180 b; *Coster v. Lorillard*, 14 Wend. 336; *Shiels v. Stark*, 14 Ga. 429.

<sup>7</sup> *Craig v. Taylor*, 6 B. Mon. 427.

<sup>8</sup> 2 Bla. Com. 180.

<sup>9</sup> 2 Bla. Com. 180; *Overton v. Lacy*, 6 B. Mon. 13; 17 Am. Dec. 111; *Richardson v. Miller*, 48 Miss. 31.

<sup>10</sup> *Franklin Savings Institution v. People's Savings Bank*, 14 R. I. 632.

band and wife, the devisees at common law are joint tenants, the survivor taking the whole estate; and the rule is the same under a statute abolishing joint tenancy.<sup>1</sup> As it respects unity of interest, one joint tenant cannot be entitled to one period of duration or quantity of interest, and the other to a different one.<sup>2</sup> Thus one cannot be tenant for life and the other for years, nor can one be tenant in fee and the other in tail.<sup>3</sup> Unity of title requires that the estate of joint tenants must be created by the same act or instrument, whether legal or illegal, as by one and the same grant, or by one and the same disseisin.<sup>4</sup> And unity of time requires that the estate be vested in all the joint tenants at the same period, as well as by the same title.<sup>5</sup> In respect to unity of possession, joint tenants are said to be seised *per my et per tout*; that is, each of them has the entire possession, as well of every part as of the whole.<sup>6</sup> Two corporations cannot hold land as joint tenants.<sup>7</sup>

**§ 2720. Joint Tenancies not Favored — Abolished by Statute.** — Joint tenancies are not favored by the courts.<sup>8</sup> Therefore, where it appears, either by the words of a will or gift, or from the nature of the case, that it was the donor's intention that the estate should be divided, it will be construed to be a tenancy in common, and not a joint tenancy.<sup>9</sup> In most of the states it is expressly provided by statute that every estate granted or devised to two or more persons is to be deemed a tenancy in common, unless a different tenure is clearly expressed or implied in

<sup>1</sup> Hall v. Stephens, 65 Mo. 670; 27 Am. Rep. 302.

<sup>2</sup> 2 Bla. Com. 181.

<sup>3</sup> Co. Lit. 188.

<sup>4</sup> 2 Bla. Com. 181.

<sup>5</sup> Co. Lit. 188; 1 Greenl. Cruise, 834; 2 Bla. Com. 181.

<sup>6</sup> 2 Bla. Com. 182; Overton v. Lacy, 6 T. B. Mon. 13; 17 Am. Dec. 111.

<sup>7</sup> De Witt v. San Francisco, 2 Cal. 289.

<sup>8</sup> Boone on Real Property, sec. 350; Westcott v. Cady, 5 Johns. Ch. 334; 9 Am. Dec. 307. Joint tenancy does not exist in Ohio: Sergeant v. Steinberger, 2 Ohio, 305; 15 Am. Dec. 553; Miles v. Fisher, 10 Ohio, 1; 36 Am. Dec. 61.

<sup>9</sup> Martin v. Smith, 5 Binn. 16; 6 Am. Dec. 395.

the instrument creating the estate,<sup>1</sup> and, except in several of the states, where the conveyance is made to two or more as trustees.<sup>2</sup>

§ 2721. Incidents of Joint Tenancy — Survivorship. —

Upon the death of one joint tenant, his interest passes to the survivors, and at length to the last survivor, and does not go to the heirs or representatives of the deceased joint tenant. This, the *jus accrescendi*, or right of survivorship, is the most important incident of an estate in joint tenancy.<sup>3</sup> An entry or re-entry made by one joint tenant is as effectual as if it were the act of all;<sup>4</sup> and the occupation by one is *prima facie* an occupation by all.<sup>5</sup> Joint tenants must join in an action for the possession of land jointly held;<sup>6</sup> and one can neither sue nor be sued alone, in respect to the joint estate, if advantage be properly taken of the omission to join his co-tenants.<sup>7</sup> Either joint tenant may convey his share of the estate to a co-tenant or to a stranger,<sup>8</sup> but a devise of his share would be inoperative, since the right of survivorship would take precedence of the devise.<sup>9</sup> Nor can one joint tenant bind his co-tenant by a contract for the sale of the joint estate, without prior authority from his co-tenant, or by his subsequent ratification of the contract.<sup>10</sup> Whether one joint tenant may convey his interest in the joint estate by metes and bounds is a question on which the authorities differ, some

<sup>1</sup> See 1 Stimson's American Statute Law, sec. 1371; *Sander v. Morrison*, 7 T. B. Mon. 54; 18 Am. Dec. 161.

<sup>2</sup> 1 Stimson's American Statute Law, sec. 1371. And see *Higbee v. Rice*, 5 Mass. 344; 4 Am. Dec. 63.

<sup>3</sup> 2 Bla. Com. 183, 184; *Overton v. Lacy*, 6 T. B. Mon. 13; 17 Am. Dec. 111. This incident is abolished by statute in many of the states: See § 2720, *ante*; *Bryan v. Everett*, 21 Ga. 401; 68 Am. Dec. 464. It was never recognized by the courts of Connecticut: *Phelps v. Jepson*, 1 Root, 48; 1 Am. Dec. 33.

<sup>4</sup> 2 Bla. Com. 182.

<sup>5</sup> *Ford v. Grey*, 6 Mod. 44; *Small v. Clifford*, 38 Ms. 213.

<sup>6</sup> *Dewey v. Lambier*, 7 Cal. 347.

<sup>7</sup> 2 Bla. Com. 182; 1 Wms. Saund. 291 f; *Webster v. Vandeventer*, 6 Gray, 428. Compare *Mitchell v. Tarbutt*, 5 Term Rep. 651.

<sup>8</sup> *Rector v. Waugh*, 17 Mo. 13; 57 Am. Dec. 251; *Shaw v. Hearsey*, 5 Mass. 522; *Denne v. Judge*, 11 East, 288; *Gates v. Salmon*, 35 Cal. 588; 95 Am. Dec. 139.

<sup>9</sup> Co. Lit. 185 b; 1 Washburn on Real Property, 412; *Duncan v. Forrer*, 6 Binn. 193.

<sup>10</sup> *Hanks v. Enloe*, 33 Tex. 624.

holding that he can,<sup>1</sup> others that he cannot, so as to bind the other.<sup>2</sup> A mortgage executed by two of three joint tenants is a severance of the joint tenancy.<sup>3</sup>

§ 2722. **Estates in Coparcenary.** — At common law, where a man dies seised of an inheritance, and his next heirs are two or more females, or their representatives, the estate descends to them jointly, and they are called coparceners.<sup>4</sup> All the parceners together make but one heir, and have but one estate among them.<sup>5</sup> Coparceners, like joint tenants, have the same unities of interest, title, and possession.<sup>6</sup> But there is no survivorship incident to this estate,<sup>7</sup> and coparceners always claim by descent, while joint tenants always claim by purchase.<sup>8</sup> The estate may be dissolved by the alienation of one coparcener to a stranger,<sup>9</sup> by partition,<sup>10</sup> or by the whole at last descending to one of the coparceners.<sup>11</sup> One purchasing the interest of coparceners before partition takes only an inchoate title to the lot afterwards acquired by partition; he takes subject to equities existing at the time between the heirs whose interest he has purchased and third parties.<sup>12</sup> In several states, estates in coparcenary are by statute abolished, and in all cases where two or more persons are entitled to an inheritance by descent, they take as tenants in common.<sup>13</sup> In other states, again, it is provided by statute that all estates shall descend in "par-

<sup>1</sup> *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139; *Treon v. Emerick*, 6 Ohio, 391; *Barnhart v. Campbell*, 50 Mo. 597; *Reinicker v. Smith*, 2 Har. & J. 421.

<sup>2</sup> *Porter v. Hill*, 9 Mass. 34; 6 Am. Dec. 22; *Varnum v. Abbot*, 12 Mass. 474; 7 Am. Dec. 87.

<sup>3</sup> *Simpson v. Ammons*, 1 Binn. 175; 2 Am. Dec. 425.

<sup>4</sup> 2 Bla. Com. 188.

<sup>5</sup> 2 Bla. Com. 188; *Burton on Real Property*, sec. 316; *Hoffar v. Dement*, 5 Gill, 137; 46 Am. Dec. 628.

<sup>6</sup> 1 Greenl. Cruise, 859, 860. See

*Gill v. Fauntleroy*, 8 B. Mon. 177; *Manchester v. Doddridge*, 3 Ind. 360.

<sup>7</sup> Co. Lit. 164; 4 Kent's Com. 364.

<sup>8</sup> 2 Bla. Com. 188.

<sup>9</sup> 1 Greenl. Cruise, 862; Co. Lit. 175 a.

<sup>10</sup> 1 Greenl. Cruise, 863; *Burton on Real Property*, sec. 318; see *Wildy v. Barney*, 31 Miss. 652.

<sup>11</sup> 2 Bla. Com. 191.

<sup>12</sup> *Flynn v. Herye*, 4 Mo. App. 360.

<sup>13</sup> Alabama, Georgia, Indiana, New Hampshire, New Jersey, New York, Oregon, Rhode Island: See 1 *Stimson's American Statute Law*, sec. 1375.

cenary.”<sup>1</sup> In this country,—for in the United States land descends to all the children, whether male or female, equally,—in states where no provision is made by statute, the heirs would seem to take by coparcenary, if of the female sex, and possibly, also, if of both sexes.<sup>2</sup>

§ 2723. **Tenancies in Common.**—A tenancy in common arises where two or more persons hold lands or tenements in fee-simple, or for term of life or years, by several and distinct titles, and occupy the same lands and tenements in common.<sup>3</sup> Unity of right of possession merely is all that is required between tenants in common.<sup>4</sup> They may have several and distinct estates in their several portions; herein differing from joint tenants.<sup>5</sup> Tenancy in common is created by deed, or by the destruction of an estate in joint tenancy, or in coparcenary, or it may be created by descent.<sup>6</sup> Tenancy in common is created by will by all expressions importing division by equal and unequal shares, or referring to the devisees as owners of respective or distinct interests, and even by words denoting equality.<sup>7</sup> Grantees are tenants in common, where the deeds under which they claim cover the same land, bear the same date, are founded upon surveys recorded and certified on the same day, and purport to have been made upon warrants issued upon the same day.<sup>8</sup> A conveyance of a moiety of a piece of land in “quantity and quality” creates an estate in common between the grantor and grantee.<sup>9</sup> So a grantor becomes

<sup>1</sup> Delaware, Arkansas, Colorado, Florida, Kentucky, Missouri, Ohio, Virginia, West Virginia, Wyoming: See 1 Stimson's American Statute Law, sec. 1375.

<sup>2</sup> 1 Stimson's American Statute Law, sec. 1375; Patterson v. Lanning, 10 Watts, 135; 36 Am. Dec. 154; Campbell v. Wallace, 12 N. H. 362; 37 Am. Dec. 219.

<sup>3</sup> 1 Greenl. Cruise, 868.

<sup>4</sup> Story v. Saunders, 8 Humph. 663; Putnam v. Ritchie, 6 Paige, 398;

Spencer v. Austin, 38 Vt. 258; Bernecker v. Miller, 40 Mo. 473.

<sup>5</sup> Boone on Real Property, sec. 357. There is no presumption that the interests of tenants in common are equal: Campan v. Campan, 44 Mich. 31.

<sup>6</sup> Hall v. Page, 4 Ga. 428; 48 Am. Dec. 235.

<sup>7</sup> Gilpin v. Hollingsworth, 3 Md. 190; 56 Am. Dec. 737.

<sup>8</sup> Young v. De Bruhl, 11 Rich. 638; 73 Am. Dec. 127.

<sup>9</sup> Adams v. Frothingham, 3 Mass. 352; 3 Am. Dec. 151.

tenant in common with one to whom he has conveyed "one half of my lot."<sup>1</sup> A devise to A and B "jointly, their heirs and assigns, forever," creates a tenancy in common.<sup>2</sup> So does a devise of land "to be equally divided."<sup>3</sup> So does a devise of land to A, B, and C, "to them and their heirs, for their use, improvement, and equal emolument during their natural lives, and after their decease to the heirs of D."<sup>4</sup> There is no survivorship among tenants in common; on the death of one, his interest passes to his heirs.<sup>5</sup>

In general, the seisin or the possession of one tenant in common is deemed to be the possession of all.<sup>6</sup> But if one ousts the other, or denies his tenure, his possession becomes adverse,<sup>7</sup> or if the circumstances show an intent on his part to hold adversely.<sup>8</sup> A tenant in com-

<sup>1</sup> Lick v. O'Donnell, 3 Cal. 59; 58 Am. Dec. 383.

<sup>2</sup> Davis v. Smith, 4 Har. (Del.) 68.

<sup>3</sup> Briscoe v. McGee, 2 J. J. Marsh. 370; Sealy v. Laurens, 1 Desaus. Eq. 137; Drayton v. Drayton, 1 Desaus. Eq. 324; Bunch v. Hurst, 3 Desaus. Eq. 273; 5 Am. Dec. 551.

<sup>4</sup> Campbell v. Rawdon, 18 N. Y. 412.

<sup>5</sup> 1 Greenl. Cruise, 869; Burton on Real Property, sec. 38; Putnam v. Ritchie, 6 Paige, 390.

<sup>6</sup> Coleman v. Hutchenson, 3 Bibb, 209; 6 Am. Dec. 649; Lodge v. Patterson, 3 Watts, 74; 27 Am. Dec. 335; Thompson v. Mawhinney, 17 Ala. 362; 52 Am. Dec. 176; Jackson v. Tibbits, 9 Cow. 241; Vaughan v. Bacon, 15 Me. 455; 33 Am. Dec. 628; Johnson v. Toulmin, 18 Ala. 50; 52 Am. Dec. 212; Catlin v. Kidder, 7 Vt. 12; Thomas v. Hatch, 3 Sum. 170; Small v. Clifford, 38 Me. 213; Thornton v. York Bank, 45 Me. 158; Brown v. Wood, 17 Mass. 68; Marcy v. Stone, 8 Cush. 4; 54 Am. Dec. 736; Pool v. Morris, 29 Ga. 374; 74 Am. Dec. 68; Page v. Branch, 97 N. C. 97; 2 Am. St. Rep. 281; Cook v. Clinton, 64 Mich. 309; 8 Am. St. Rep. 816. Where one tenant in common has the charge of the common property for all the others, his knowledge of an easement therein is the knowledge of his

co-tenants: Ward v. Warren, 82 N. Y. 265.

<sup>7</sup> Young v. Adams, 14 B. Mon. 127; 58 Am. Dec. 654; Gossom v. Donaldson, 18 B. Mon. 230; 68 Am. Dec. 723; Coleman v. Clements, 23 Cal. 245; Harpending v. Dutch Church, 16 Pet. 455; Willison v. Watkins, 3 Pet. 51; Hart v. Gregg, 10 Watts, 185; 36 Am. Dec. 166; Baird v. Baird, 1 Dev. & B. Eq. 524; 31 Am. Dec. 399; Newell v. Woodruff, 30 Conn. 498.

<sup>8</sup> Phillips v. Gregg, 10 Watts, 158; 36 Am. Dec. 158; Colburn v. Mason, 25 Me. 434; 43 Am. Dec. 292; Alexander v. Kennedy, 19 Tex. 488; 70 Am. Dec. 358; Gillaspie v. Osburn, 3 A. K. Marsh. 77; 13 Am. Dec. 136; Oglesby v. Hollister, 76 Cal. 136; 9 Am. St. Rep. 177; Rutter v. Small, 68 Md. 133; 6 Am. St. Rep. 434; Unger v. Mooney, 63 Cal. 686; 49 Am. Rep. 100, the court saying: "The possession of one tenant in common is the possession of his co-tenant. Such possession by one tenant has no element of hostility to the right of his co-tenant. The co-tenant out of possession is not informed by such possession that it has any adverse character. Such a possession under claim of title adverse to the co-tenant, but not manifested to him by the conduct of the possessor of a character to notify the co-tenant of

mon, to show an ouster of his co-tenant, must show acts of possession inconsistent with and exclusive of the rights of such co-tenant, and such as would amount to an ouster between landlord and tenant, and knowledge on the part of his co-tenant, of his claim of exclusive ownership.<sup>1</sup> He has the right to assume that the possession of his co-tenant is his possession, until informed to the contrary, either by express notice, or by acts and declarations which may be equivalent to notice.<sup>2</sup> Exclusive possession by one tenant in common, and receipt of the rents and profits, of the common land, for a great length of time, is

its adverse nature, is not sufficient to set the statute in operation as between tenants in common. The co-tenant must in some way be notified of the adverse holding in order to be prejudiced by it. This may be by actual notice, or by acts or declarations so open and notorious that it may be inferred that the co-tenant had knowledge of them. This rule and the reason on which it is founded is well stated in *Miller v. Myers*, 46 Cal. 539, referring to the tenant out of possession, in these words: 'But until he has notice, either actual or constructive, in some form, that the possession of his co-tenant has become hostile, it will be deemed in law to have been amicable notwithstanding the tenant in possession may in fact have been holding adversely. If the rule were otherwise, the tenant out of possession might be disseised and lose his remedy by the bar of the statute of limitations without notice that the possession of his co-tenant had become hostile. To avoid this injustice, the law deems the possession to have continued amicable until the tenant out of possession has in some method been notified that it has become hostile.' The adverse character of the possession must in every case be manifested to the owner. The owner must be notified in some way that the possession is hostile to his claim, or the statute does not operate on his right: See remarks in opinion in *Thompson v. Pioche*, 44 Cal. 517; *Fort Hampton v. Kirk*, 84 N. Y. 220; 38 Am. Rep. 505; *Culver v. Rhodes*, 87 N. Y. 354; *Abell v. Harris*, 11 Gill

& J. 371, per Dorsey, J. As was said in the case cited from 84 N. Y., per Andrews, J., the object of the statute defining the acts essential to constitute an adverse possession is, that the real owner may by unequivocal acts of the disseisor have notice of the hostile claim, and be thereby called upon to assert his legal title.' Hence an open and notorious occupation with hostile intent is a necessary constituent of an adverse possession; neither a hostile intent without such occupation, nor such occupation without hostile intent, is sufficient. The case of tenants in common is no exception to this rule. The evidence required is of a different character from the legal character of the tenure, tenants in common being seized *per my et per tout*, and the actual occupation of one tenant of the entire tract having no element of hostility to his co-tenant. Such occupation, with user of the land for husbandry, or of any kind, is reconcilable with right, and in harmony with the legal aspects of the tenure. Hence there must be some conduct of the occupying tenant evidenced by act or declarations, or both, in its nature and essence hostile to the title of the tenant out of possession, and imparting knowledge of such hostility to the latter to affect his right: *Portis v. Hill*, 3 Tex. 278."

<sup>1</sup> *Chandler v. Ricker*, 49 Vt. 128; *Squires v. Clark*, 17 Kan. 84; *Ball v. Palmer*, 81 Ill. 370.

<sup>2</sup> *Aguirre v. Alexander*, 58 Cal. 21.

not sufficient to create a legal presumption of the actual ouster of a co-tenant.<sup>1</sup> But ouster by one tenant of his co-tenant may be inferred from circumstances,<sup>2</sup> and is a question of fact for the jury.<sup>3</sup> Actual notice is not necessary, however, before the possession of one joint tenant or tenant in common can be considered as adverse to his co-tenant. Circumstances from which such co-tenant can infer that it is adverse will be sufficient.<sup>4</sup> The assertion of the entire ownership by one tenant in common to work ouster of co-tenants must be made or communicated to the latter when it consists of a mere verbal declaration; but when the act is of such a nature as will be presumed to be noticed by persons of ordinary diligence in attending to their own interests, and is of such an unequivocal character as not to be easily misunderstood, it is not necessary that positive notice should be given to the co-tenants, or that they have actual knowledge.<sup>5</sup> Where one co-tenant conveys the whole estate, and the grantee records the deeds, and enters into open and notorious possession, claiming title to the entire estate, this will amount to a *desseisin* by such grantee of the other co-tenants.<sup>6</sup> Where a tenant in common conveys the whole land to a third person, and the grantee records the deed, and enters under it, makes valuable improvements, pays the taxes, and receives the rents and profits, without offering to account, the co-tenant is chargeable with actual notice, and the possession is effectual against him.<sup>7</sup> A tenant in common is ousted by a co-tenant when the latter will not suffer him to enter and occupy.<sup>8</sup>

<sup>1</sup> *Bolton v. Hamilton*, 2 Watts & S. 294; 37 Am. Dec. 509.

<sup>2</sup> *Meredith v. Andres*, 7 Ired. 5; 45 Am. Dec. 504; *Harmon v. James*, 7 Smedes & M. 111; 45 Am. Dec. 296.

<sup>3</sup> *Harmon v. James*, 7 Smedes & M. 111; 45 Am. Dec. 296.

<sup>4</sup> *Lodge v. Patterson*, 3 Watts, 74; 27 Am. Dec. 335.

<sup>5</sup> *Warfield v. Lindell*, 30 Mo. 272; 77 Am. Dec. 615; *Packard v. Johnson*, 57 Cal. 180.

<sup>6</sup> *Parker v. Proprietors*, 3 Met. 91; 37 Am. Dec. 121.

<sup>7</sup> *Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100.

<sup>8</sup> *Norris v. Sullivan*, 47 Conn. 474.

Tenancy in common can only be destroyed by uniting all the titles in one holder or by partition.<sup>1</sup>

§ 2724. **Actions between Tenants in Common.**—One tenant in common may sue his co-tenant for ejectment where he has been ousted of his share of the estate,<sup>2</sup> but not until then.<sup>3</sup> So he may sue him in trespass or trover where there has been a total destruction of the subject-matter of the tenancy, or some part of it, or a total denial of the plaintiff's right;<sup>4</sup> he may sue him for mesne profits;<sup>5</sup> for waste;<sup>6</sup> for his half of the purchase-money of the common estate;<sup>7</sup> for his share of taxes paid by him on the entire tract;<sup>8</sup> for his share of insurance money on property destroyed;<sup>9</sup> or for his share of the rents and profits received by his co-tenant.<sup>10</sup> One tenant in com-

<sup>1</sup> *Sullivan v. McLenans*, 2 Iowa, 437; 143; *Lucas v. Hardin*, 3 Dev. 398; 24 65 Am. Dec. 780.

<sup>2</sup> *Peaceable v. Read*, 1 East, 568; *Halford v. Tetherow*, 2 Jones, 393; *Noble v. McFarland*, 51 Ill. 226; *Bethell v. McCool*, 46 Ind. 303; *Norris v. Sullivan*, 47 Conn. 474; *Gale v. Hines*, 17 Fla. 778; *Univ. of Vt. v. Reynolds*, 3 Vt. 542; 23 Am. Dec. 234; *Thomas v. Garvin*, 4 Dev. 223; 25 Am. Dec. 708; *Hutchinson v. Chase*, 39 Me. 508; 63 Am. Dec. 645; *Jones v. De Lassus*, 84 Mo. 541. Or trespass *quare clausum fregit*: *Harman v. Gartman*, Harp. 430; 18 Am. Rep. 656. *Contra*, *Duncan v. Sylvester*, 13 Me. 417; 29 Am. Dec. 512; *Anders v. Meredith*, 4 Dev. & B. Eq. 199; 34 Am. Dec. 376; *Wait v. Richardson*, 33 Vt. 190; 78 Am. Dec. 622.

<sup>3</sup> *Lawton v. Adams*, 29 Ga. 273; 74 Am. Dec. 59.

<sup>4</sup> *Tubbs v. Richardson*, 6 Vt. 442; 27 Am. Dec. 570; *Booth v. Adams*, 11 Vt. 156; 34 Am. Dec. 680; *McGill v. Ash*, 7 Pa. St. 397; *Erwin v. Olmsted*, 7 Cow. 229; *Thompson v. Gerrish*, 57 N. H. 85; *Murray v. Hall*, 7 Com. B. 441; *Silloway v. Brown*, 12 Allen, 37; *Cubitt v. Porter*, 8 Barn. & C. 268; *Bennett v. Bullock*, 35 Pa. St. 364; *Filbert v. Hoff*, 42 Pa. St. 97; 82 Am. Dec. 493; *Maddox v. Goddard*, 15 Me. 218; 33 Am. Dec. 604; *Gibson v. Vaughan*, 2 Bail. 389; 23 Am. Dec.

427; 80 Am. Dec. 533; *Goodtitle v. Tombs*, 3 Wils. 118; *Bennett v. Bullock*, 35 Pa. St. 367; *Cook v. Webb*, 21 Minn. 428; *Camp v. Homesley*, 11 Ired. 211.

<sup>5</sup> *Critchfield v. Humbert*, 39 Pa. St. 427; 80 Am. Dec. 533; *Goodtitle v. Tombs*, 3 Wils. 118; *Bennett v. Bullock*, 35 Pa. St. 367; *Cook v. Webb*, 21 Minn. 428; *Camp v. Homesley*, 11 Ired. 211.

<sup>6</sup> *Hancock v. Day*, 1 McMull. Eq. 69; 36 Am. Dec. 293; *Maxwell v. Maxwell*, 31 Me. 184; 50 Am. Dec. 657. *Contra*, *Darden v. Cowper*, 7 Jones, 210; 75 Am. Dec. 461.

<sup>7</sup> *Coles v. Coles*, 15 Johns. 159; 8 Am. Dec. 231.

<sup>8</sup> *Eads v. Retherford*, 114 Ind. 273; 5 Am. St. Rep. 611.

<sup>9</sup> *Starks v. Sikes*, 8 Gray, 609; 69 Am. Dec. 270.

<sup>10</sup> *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288.

mon may maintain an action against his co-tenant for diverting the water from their common mill for separate purposes.<sup>1</sup> He may sue his co-tenant to recover the latter's proportion of moneys paid by the former to remove an encumbrance on their property which they had assumed on their purchase thereof.<sup>2</sup> He may sue his co-tenant for flowing the land owned in common by means of a dam erected upon other land.<sup>3</sup> He may distrain for rent where he has leased to his co-tenant.<sup>4</sup> He may maintain trover against his co-tenant for using hay owned by them as such tenants, but not for selling it.<sup>5</sup> A tenant in common who sells growing timber and receives payment therefor is liable to his co-tenant.<sup>6</sup> Where a mill owned in common was burned through the negligence of one of the tenants in common, it was held that his co-tenants might maintain a joint action on the case against him therefor.<sup>7</sup>

If one tenant in common exclusively occupies the whole or more than his share of the common estate, he is liable to account to his co-tenant for rents and profits in an action of account.<sup>8</sup> But if he occupies the same common property, he is not liable to his co-tenant for rents and profits of the land received by him, unless he received more than his share;<sup>9</sup> *aliter*, if he disseises his

<sup>1</sup> Pillsbury v. Moore, 44 Me. 134; 69 Am. Dec. 91.

<sup>2</sup> Dickinson v. Williams, 11 Cush. 258; 59 Am. Dec. 142.

<sup>3</sup> Odiorne v. Lyford, 9 N. H. 502; 32 Am. Dec. 387.

<sup>4</sup> Luther v. Arnold, 8 Rich. 24; 62 Am. Dec. 422.

<sup>5</sup> Lewis v. Clark, 59 Vt. 363.

<sup>6</sup> Miller v. Miller, 7 Pick. 133; 19 Am. Dec. 265; Shepard v. Platt, 30 Minn. 119.

<sup>7</sup> Chealey v. Thompson, 3 N. H. 9; 14 Am. Dec. 325.

<sup>8</sup> Boone on Real Property, sec. 360; Puckett v. Smith, 5 Strob. 26; 53 Am. Dec. 686; Smith v. Wiley, 22 Ala. 396; 58 Am. Dec. 262; Tarleton v. Goldthwaite, 23 Ala. 346; 58 Am. Dec.

296; Moses v. Ross, 41 Me. 360; 66 Am. Dec. 270; Huff v. McDonald, 22 Ga. 131; 68 Am. Dec. 487; Izard v. Bodine, 11 N. J. Eq. 403; 69 Am. Dec. 595; Knowles v. Harris, 5 R. I. 402; 73 Am. Dec. 77; Early v. Friend, 16 Gratt. 21; 78 Am. Dec. 649; Edsall v. Merrill, 37 N. J. Eq. 114; Pearson v. Carleton, 18 S. C. 47; Tyner v. Fenaer, 4 Lea, 469; Buckelew v. Snedeker, 27 N. J. Eq. 82; Bird v. Bird, 15 Fla. 424; 21 Am. Rep. 296; Hayden v. Merrill, 44 Vt. 336; 8 Am. Rep. 372.

<sup>9</sup> Keisel v. Earnest, 21 Pa. St. 90; Calhoun v. Curtis, 4 Met. 413; 38 Am. Dec. 380; Chambers v. Chambers, 3 Hawks, 232, and note in 14 Am. Dec. 587; Peck v. Carpenter, 7 Gray, 283; 66 Am. Dec. 477; Roseboom v. Rose-

co-tenant, and ousts him of the possession.<sup>1</sup> The occupation of one tenant in common is, at common law, but the exercise of his legal right, so long as he does not exclude his co-tenant. His cultivation and improvement are made at his own risk; if they result in loss, he cannot call upon his co-tenant for contribution; and if they produce a profit, his co-tenant is not entitled to share in them. The co-tenant can, at any moment, enter into equal enjoyment of his possession, and his neglect to do so may be regarded as an assent to the sole occupation of the other.<sup>2</sup> The fact that one tenant in common has had the entire occupancy of the common estate, and his co-tenants have not occupied it, gives no right of action against him for the value of the use of their interests.<sup>3</sup>

One tenant in common cannot sue another to recover documents relating to the joint estate.<sup>4</sup> He cannot maintain replevin against his joint tenant,<sup>5</sup> nor forcible entry and unlawful detainer.<sup>6</sup> Tenants in common cannot be sued jointly in an action of account by their co-tenants, where each of the defendants received portions of the profits severally.<sup>7</sup> And *assumpsit* will not lie by a tenant in common against his companion to recover for the use and occupation of the common property, in the absence of an express contract to pay rent.<sup>8</sup>

§ 2725. **Actions by or against Strangers.**—At common law, tenants in common must sever in real actions; but in actions for injury to the estate, they must join, for

boom, 15 Hun, 309; *Hause v. Hause*, 29 Minn. 252; *Booth v. Adams*, 11 Vt. 156; 34 Am. Dec. 680; *Hamby v. Wall*, 48 Ark. 135; 3 Am. St. Rep. 218.

<sup>1</sup> *Sears v. Sellen*, 28 Iowa, 501.

<sup>2</sup> *Pico v. Columbet*, 12 Cal. 414; 73 Am. Dec. 550.

<sup>3</sup> *Everts v. Beach*, 31 Mich. 136; 18 Am. Rep. 169.

<sup>4</sup> *Clowes v. Hawley*, 12 Johns. 484.

<sup>5</sup> *Pulliam v. Burlingame*, 81 Mo. 111; *Hill v. Seager*, 3 Utah, 379.

<sup>6</sup> *Lick v. O'Donnell*, 3 Cal. 59; 58 Am. Dec. 383.

<sup>7</sup> *McPherson v. McPherson*, 11 Ired. 391; 53 Am. Dec. 417.

<sup>8</sup> *Crow v. Mark*, 52 Ill. 332; *Kline v. Jacobs*, 68 Pa. St. 57; *Chambers v. Chambers*, 3 Hawks, 232; 14 Am. Dec. 585.

the damages belong to them jointly.<sup>1</sup> And tenants in common of personalty must join in an action to recover it.<sup>2</sup> "Tenants in common cannot join or be joined in real or mixed actions, unless in the case where some entire or indivisible thing is to be recovered."<sup>3</sup> But where the tenants in common are not jointly interested in the damages, the remedy may be by a several action.<sup>4</sup> So where the other tenants refuse to join, and they are non-residents.<sup>5</sup> A tenant in common who has an interest in the property which entitles him to the enjoyment of the entire estate can maintain ejectment against all persons but his co-tenants and parties claiming under them.<sup>6</sup> They are not obliged to join in an action against their grantor for a breach of the covenants of warranty in his deed.<sup>7</sup> A tenant in common, without joining his co-tenant in the action, may recover of a purchaser the price of his undivided part of the common property.<sup>8</sup> Tenants in common may sever their actions, where they lease property and reserve separate portions to each.<sup>9</sup> But they may maintain a joint action to recover rent due on a lease of the common property which contains a covenant to pay rent to the lessors jointly, although by a memorandum annexed to the lease, and forming part of it, it is agreed that one half of the rent be paid to each of the lessors separately.<sup>10</sup> Where there is no express demise of land by tenants in common, they may join in an action for use and occupation, and on the death of one of them

<sup>1</sup> *May v. Parker*, 12 Pick. 34; 22 Am. Dec. 393; *Dawson v. Mills*, 32 Pa. St. 302; *Stevenson v. Cofferin*, 20 N. H. 150; *Covillard v. Tanner*, 7 Cal. 38; *Hines v. Frantham*, 27 Ala. 359.

<sup>2</sup> *Clapp v. Pawtucket Inst.*, 15 R. I. 489; 2 Am. St. Rep. 915.

<sup>3</sup> *Malcolm v. Rogers*, 5 Cow. 188; 15 Am. Dec. 464; *Southard v. Hill*, 44 Me. 92; 69 Am. Dec. 85. *Aliter* in same states: *Hillhouse v. Mix*, 1 Root, 246; 1 Am. Dec. 41.

<sup>4</sup> *Lothrop v. Arnold*, 25 Me. 136; *Longfellow v. Quimby*, 29 Me. 196.

<sup>5</sup> *Peck v. McLean*, 36 Minn. 228; 1 Am. St. Rep. 665.

<sup>6</sup> *Brown v. Warren*, 16 Nev. 228; *Thames v. Jones*, 97 N. C. 121.

<sup>7</sup> *Lamb v. Danforth*, 59 Me. 322; 8 Am. Rep. 426.

<sup>8</sup> *Lyman v. R. R. Co.*, 58 N. H. 384.

<sup>9</sup> *Lahy v. Holland*, 8 Gill, 445; 50 Am. Dec. 705.

<sup>10</sup> *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 65.

after suit brought, the survivor may recover the entire damages for the use.<sup>1</sup> A tenant in common may maintain an action for trespass on the estate.<sup>2</sup> A joint tenant, or tenant in common, bringing an action for the whole tract, and failing to establish his right to more than a part of it, may have judgment for that part.<sup>3</sup>

### § 2726. Rights and Liabilities of Tenants in Common.

—A tenant in common may manage his estate in any way he pleases, provided he does not injure his co-tenants.<sup>4</sup> One tenant in common is liable to another for the cost of such repairs as were absolutely necessary to prevent the property from falling into decay.<sup>5</sup> But one tenant in

<sup>1</sup> Cobb v. Kidd, 19 Blatchf. 560.

<sup>2</sup> Longfellow v. Quimby, 29 Me. 196; 48 Am. Dec. 525; Hodges v. Heal, 80 Me. 281; 6 Am. St. Rep. 199.

<sup>3</sup> McFadden v. Haley, 2 Bay, 457; 1 Am. Dec. 683.

<sup>4</sup> Peabody v. Minot, 24 Pick 329.

<sup>5</sup> Beatty v. Bordwell, 91 Pa. St. 438; Alexander v. Ellison, 79 Ky. 148; Percy v. Millaudon, 6 Martin, N. S., 616; 17 Am. Dec. 198; (Gwinneeth v. Thompson, 9 Pick. 31; 19 Am. Dec. 350; Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540. But in the case of necessary repairs, there must be a previous request to join in making them, and a refusal so to do, or no action can be sustained: Mumford v. Brown, 6 Cow. 476; 16 Am. Dec. 440; Crest v. Jack, 3 Watts, 238; 27 Am. Dec. 353; Doane v. Badger, 12 Mass. 65; Calvert v. Aldrich, 99 Mass. 74; 96 Am. Dec. 693; Thurston v. Dickinson, 2 Rich. Eq. 317; 46 Am. Dec. 56. "At the common law, if there are two tenants in common, or joint tenants, of a house or mill, and it should fall into decay, and one is willing to repair, and the other is not, he that is willing to repair shall have a writ *de reparatione faciendi*, for owners are bound, *pro bono publico*, to maintain houses and mills, which are for the habitation and use of man: Story's Eq. Jur., sec. 1235. Chancellor Kent says: 'One joint tenant, or tenant in common, can compel the others to unite in the expense of

necessary reparations to a house or mill belonging to them, though the rule is limited to those parts of the common property, and does not apply to fences inclosing wood or arable land': 4 Kent's Com. 370. See also Anderson v. Greble, 1 Ashm. 136; Adams's Equity, 267; 1 Washburn on Real Property, 421. Whether the writ *de reparatione faciendi* could now be resorted to to compel a recusant tenant to unite in making needed repairs, we need not decide. We only refer to the subject for the purpose of showing that the common law recognized the legal obligation of each tenant to bear his just proportion of the necessary reparation of houses on the common estate, when one or more desired that such repairs should be made. That there should be an obligation enforceable in some form seems to be necessary to prevent injustice and wrong, and to grow out of the relation in which the parties stand to each other with respect to the common estate. Whatever injuries or benefits one co-tenant is an injury or benefit to all the others. If one makes repairs, the others receive a part of the benefits, and they ought not to be permitted, by refusing to unite in making necessary repairs, to compel their co-tenant to bear the whole expense, or to allow his interest to suffer because they are reckless of their own": Alexander v. Ellison, 79 Ky. 148. A tenant in common is lia-

common cannot go on and make expensive and valuable improvements, which are not repairs in the strict sense of that term, and make his co-tenant liable for any part of the same, in the absence of an express or implied contract to pay therefor.<sup>1</sup> If one tenant in common, with authority to improve the property, does so in good faith, he cannot be held responsible to the other for errors of judgment in making the improvements, but will be entitled to contribution.<sup>2</sup> But one co-tenant cannot maintain an action against his co-tenants for loss sustained through want of repairs, when he himself has refused to unite with them in making repairs necessary to the use of the property.<sup>3</sup>

Where tenants in common have occupied the same property to the exclusion of a co-tenant, they are entitled, in an accounting for the rents and profits, not only to a credit for their expenses and services actually rendered in operations upon the common property which have made it of great value, but also for expenses and for labor and services rendered in endeavoring to make it valuable, though unsuccessfully, they having acted *bona fide*, and only with a view of increasing the value of the property.<sup>4</sup> Where one tenant in common enters upon the common estate, which yields no profit, and so improves it as to make it productive, he is entitled to all the profits produced by reason of such improvements, to the exclusion of his co-tenant.<sup>5</sup> He is not chargeable, on accounting, with the rental value of the improvements, but only with

ble to his co-tenant for repairs that are absolutely necessary to houses and mills already erected and in being, which fall into decay, but the rule does not apply to woodland or arable land: *Beaty v. Bordwell*, 91 Pa. St. 438.

<sup>1</sup> *Taylor v. Baldwin*, 10 Barb. 582; *Walter v. Greenwood*, 29 Minn. 87; *Crest v. Jack*, 3 Watts, 238; 27 Am. Dec. 353; *Hancock v. Day*, 1 McMull. Eq. 69; 36 Am. Dec. 293; *Louville v.*

*Menard*, 1 Gilm. 39; 41 Am. Dec. 161; *Kidder v. Rixford*, 16 Vt. 169; 42 Am. Dec. 504; *Thurston v. Dickinson*, 2 Rich. Eq. 317; 46 Am. Dec. 56.

<sup>2</sup> *Reed v. Jones*, 8 Wis. 421.

<sup>3</sup> *Stallings v. Corbett*, 2 Speers, 613; 42 Am. Dec. 388.

<sup>4</sup> *Ruffners v. Lewis*, 7 Leigh, 720; 30 Am. Dec. 513.

<sup>5</sup> *Nelson v. Clay*, 7 J. J. Marsh. 138; 23 Am. Dec. 387.

the rental value of the land.<sup>1</sup> Where a co-tenant is obliged to redeem the whole estate in order to relieve his own share from encumbrance, he has a right to retain the share of his co-tenant as security for the repayment of the amount equitably chargeable to it. And until such reimbursement has been made to the co-tenant who redeemed, the delinquent co-tenant cannot maintain an action against him for the recovery of the land.<sup>2</sup> It is obligatory upon each co-tenant to keep the taxes paid, and if one pays them all, he is entitled to be reimbursed, with interest.<sup>3</sup> A tenant in common who is debarred by his co-tenants from enjoyment of the premises owned in common has a right to take peaceable possession thereof, although such possession is acquired by stealth, but without tumult or a breach of the peace.<sup>4</sup> A tenant in common is not permitted, even after partition made, to purchase in a superior outstanding claim for his own exclusive benefit, and much less to use it for the expulsion of his co-tenant.<sup>5</sup> Such a purchase is considered in equity as inuring to the benefit of all the co-tenants, though the purchaser is entitled to contribution.<sup>6</sup> At the same time, however, the other must exercise reasonable diligence in making his election to participate in the benefits of such pur-

<sup>1</sup> *Annelly v. De Saussure*, 26 N. C. 497; 4 Am. St. Rep. 725.

<sup>2</sup> *Watkins v. Eaton*, 30 Me. 529; 50 Am. Dec. 637.

<sup>3</sup> *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540; *Morgan v. Herrick*, 21 Ill. 481; *Oliver v. Montgomery*, 39 Iowa, 601.

<sup>4</sup> *Wood v. Phillips*, 43 N. Y. 152.

<sup>5</sup> *Rector v. Waugh*, 17 Mo. 13; 57 Am. Dec. 251; *Venable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec. 74, and note 83-86; *Davis v. King*, 87 Pa. St. 261; *Swinburne v. Swinburne*, 28 N. Y. 568; *Titworth v. Stout*, 49 Ill. 78; 95 Am. Dec. 577; *Funk v. Newcomer*, 10 Md. 301; *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696; *Tisdale v. Tisdale*, 2 Sneed, 596; 64 Am. Dec. 775.

<sup>6</sup> *Sneed v. Atherton*, 6 Dana, 276; 32 Am. Dec. 70; *Rothwell v. Dewees*,

2 Black, 613; *Mandeville v. Solomon*, 39 Cal. 125; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137; *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497; *Roberts v. Thorn*, 25 Tex. 728; 78 Am. Dec. 552; *Gentry v. Gentry*, 1 Sneed, 87; 60 Am. Dec. 137; *Frentz v. Klotch*, 23 Wis. 312; *Buchanan v. King*, 22 Gratt. 414; *Whitney v. Salter*, 36 Minn. 103; 1 Am. St. Rep. 656. A tax title cannot be acquired by one co-tenant against his co-tenants, but he holds it in trust for them: *Smith v. Smith*, 68 Iowa, 608; *Weare v. Van Meter*, 42 Iowa, 128; 20 Am. Rep. 616; *Mintur v. Durham*, 13 Or. 470. Nor can he acquire the right of homestead in government land of which he is in possession for himself and his co-tenants: *Reinhart v. Bradshaw*, 19 Nev. 255; 3 Am. St. Rep. 886.

chase. Unless he elect within a reasonable time, and contribute, or offer to contribute, his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits.<sup>1</sup> A purchase made by one not then a co-tenant does not inure to the benefit of those with whom he afterwards becomes a co-tenant.<sup>2</sup>

The undivided interest of a tenant in common of chattels may be seized and sold under attachment, if the property is severable; and if the tenant's share is exempt from such seizure, he may maintain his action alone to vindicate his exemption rights.<sup>3</sup>

§ 2727. **Right of Tenant in Common to Convey.**—One tenant in common may demise or convey his undivided share, but no more, of the common estate,<sup>4</sup> and the purchaser thereupon takes the place of the grantor, and holds as tenant in common with the other tenants.<sup>5</sup> A deed of one tenant in common cannot affect the title or interest of his co-tenant, whatever title such deed may purport to convey.<sup>6</sup> He can only lease his individual share, unless he has authority from his co-tenants.<sup>7</sup> According to the weight of authority, one tenant in common cannot, as against the rights of his associates, convey his share in any particular part of the estate held in common by metes and bounds.<sup>8</sup> In some states, however, it is

<sup>1</sup> *Mandeville v. Solomon*, 39 Cal. 125.

<sup>2</sup> *Sneed's Heirs v. Atherton*, 6 Dana, 276; 32 Am. Dec. 70.

<sup>3</sup> *Newton v. Howe and Drury*, 29 Wis. 531; 9 Am. Rep. 616.

<sup>4</sup> *Butler v. Roys*, 25 Mich. 53; 12 Am. Rep. 218; *Luther v. Arnold*, 8 Rich. 24; *Shepardson v. Rowland*, 28 Wis. 108; *Dillon v. Brown*, 11 Gray, 179; 71 Am. Dec. 700; *Vaughan v. Cravens*, 1 Head, 108; 73 Am. Dec. 163. *Aliter* as to a mortgage: *Marks v. Sewell*, 120 Mass. 174. A tenant in common can mortgage his interest to secure his individual indebtedness, unless the real estate is partnership

property: *Ruppe v. Steinbach*, 48 Mich. 465.

<sup>5</sup> *Adams v. Frothingham*, 3 Mass. 352; 3 Am. Dec. 151; *In re Prentiss*, 7 Ohio, pt. 2, 129; 30 Am. Dec. 203; *Dain v. Cowing*, 22 Me. 347; 39 Am. Dec. 585; *Sewell v. Holland*, 61 Ga. 608.

<sup>6</sup> *Bigelow v. Topliiff*, 25 Vt. 273; 60 Am. Dec. 264; *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121.

<sup>7</sup> *Mussey v. Holt*, 24 N. H. 248; 55 Am. Dec. 234; *McKinley v. Peters*, 111 Pa. St. 283; *Tainter v. Cole*, 120 Mass. 162.

<sup>8</sup> *Dennison v. Foster*, 9 Ohio, 126; 34 Am. Dec. 429; *Smith v. Benson*, 9

held that he may convey his share in a particular part of the estate.<sup>1</sup> It has been held that one tenant in common of separate and distinct parcels of land may convey all his undivided interest in the whole of any one of the distinct parcels, and his deed will be valid and effectual against his co-tenants;<sup>2</sup> and that if an inheritance consists of several distinct freeholds, a tenant in common may convey his undivided interest in any one or more of them, and it may be sold on execution, without reference to any of the other parcels.<sup>3</sup> If all the tenants in common of a tract of land give conveyances at different times, by metes and bounds, to the same person, of the same part of the land, the conveyances taken together pass the title. And the same principle applies where the several interests of tenants in common in a part of the land held in common are taken, at different times, by compulsory proceedings, for public use.<sup>4</sup>

§ 2728. **Partition — In General.** — Partition is the allotment to each of two or more joint owners of real property of his share in severalty.<sup>5</sup> Proceedings in partition are proceedings *in rem*;<sup>6</sup> and such actions, like all real

Vt. 138; 31 Am. Dec. 614; Bartlet v. Harlow, 12 Mass. 348; Smith v. Knight, 20 N. H. 9; Good v. Coombs, 28 Tex. 34; Duncan v. Sylvester, 24 Me. 482; 41 Am. Dec. 400; Boggess v. Meredith, 16 W. Va. 1; Mattox v. Hightshue, 39 Ind. 95; Boston etc. Co. v. Condit, 19 N. J. Eq. 394; Griswold v. Johnson, 5 Conn. 363; Crocker v. Tiffany, 9 R. I. 505; Tainter v. Cole, 120 Mass. 162; Ballou v. Hale, 47 N. H. 347; 93 Am. Dec. 438; Jewett v. Stockton, 3 Yerg. 492; 24 Am. Dec. 594; Hutchinson v. Chase, 39 Me. 508; 63 Am. Dec. 645; Marshall v. Trumbull, 28 Conn. 183; 73 Am. Dec. 667; Whitton v. Whitton, 38 N. H. 127; 75 Am. Dec. 163; Phillips v. Tudor, 10 Gray, 78; 69 Am. Dec. 306. But such a conveyance will operate as an estoppel against him and those claiming under him: Varnum v. Abbot, 12

Mass. 474; 7 Am. Dec. 87. Generally the deed of a part of the common property by metes and bounds, by one of several tenants, is voidable only by the co-tenants, or some one of them, and is valid against all other persons: Nichols v. Smith, 22 Pick. 319.

<sup>1</sup> Barnhart v. Campbell, 50 Mo. 597; Reinecker v. Smith, 2 Har. & J. 421; Treon v. Emerick, 6 Ohio, 391; Camoran v. Thurmond, 56 Tex. 22; Goodwin v. Keney, 49 Conn. 563.

<sup>2</sup> Primm v. Walker, 38 Mo. 94.

<sup>3</sup> Butler v. Roy, 25 Mich. 53; 12 Am. Rep. 218.

<sup>4</sup> Stevens v. Norfolk, 46 Conn. 227.

<sup>5</sup> 2 Bouvier's Inst. 410, 411; 2 Bla. Com. 323; Freeman on Cotenancy and Partition, secs. 393 et seq.

<sup>6</sup> Corwithe v. Griffing, 21 Barb. 9; Pillsbury v. Dugan, 9 Ohio, 117; 34 Am. Dec. 427.

actions, are local.<sup>1</sup> It is an adversary suit, in which the title may be contested.<sup>2</sup>

§ 2729. **Voluntary Partition.**— Partition is voluntary where it is made by the parties themselves, as by conveying or releasing to each other their respective estates. When persons owning lands in common execute mutual deeds of bargain and sale and release, in consideration of one dollar, and an agreement to divide, the conveyances operate as deeds of partition.<sup>3</sup> If each of two tenants in common execute to the other conveyances, — one of the north half of the land held in common, and the other of the south half, — the partition is binding upon them.<sup>4</sup> Where joint tenants divide land by deeds, following an old survey, the accuracy of which neither knows anything about, the partition is valid, notwithstanding the division may have been unequal, there being no fraud or misrepresentation.<sup>5</sup> Where land is divided between tenants in common, and each accepts his part, takes possession, and makes improvements, it is a good partition, although there be no judgment of a court.<sup>6</sup> But a *bona fide* purchaser without notice of an undivided interest in land is not bound by a parol agreement for partition made by the tenants in common.<sup>7</sup> So if there are owners who are not personally present, and do not participate in such consent, or who are not legally represented in the transaction, and whose interests or just rights may be injuriously affected or lost thereby, such persons may seek redress in equity.<sup>8</sup> A minor to whom a tract of land has been devised is not bound by a partition made by other devisees of the same testator of land devised to them, and

<sup>1</sup> *Brown v. McMullen*, 1 Nott & McC. 252; *Bonner, Petitioner*, 4 Mass. 122.

<sup>2</sup> *Brownell v. Bradley*, 16 Vt. 105; 42 Am. Dec. 498.

<sup>3</sup> *Dawson v. Lawrence*, 13 Ohio, 543; 42 Am. Dec. 210.

<sup>4</sup> *Eaton v. Tallmadge*, 24 Wis. 217.

<sup>5</sup> *Jones v. Carter*, 4 Hen. & M. 184.

<sup>6</sup> *Welchel v. Thompson*, 39 Ga. 559; 99 Am. Dec. 470; *Hubbard v. Ricart*, 3 Vt. 207; 23 Am. Dec. 198.

<sup>7</sup> *Gates v. Salmon*, 46 Cal. 361.

<sup>8</sup> *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491.

of his land, by which a portion of both tracts is set off to him, although upon attaining majority he exercised acts of ownership over the part so set off to him.' Where a partition of land is made between several by deed without covenants, and there is an encumbrance on the portion assigned to one, for the discharge of which he is compelled to pay money, he may call on the others for contribution.<sup>2</sup> Partition, to be effectual, need not be made upon the land, but the same may be made on a map, although the lines there traced merely existed in the mind. Actual separation of parts is not necessary, and the acts of the co-owners allotting to one and another a portion of joint property which each is entitled to, and which each enjoys without interruption, are sufficient.<sup>3</sup> Where a tract of land held in common has been subdivided into lots, and one of the lots has long been known and called by the name of one of the tenants in common, and there is no evidence of any subsequent claim of a tenancy in common, it may fairly be inferred that there has been a partition, and that such lot was set off to him whose name it bears.<sup>4</sup> Partition made by deeds of release between the grantee of a tenant in common and co-tenants is valid when it is in the power of any co-tenant to compel a partition by legal proceeding.<sup>5</sup> An attempted deed of partition not signed by some of those named therein as tenants in common is void.<sup>6</sup>

**§ 2730. Written Agreements for Partition.**—A written agreement for a partition will be regarded in equity as an actual partition.<sup>7</sup> Such an agreement will be liberally construed,<sup>8</sup> and it will be enforced by the court, and an allowance made where there is a difference in value.<sup>9</sup>

<sup>1</sup> *Hemmich v. High*, 2 Watts, 159; 27 Am. Dec. 295.

<sup>2</sup> *Dugan v. Hollins*, 4 Md. Ch. 139.

<sup>3</sup> *Compton v. Mathews*, 3 La. 128; 22 Am. Dec. 167.

<sup>4</sup> *Jackson v. Miller*, 6 Wend. 228; 21 Am. Dec. 316.

<sup>5</sup> *Staples v. Bradley*, 23 Conn. 167; 60 Am. Dec. 631.

<sup>6</sup> *Emerie v. Alvarado*, 64 Cal. 529.

<sup>7</sup> *Masterson v. Finnigan*, 2 R. I. 316.

<sup>8</sup> *Moore v. Eagles*, 1 Murph. 302.

<sup>9</sup> *Norwood v. Norwood*, 4 Har. & J. 112; *Coates v. Street*, 2 Ashm. 12.

A fair partition of land, followed by a judicial sale of the share of one of the parties, and a proper application of the proceeds, will sever the possession, notwithstanding the owners of one moiety are minors;<sup>1</sup> and an agreement for partition entered into by parties who are all *sui juris* will be valid and binding without the sanction of the court.<sup>2</sup> So where proceedings for partition are discontinued, a voluntary partition made by the parties while the proceedings were pending is binding.<sup>3</sup> But an unfair partition by agreement is not binding on an infant, though he exercise acts of ownership after he becomes of age.<sup>4</sup>

§ 2731. **Parol Agreements for Partition.**—An unexecuted parol agreement for a partition of land is not binding.<sup>5</sup> A parol agreement for partition of land, of such a character that possession thereunder cannot follow, is void.<sup>6</sup> But where tenants in common of land, in order to ascertain the separate interests of each, agree by parol to a division, and each takes possession of the share allotted to him, such partition is binding on the parties,<sup>7</sup> notwithstanding they are *femes covert* or minors, if the partition is made with the acquiescence of their husbands or guardians,<sup>8</sup> or if acquiesced in and confirmed

<sup>1</sup> Williard v. Williard, 56 Pa. St. 119.

<sup>2</sup> Bompart v. Roderman, 24 Mo. 385.

<sup>3</sup> Folger v. Mitchell, 3 Pick. 396.

<sup>4</sup> Hemmich v. High, 2 Watts, 159; 27 Am. Dec. 295.

<sup>5</sup> Woodbeck v. Wilders, 18 Cal. 131; Slice v. Derrick, 2 Rich. 627; Snively v. Luce, 1 Watts, 69.

<sup>6</sup> Lanterman v. Williams, 55 Cal. 60.

<sup>7</sup> Coles v. Wooding, 2 Pat. & H. 189; Jackson v. Harder, 4 Johns. 202; 4 Am. Dec. 262; Mount v. Morton, 20 Barb. 123; Ebert v. Woods, 1 Binn. 216; 2 Am. Dec. 436; Rider v. Maul, 46 Pa. St. 376; Stuart v. Baker, 17 Tex. 417; Word v. Fleet, 36 N. Y. 499; 93 Am. Dec. 528, and cases cited; Buzzell v. Gallagher, 28 Wis. 678; Long's Appeal, 77 Pa. St. 151; Shepard v. Rinks,

78 Ill. 188; Dement v. Williams, 44 Tex. 158; Haughenbaugh v. Honald, 3 Brev. 97; 5 Am. Dec. 548; Ryerss v. Wheeler, 25 Wend. 434; 37 Am. Dec. 243; Brown v. Wheeler, 17 Conn. 345; 44 Am. Dec. 550; Grimes v. Butts, 65 Ill. 347; Moore v. Kerr, 46 Ind. 468; Parker v. Spencer, 61 Tex. 155; Gates v. Salmon, 46 Cal. 361; Pomroy v. Taylor, Brayt. 174; Kennemore v. Kennemore, 26 S. C. 251; Bruce v. Osgood, 113 Ind. 360; Nave v. Smith, 95 Mo. 596; 6 Am. St. Rep. 79; Whittaker v. Allday, 71 Tex. 623. A parol partition can be made of lands held in common by an equitable title: Maul v. Rider, 51 Pa. St. 377.

<sup>8</sup> Calhoun v. Hays, 8 Watts & S. 127; 42 Am. Dec. 275; Darlington's

by such heir after coming of age.<sup>1</sup> A parol partition, valid between the parties to it, may be ratified by the other parties interested.<sup>2</sup> But in some states parol partitions are void, as within the statute of frauds.<sup>3</sup>

### § 2732. Involuntary Partition — Jurisdiction of Equity.

— Equity has concurrent jurisdiction with law to order partition. The common-law remedy by writ of partition was at an early period found inadequate and incomplete, on account of the various and complicated interests which in process of time arose out of or attached to the ownership of real estate. Moreover, courts of law were content merely to declare the rights of the parties, and were incapable of effectuating the petition by directing the execution of mutual conveyances. For these reasons, and because of the necessity of the discovery of titles, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of courts of equity, and their ability to clear away all intermediate obstructions against complete justice, — the latter courts assumed a general concurrent jurisdiction with courts of law in all cases of partition. And in so doing they usually followed the analogies of the law, and decreed partition in such cases as the courts of law recognized as fit for their interference. But courts of equity were not therefore to be understood as limiting their jurisdiction in partition to cases cognizable or relievable at law; for there was no doubt that they might interfere

Appeal, 13 Pa. St. 430; *McConnell v. Carey*, 48 Pa. St. 345; *Hardy v. Summers*, 10 Gill & J. 316; 32 Am. Dec. 167; *Bryan v. Stump*, 8 Gratt. 241; 56 Am. Dec. 139.

<sup>1</sup> *Lynch v. Baxter*, 4 Tex. 431; 51 Am. Dec. 735.

<sup>2</sup> *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 372.

<sup>3</sup> *Porter v. Perkins*, 5 Mass. 233; 4 Am. Dec. 52; *Porter v. Hill*, 9 Mass. 34; 6 Am. Dec. 22; *Perkins v. Pitts*, 11

Mass. 125; *Gratz v. Gratz*, 4 Rawle, 411; *Wood v. Griffin*, 46 N. H. 230; *Ballou v. Hale*, 47 N. H. 347; 93 Am. Dec. 438; *Den v. Longstreet*, 18 N. J. L. 405. But if it is followed by twenty years' continuous, adverse, exclusive possession by each of their respective shares in severalty, such possession will operate as a bar to the claim of either upon the other for the share so occupied: *John v. Sabattis*, 69 Me. 473.

in cases where a partition would not be at law,—as, for instance, where an equitable title was set up,<sup>1</sup>—and equity has exclusive jurisdiction of suits for the partition of personal property, even though defendant denies plaintiff's title.<sup>2</sup> The statutory regulations for partition of land do not take away the original jurisdiction of chancery,<sup>3</sup> nor does a provision by a testator for the partition of his estate “by five judicious and impartial freeholders of the county aforesaid, appointed by the chancellor of the said state according to law.”<sup>4</sup> Partition in equity is a matter of right, and not of discretion, in all cases where the complainant is entitled to partition at law, and can show a clear legal title.<sup>5</sup> A court of equity will not interfere with proceedings for partition commenced at law, unless such interference becomes necessary to protect some party thereto from fraud or wrong, or to secure to him some clear right which the law tribunal cannot secure.<sup>6</sup> In order to obtain partition in equity, the legal title must be clear and undisputed.<sup>7</sup> If the complainant have no actual or constructive possession, and the lands are held adversely, and the title is doubtful or suspicious, the bill should either be dismissed, or the proceeding stayed until the complainant establishes his title at law. If the title

<sup>1</sup> Snell's Equity, sec. 505; Paddock v. Shields, 57 Miss. 340; Beeller v. Bullitt, 3 A. K. Marsh. 280; 13 Am. Dec. 161; Hall v. Paddock, 21 N. J. Eq. 314; Howey v. Goings, 13 Ill. 95; 54 Am. Dec. 427; Story's Eq. Jur., sec. 646; Baxter v. Knowles, 1 Ves. Sr. 494; Smith v. Smith, 10 Paige, 470; Bailey v. Sisson, 1 R. I. 233; Greenup v. Sewell, 18 Ill. 53; Kennedy v. Kennedy, 43 Pa. St. 413; 82 Am. Dec. 574; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Whitten v. Whitten, 36 N. H. 332; Simmons v. Hendricks, 8 Ired. Eq. 85; 55 Am. Dec. 439; Rutherford v. Jones, 14 Ga. 521; 60 Am. Dec. 655; Wright v. Marsh, 2 G. Greene, 94; Donnell v. Mateer, 7 Ired. Eq. 94; Severtson v. Waters, 7 Cold. 20; Breit v. Yeaton,

101 Ill. 242; Thayer v. Lane, Harr. (Mich.) 247; Dinckle v. Timrod, 1 De-saus. Eq. 109; Hopper v. Fisher, 2 Head, 253; Castleman v. Veitch, 3 Rand. 598.

<sup>2</sup> Godfrey v. White, 60 Mich. 443; 1 Am. St. Rep. 537.

<sup>3</sup> Patton v. Wagner, 19 Ark. 233.

<sup>4</sup> Marshall v. Rensch, 3 Del. Ch. 239.

<sup>5</sup> Wiseley v. Findlay, 3 Rand. 561; 15 Am. Dec. 712.

<sup>6</sup> Hall v. Paddock, 21 N. J. Eq. 311.

<sup>7</sup> Hassan v. Day, 39 Miss. 392; 77 Am. Dec. 684; Whillock v. Hale, 10 Humph. 64; Albergottie v. Chaplin, 10 Rich. Eq. 428; Shearer v. Winston, 33 Miss. 149; Maxwell v. Maxwell, 8 Ired. Eq. 25; Howey v. Goings, 13 Ill. 95; 54 Am. Dec. 427.

be an equitable one, or partly equitable and partly legal, the court of equity may try the title; and it may do so when the title is of a legal character, where a fair and perfect trial at law cannot be had.<sup>1</sup> Partition of lands held adversely or under a disputed title can be had in chancery only where they are unoccupied, and where there is merely that possession in law which is connected with the title so that there is no adequate remedy at law.<sup>2</sup> It is competent to try title in an action of partition.<sup>3</sup> Courts cannot by judgment or decree pass title to land situate in a foreign country, and therefore a court of one state has no jurisdiction to decree a partition of lands lying in another state.<sup>4</sup>

**§ 2733. Statutory Jurisdiction.** — The methods of partition are, in most of the states, laid down by statutory enactments which, in some jurisdictions, have, and in some have not, superseded the remedy by bill in equity.<sup>5</sup> The jurisdiction of chancery in proceedings for partition, when any of the defendants are non-resident, depends entirely upon statute, which must be strictly construed. All the preliminary requisitions must be strictly complied with, and the necessary facts to confer jurisdiction must appear affirmatively of record.<sup>6</sup> Notice

<sup>1</sup> *Hoffman v. Beard*, 22 Mich. 59; *Phelps v. Green*, 3 Johns. Ch. 202; *Coxe v. Smith*, 4 Johns. Ch. 271; *Campbell v. Lowe*, 9 Md. 500; 66 Am. Dec. 339; *Clapp v. Bromagham*, 9 Cow. 530; *Adams v. Iron Co.*, 24 Conn. 230; *Lambert v. Blumenthal*, 26 Mo. 471; *Jenkins v. Van Schaak*, 3 Paige, 242; *Obert v. Obert*, 12 N. J. Eq. 423; *Shearer v. Winston*, 33 Miss. 149; *Chapin v. Sears*, 18 Fed. Rep. 814; *Hank v. McComas*, 98 Ind. 460; *Wright v. Jones*, 105 Ind. 17; *Brazee v. Schofield*, 2 Wash. 209; *McCall v. Carpenter*, 18 How. 297; *Horton v. Sledge*, 29 Ala. 478; *Walker v. Laffin*, 26 Ill. 472; *Foust v. Moorman*, 2 Ind. 17; *Manners v. Manners*, 2 N. J. Eq. 384; 35 Am. Dec. 512; *Dewitt v. Ackerman*,

17 N. J. Eq. 215; *Hay v. Estell*, 18 N. J. Eq. 251; *Obert v. Obert*, 10 N. J. Eq. 98; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Moore v. Gordon*, 44 Ark. 334; *Ramsay v. Bell*, 3 Ired. Eq. 209; 42 Am. Dec. 163.

<sup>2</sup> *Byers v. Dauley*, 27 Ark. 77; *Chaplin v. Holmes*, 27 Ark. 414.

<sup>3</sup> *Morenhout v. Higuera*, 32 Cal. 289; *Bollo v. Navarro*, 33 Cal. 459; *Ormond v. Martin*, 37 Ala. 598; *Ala. Sel. Cas.* 526; *Griffin v. Griffin*, 33 Ga. 107; *Godfrey v. Godfrey*, 17 Ind. 6; 79 Am. Dec. 448; *Fry v. Payne*, 82 Va. 759.

<sup>4</sup> *Johnson v. Kimbro*, 3 Head, 557; 75 Am. Dec. 781.

<sup>5</sup> *Bispham's Equity*, sec. 488; *Smith v. Smith*, 10 Paige, 470.

<sup>6</sup> *Platt v. Stewart*, 10 Mich. 260.

must be given in case of partition among heirs and devisees to all who do not join in the petition, or they will not be bound by the acts of the court.<sup>1</sup> A statute requiring that, before a partition of land can be had among heirs, written notice thereof must be given to all persons interested therein, and that the service of such notice shall be proved by affidavit, must be strictly pursued.<sup>2</sup>

§ 2734. **Who may have Partition.**—Tenants in common have a right to apply for partition.<sup>3</sup> So have joint tenants<sup>4</sup> and coparceners;<sup>5</sup> the owner of a life interest in an undivided part;<sup>6</sup> a tenant for years;<sup>7</sup> one not in actual pos-

<sup>1</sup> *Vick v. Vicksburg*, 1 How. (Miss.) 379; 31 Am. Dec. 166.

<sup>2</sup> *Newby v. Perkins*, 1 Dana, 440; 25 Am. Dec. 161.

<sup>3</sup> *Hanson v. Willard*, 12 Me. 142; 28 Am. Dec. 162; *Smith v. Smith*, 10 Paige, 470; *Campbell v. Lowe*, 9 Md. 500; 66 Am. Dec. 339; *Scovil v. Kennedy*, 14 Conn. 349; *Witherspoon v. Dunlap*, Harp. 390; *Potter v. Wheeler*, 13 Mass. 504; *Bradshaw v. Callaghan*, 8 Johns. 558; *Holmes v. Holmes*, 2 Jones Eq. 334; *Donnell v. Mateer*, 7 Ired. Eq. 94; *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198. An agreement made between co-heirs does not preclude a partition at any time on the part of heirs not joined in the agreement: *Helms v. Mynatt*, 6 Cold. 215. One tenant in common of land holding his share under a deed from his co-tenant is not barred from having partition by a condition in the deed that the grantee shall not dispose of the premises, or permit them to be occupied by any person but himself, during the life of the grantor: *Whitney v. Kendall*, 63 N. H. 200. But if the property is held under a will which prescribes the time when a division may be had, partition cannot be made at an earlier day: *Hill v. Jones*, 65 Ala. 214. Where the owner of land conveyed an undivided share of it by warranty deed which contained, after the description, and before the *habendum*, this clause, "to remain in common and undivided," it was held that

the clause was neither a condition nor a covenant, and that the vendor was not estopped to sue his grantee for partition: *Spaulding v. Woodward*, 53 N. H. 573; 16 Am. Rep. 392. But a tenant in common, and out of possession, must establish his title in an action of ejectment before he can have partition against one in possession, and holding adversely to him: *Lambert v. Blumenthal*, 28 Mo. 471; *Jenkins v. Van Schack*, 3 Paige, 242; *Brock v. Eastman*, 28 Vt. 658; 67 Am. Dec. 733. Partition cannot be had in one suit of several tracts by a tenant in common of all where the ownership therein, other than his, is vested in persons who have between themselves no common interest in the separate tracts: *In re Prentiss*, 7 Ohio, pt. 2, 129; 30 Am. Dec. 203. It will not be decreed between a tenant in common of the whole and the owner in severalty of part: *Sautter v. Atwood*, 34 Me. 153; 56 Am. Dec. 647. The distinction between joint tenancy, tenancy in common, and estate in coparcenary has been abolished in Texas, and the tenants are there treated all alike simply as "part owners," and are all alike entitled to compulsory partition: *Ross v. Armstrong*, 25 Tex. Sup. 354; 78 Am. Dec. 575.

<sup>4</sup> *Holmes v. Holmes*, 2 Jones Eq. 334.

<sup>5</sup> *Purvis v. Wilson*, 5 Jones, 22; 69 Am. Dec. 773.

<sup>6</sup> *Shaw v. Beers*, 84 Ind. 528.

<sup>7</sup> *Mussey v. Sanborn*, 15 Mass. 155.

session, but entitled to immediate possession;<sup>1</sup> an infant;<sup>2</sup> one holding only an equitable title;<sup>3</sup> a partner in partnership land;<sup>4</sup> the grantee of right of dower in the land;<sup>5</sup> a tenant by the curtesy initiate;<sup>6</sup> the owners of an equity of redemption before entry by the mortgagee and possession taken under his mortgage;<sup>7</sup> the guardian of a minor who is a tenant in common with adults;<sup>8</sup> one who purchases the interest of a devisee of real estate;<sup>9</sup> a widow devisee of a life estate in her son's undivided interest as devisee of one half of his father's land;<sup>10</sup> a lessee of lands the reversion in fee of which is in tenants in common upon purchasing a part of the reversion.<sup>11</sup> A judgment or a mortgage or a lien against one tenant in common does not prevent a partition, either at his instance or at that of another of the tenants.<sup>12</sup>

But the following cannot have partition, viz.: Tenants not having the seisin, but only the reversion or remainder.<sup>13</sup>

<sup>1</sup> *Scarborough v. Smith*, 18 Kan. 399; *Wommaack v. Whitmore*, 58 Mo. 448; *Nichols v. Nichols*, 28 Vt. 228; 67 Am. Dec. 699. Actual corporeal seisin is not necessary to enable a tenant in common to maintain a suit for partition; constructive seisin is sufficient, unless there is proof of an ouster: *Barnard v. Pope*, 14 Mass. 434; 7 Am. Dec. 225.

<sup>2</sup> *Shull v. Kennon*, 12 Ind. 34; *Thornton v. Thornton*, 27 Mo. 302; 72 Am. Dec. 266.

<sup>3</sup> *Willing v. Brown*, 7 Serg. & R. 467; *Welch v. Anderson*, 28 Mo. 293.

<sup>4</sup> *Hughes v. Devlin*, 23 Cal. 501; *Canfield v. Ford*, 28 Barb. 336; *Danvers v. Dorrity*, 14 Abb. Pr. 208. Though the purposes of the partnership have not been accomplished: *Collins v. Dickinson*, 1 Hawy. (N. C.) 240. But not prior to a settlement of the partnership accounts: *Baird v. Baird*, 1 Dev. & B. 524; 31 Am. Dec. 399.

<sup>5</sup> *Morgan v. Staley*, 11 Ohio, 389.  
<sup>6</sup> *Otley v. McAlpine*, 2 Gratt. 343; *Riker v. Darke*, 4 Edw. Ch. 668.

<sup>7</sup> *Upham v. Bradley*, 17 Me. 423; *Colton v. Smith*, 11 Pick. 311; 22 Am. Dec. 375; *Call v. Barker*, 12 Me. 320.

<sup>8</sup> *Zirkle v. McCue*, 26 Gratt. 517.

<sup>9</sup> *De Caston v. Barny*, 18 Cal. 96; *Stewart's Appeal*, 56 Pa. St. 241.

<sup>10</sup> *Ackley v. Dygert*, 33 Barb. 176.

<sup>11</sup> *Hill v. Reno*, 112 Ill. 154; 54 Am. Rep. 223.

<sup>12</sup> *McCandless v. Mackey*, 98 Pa. St. 489; *Longwell v. Bently*, 23 Pa. St. 103; *Bavington v. Clarke*, 2 Penr. & W. 115; 21 Am. Dec. 432.

<sup>13</sup> *Brownell v. Brownell*, 19 Wend. 367; *Striker v. Mott*, 2 Paige, 387; 22 Am. Dec. 646; *Nichols v. Nichols*, 28 Vt. 228; 67 Am. Dec. 699; *Brown v. Brown*, 8 N. H. 93; *Hughes v. Hughes*, 63 How. Pr. 408; *Wood v. Sugg*, 91 N. C. 93; 49 Am. Rep. 639; *Osborne v. Mull*, 91 N. C. 203. When one person has an interest in reversion or remainder, and another a life estate or a lease for years, the former cannot have partition without the concurrence of the latter: *Fleet v. Dorland*, 11 How. Pr. 489; *Hunnewell v. Taylor*, 6 Cush. 472. *Contra*, *Blakely v. Calder*, 13 How. Pr. 476; *Bradshaw v. Callaghan*, 8 Johns. 558. But a tenant for years is entitled to partition as against a party who holds the other part of the premises in fee: *Mussey v. Sanborn*,

one having only a right of entry;<sup>1</sup> one having no interest in the land except as a guardian of an infant owner;<sup>2</sup> a grantee of an undivided interest whose grantor retains the use of the premises for his life, and is still living;<sup>3</sup> a purchaser from a person having no title in the land itself, but only in the proceeds of sale under a will;<sup>4</sup> a tenant in dower;<sup>5</sup> the administrator of an insolvent estate;<sup>6</sup> a mortgagor of an undivided part of a lot of land, the residue whereof belongs to the mortgagee in fee-simple absolute;<sup>7</sup> a judgment creditor who levies his execution on real estate of the debtor held in common with others before the debtor's right of redemption has expired.<sup>8</sup> Devisees cannot have partition of the present interest in the land devised, where it is vested in the executors, in trust, to pay them the rents and profits;<sup>9</sup> nor of a future contingent estate in land which it is not certain will belong to them on the termination of a particular estate vested in the executors.<sup>10</sup> Heirs are not entitled to partition among themselves while the lien of the administrator for the payment of the intestate's debts remains upon the land; nor can they, until the lien is satisfied, convey the land so as to entitle their grantee to immediate possession.<sup>11</sup> Where a tenant in common of land has granted a right to dig ores therein, the grantee is not entitled to a partition as against the other owners.<sup>12</sup> The court has no jurisdiction

15 Mass. 155. Partition can be made between remaindermen subject to the life estate: *Smith v. Gaines*, 38 N. J. Eq. 65. A tenant in fee of a tract of land subject to a life estate in an undivided half of the land can have partition against the life tenant: *Allen v. Libbey*, 140 Mass. 82. Under its chancery powers, the supreme court of Rhode Island may make partition of realty between tenants in fee and tenants for years: *Calland v. Conway*, 14 R. I. 9.

<sup>1</sup> *Brock v. Eastman*, 28 Vt. 658; 67 Am. Dec. 734. But see *Miller v. Dennett*, 6 N. H. 103; *Rozier v. Griffith*, 31 Mo. 174.

<sup>2</sup> *Bowles v. McAllen*, 16 Ill. 30.

<sup>3</sup> *Nichols v. Nichols*, 23 Vt. 223; 67 Am. Dec. 699.

<sup>4</sup> *Barton v. Cannon*, 7 Baxt. 398.

<sup>5</sup> *Coles v. Coles*, 15 Johns. 320.

<sup>6</sup> *Nason v. Willard*, 2 Mass. 478.

<sup>7</sup> *Bradley v. Fuller*, 23 Pick. 1.

<sup>8</sup> *Phelps v. Palmer*, 15 Gray, 499; 77 Am. Dec. 378.

<sup>9</sup> *Striker v. Mott*, 2 Paige, 387; 22 Am. Dec. 646.

<sup>10</sup> *Striker v. Mott*, 2 Paige, 387; 22 Am. Dec. 646.

<sup>11</sup> *Hubbard v. Ricart*, 3 Vt. 207; 23 Am. Dec. 198.

<sup>12</sup> *Boston etc. Co. v. Condit*, 19 N. J. Eq. 394.

to order partition of lands between heirs of a father where the petition alleges that one heir is alive, and that the mother is pregnant by the father.<sup>1</sup> To maintain partition, it is not sufficient to show title in severalty to a distinct portion.<sup>2</sup> Where the applicants hold the whole of the land of which partition is prayed, their petition does not lie.<sup>3</sup>

**§ 2735. Of What Property may Partition be Made. —**

There may be partition of standing timber;<sup>4</sup> of a mill and mill privilege;<sup>5</sup> of land devised to two on condition that they improve it;<sup>6</sup> of partnership property;<sup>7</sup> of the property of a lunatic;<sup>8</sup> of personal property generally;<sup>9</sup> of the right to a water-power.<sup>10</sup> But it has been held that the following were not the subjects of partition, viz.: A saw-mill, mill-yard, pond, and mill utensils;<sup>11</sup> buildings held in common standing on land to which their owners claim no title;<sup>12</sup> land valuable only as an ore-bed;<sup>13</sup> realty owned in severalty;<sup>14</sup> a homestead right;<sup>15</sup> mines in land, when opened;<sup>16</sup> or lands containing mineral deposits, where the location, extent, and value of the deposits cannot be ascertained;<sup>17</sup> an estate in remainder;<sup>18</sup> lands, the title to which is in dispute, unless they are not in actual possession;<sup>19</sup> a re-

<sup>1</sup> Gillespie v. Nabors, 59 Ala. 441; 31 Am. Rep. 20.

<sup>2</sup> Russell v. Beasley, 72 Ala. 190.

<sup>3</sup> Swett v. Bussey, 7 Mass. 503.

<sup>4</sup> Steedman v. Weeks, 2 Strob. Eq. 145; 49 Am. Dec. 660.

<sup>5</sup> Hansen v. Willard, 12 Me. 142; 28 Am. Dec. 162.

<sup>6</sup> Richardson v. Merrill, 21 Me. 47.

<sup>7</sup> Hughes v. Devlin, 23 Cal. 501.

<sup>8</sup> Snowden v. Dunlavey, 11 Pa. St. 522.

<sup>9</sup> Marshall v. Crow, 29 Ala. 278; Irwin v. King, 6 Ired. 219; Steedman v. Weeks, 2 Strob. Eq. 145; 49 Am. Dec. 660; Turney v. Stebbins, 28 Barb. 290; Conover v. Earl, 26 Iowa, 167. *Contra*, Gudgell v. Mead, 8 Mo. 53; 40 Am. Dec. 120.

<sup>10</sup> Doan v. Metcalf, 46 Iowa, 120.

<sup>11</sup> Brown v. Turner, 1 Aiken, 67; 15 Am. Dec. 696.

<sup>12</sup> Rice v. Freeland, 12 Cush. 170.

<sup>13</sup> Conant v. Smith, 1 Aiken, 67; 15 Am. Dec. 669. And see Coleman v. Coleman, 19 Pa. St. 100; 57 Am. Dec. 641.

<sup>14</sup> Johnson v. Moser, 72 Iowa, 523.

<sup>15</sup> Trotter v. Trotter, 31 Ark. 145.

<sup>16</sup> Lenfers v. Henke, 73 Ill. 405; 24 Am. Rep. 263.

<sup>17</sup> Kemble v. Kemble, 44 N.J. Eq. 454.

<sup>18</sup> Wood v. Sugg, 91 N. C. 93; 49 Am. Rep. 639. *Aliter* in Tennessee: *Bierce v. James*, 87 Tenn. 583.

<sup>19</sup> London v. Overby, 40 Ark. 155. In a partition suit the title is not meddled with, but the plaintiff must show a clear legal title; hence if he prays a settlement of boundary and a decree for the delivery of land in the defendant's possession, it is not a proper case for partition in equity: *Stuart v. Coalter*, 4 Rand. 74; 15 Am. Dec. 731.

versionary interest in land covered by a license held by one of the tenants in common;' lands which they have devoted to a particular use, which use enters into the consideration of the contract creating it;<sup>2</sup> lands lying in another state.<sup>3</sup> There cannot be a partition of different tracts of land in one proceeding unless the tracts are all owned by the same persons.<sup>4</sup> Partition will not be ordered of land in which the defendant alleges that the plaintiffs have an estate for the life of another, and an equal share with the defendant in a contingent remainder therein.<sup>5</sup> The doctrine that partition cannot be had while the defendant is holding the premises adversely does not apply when plaintiff's title is only an equitable one.<sup>6</sup>

§ 2736. **Who must be Defendants.** — All persons interested in the real property sought to be divided should be made parties to the proceedings for partition, either as plaintiffs or defendants;<sup>7</sup> otherwise, they will not be bound by the judgment or decree.<sup>8</sup> Thus remaindermen are necessary parties to a partition suit;<sup>9</sup> and reversioners;<sup>10</sup> and mortgagees;<sup>11</sup> and infants;<sup>12</sup> and the purchaser of a mortgagor's interest in land at an execution sale.<sup>13</sup> And the

<sup>1</sup> *Baldwin v. Aldrich*, 34 Vt. 526; 80 Am. Dec. 695.

<sup>2</sup> *Appeal of Latahaw*, 112 Pa. St. 142; 9 Am. St. Rep. 76.

<sup>3</sup> *Wimer v. Wimer*, 82 Va. 890.

<sup>4</sup> *Kitchen v. Sheets*, 1 Ind. 138; *Hunnewell v. Taylor*, 3 Gray, 111; *Brownell v. Bradley*, 16 Vt. 105; 42 Am. Dec. 498.

<sup>5</sup> *Simpson v. Wallace*, 83 N. C. 477.

<sup>6</sup> *Dameron v. Jameson*, 71 Mo. 97.

<sup>7</sup> *Battarton v. Chiles*, 12 B. Mon. 348; 54 Am. Dec. 539; *Burhans v. Burhans*, 2 Barb. Ch. 398; *Kester v. Stark*, 19 Ill. 328; *Bogardus v. Parker*, 7 How. Pr. 305; *Harlan v. Stout*, 22 Ind. 488; *Candy v. Stradley*, 1 Del. Ch. 113; *Kuapp v. Hungerford*, 7 Hun, 588; *Newby v. Perkins*, 1 Dana, 440; 25 Am. Dec. 160; *Harman v. Kelley*, 14 Ohio, 502; 45 Am. Dec.

552; *Braker v. Devereux*, 8 Paige, 513; *Sullivan v. Sullivan*, 66 N. Y. 37; *Barney v. Baltimore*, 6 Wall. 280; *Lancaster v. Seay*, 6 Rich. Eq. 111; *Hill v. Den*, 54 Cal. 6.

<sup>8</sup> *Cook v. Allen*, 2 Mass. 462; *Harlan v. Stout*, 22 Ind. 488; *Munroe v. Lake*, 19 Pick. 39; *Foxcroft v. Barnes*, 29 Me. 128; *Purvis v. Wilson*, 5 Jones, 22; 69 Am. Dec. 773.

<sup>9</sup> *Bell v. Adams*, 81 N. C. 118.

<sup>10</sup> *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Moore v. Appleby*, 36 Hun, 368.

<sup>11</sup> *Loomis v. Riley*, 24 Ill. 307; *Lewis v. Atkinson*, 15 Iowa, 361; 83 Am. Dec. 417; *Whitton v. Whitton*, 38 N. H. 127; 75 Am. Dec. 164.

<sup>12</sup> *Binks v. Binks*, 7 Baxt. 353; *Tindal v. Drake*, 51 Ala. 574.

<sup>13</sup> *De la Vega v. League*, 64 Tex. 205.

wife of a tenant in common may be made defendant in an action by him for partition.<sup>1</sup> Persons who hold encumbrances upon the separate undivided shares need not be made parties.<sup>2</sup> So before assignment of dower the widow need not be made a party to an action for the partition of the estate in which she claims dower.<sup>3</sup> But though all who are interested in the land must be made parties, yet plaintiff can obtain partition of his interest, though partition may not be made of the several interests of his cotenants.<sup>4</sup> A petition for partition of several tracts against several defendants, all of whom are not interested in all the tracts, is bad for misjoinder, and will be dismissed on motion of one of the defendants.<sup>5</sup> The real owners of land sought to be partitioned may come in and resist the demandant's claim for partition, although he may have misdescribed them in his petition.<sup>6</sup> If an owner of an undivided interest in real estate devise his interest in part of the land to one, and in another part to another, both devisees are proper parties to a bill for partition.<sup>7</sup> Judgment in partition will bind one who claims title, unless he previously comes in and sets up his claim, if he has any. To demur is insufficient.<sup>8</sup> The grantee of one of several heirs whose deed has not been recorded is not entitled to notice of partition proceedings.<sup>9</sup> An administrator cannot be made a party to a petition for partition on the death of his intestate.<sup>10</sup>

<sup>1</sup> *Rosekrans v. White*, 7 Lans. 486.

<sup>2</sup> *Boring v. Nash*, 1 Ves. & B. 551; *Low v. Holmes*, 17 N. J. Eq. 148; *Sebring v. Messereu*, 9 Cow. 344; *Townshend v. Townshend*, 1 Abb. N. C. 81; *Long's Appeal*, 77 Pa. St. 151; *Thurston v. Minks*, 32 Md. 574.

<sup>3</sup> *Power v. Power*, 7 Watts, 205; *Tanner v. Niles*, 1 Barb. 560; *Gordon v. Sterling*, 13 How. Pr. 405.

<sup>4</sup> *Glasscock v. Hughes*, 55 Tex. 461. Any person having an undivided interest in real estate may commence an action for partition without joining

others as plaintiffs. They may be made defendants: *Sample v. Sample*, 34 Kan. 73.

<sup>5</sup> *Brownell v. Bradley*, 16 Vt. 105; 42 Am. Dec. 498.

<sup>6</sup> *Harman v. Kelley*, 14 Ohio, 502; 45 Am. Dec. 553.

<sup>7</sup> *Whitton v. Whitton*, 38 N. H. 127; 75 Am. Dec. 163.

<sup>8</sup> *Godfrey v. Godfrey*, 17 Ind. 6; 79 Am. Dec. 448.

<sup>9</sup> *Merklein v. Trapnell*, 34 Pa. St. 42; 75 Am. Dec. 634.

<sup>10</sup> *Richards v. Richards*, 136 Mass. 126.

§ 2737. **Mode of Decreeing Partition.**—At common law, when individual property was owned by joint tenants, and the tenants could not agree upon a joint use of it, the remedy was to allow each owner to use it alternately; as in the case of a piscary, one to have one draught, and the other the second; or of a mill, one to use it one day, and the other the second.<sup>1</sup> And at first, when the chancellor's aid was invoked, he decreed a use of the property, in accordance with the rule laid down by Lord Coke.<sup>2</sup> This is an inadequate remedy, rendered so by the caprices of weather and many other casualties. Besides being likely to produce inequalities, it has a tendency to aggravate the evil that partition is intended to cure; it leaves the property in possession of the joint owners to be the subject of protracted dispute, whereas by a sale and partition each has his own to do with as he pleases. Hence, in modern times, the courts will decree a sale and division of the proceeds,<sup>3</sup> especially where a partition, from the nature of the property, cannot be made.<sup>4</sup> And the court will order a sale of the property, although it is capable of being equally divided, if such division will greatly depreciate its value.<sup>5</sup> It is no objection to a sale that it will result in a reduced income, or that one of the interests is owned by a wife in fee, with curtesy by her

<sup>1</sup> 1 Co. Lit., Thomas's ed., 795.

<sup>2</sup> 2 Daniell's Chancery Pleading and Practice, 4th ed., 1157. A court of equity may, in partition of numerous lots, if necessary, appoint a receiver to rent out the property in whole or in part, and pay the rent over to the co-tenants, according to their respective rights, or may order the lots to be held and enjoyed by one for a certain length of time, and then by the others successively: *Rutherford v. Jones*, 14 Ga. 521; 60 Am. Dec. 655.

<sup>3</sup> *Prather v. Davis*, 13 Bush, 372; *Tinney v. Stebbins*, 28 Barb. 290. A plea that premises are not partible is no sufficient defense to petition for partition, which prays not only for partition, but that if the premises are

not partible, that they may be assigned or sold: *Baldwin v. Aldrich*, 34 Vt. 526; 80 Am. Dec. 695. One dissatisfied with the appraisement by commissioners may bring the property to a sale by securing and making a bid offering a material advance in price over such appraised value: *Moore v. Williamson*, 10 Rich. Eq. 323; 73 Am. Dec. 93.

<sup>4</sup> *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198; *Potter v. Wheeler*, 13 Mass. 504; *Lucas v. Peters*, 45 Ind. 313; *Steedman v. Weeks*, 2 Strob. Eq. 145; 49 Am. Dec. 660; *Grimes v. Little*, 56 Ga. 649; *Rutherford v. Jones*, 14 Ga. 521; 60 Am. Dec. 655; *Oates v. Gassie*, 40 La. Ann. 360.

<sup>5</sup> *Branscomb v. Gillian*, 55 Iowa, 235.

husband, as the court can protect the interests of both in the money realized by the sale.<sup>1</sup> But the discretionary power of the court to vacate a sale will not be exercised when the rights of *bona fide* purchasers who are not made parties to the motion have intervened.<sup>2</sup> An order of sale expires with the term at which the sale should have been made.<sup>3</sup> When the real estate cannot be divided, it may be decreed to the partitioner at a valuation.<sup>4</sup> If a sale of the land is necessary, the court has power to adjust and secure the rights of the parties in the proceeds of the sale, whether such rights be legal or equitable.<sup>5</sup> If the bill pray for general relief, the decree may direct an account of the rents and profits.<sup>6</sup>

If the estate consists of distinct kinds of property, a part of each kind should be assigned in severalty, if this can be done without impairing the value of the estate.<sup>7</sup> If the common estate consists of several parcels, the entire share of one tenant in common applying for partition may be set off, if practicable, leaving the residue undivided.<sup>8</sup> In a division of land among co-tenants, it is not necessary that each should receive of the several parcels held; it is sufficient that the part of each is of equal value, though made up of entire tracts.<sup>9</sup> Improvements should be awarded to the tenant who made them, without any allowance against them for the increase in the value of the land caused thereby.<sup>10</sup> But improvements are not allowed for according to their cost, but

<sup>1</sup> Johnson v. Olmstead, 49 Conn. 509.  
But see Bragg v. Lyon, 93 N. C. 151;  
Parks v. Siler, 76 N. C. 191.

<sup>2</sup> Prior v. Prior, 41 Hun. 613.

<sup>3</sup> Carson v. Hughes, 90 Mo. 173.

<sup>4</sup> Dewar v. Spence, 2 Whart. 211;  
30 Am. Dec. 241; Stannard v. Sperry,  
56 Conn. 541.

<sup>5</sup> Milligan v. Poole, 35 Ind. 64;  
Gregory v. Gregory, 69 N. C. 522.

<sup>6</sup> Humphrey v. Foster, 13 Gratt. 653.

<sup>7</sup> Hay v. Estell, 19 N. J. Eq. 133.

<sup>8</sup> Gordon v. Pearson, 1 Mass. 323;  
Hagar v. Wiswall, 10 Pick. 152.

<sup>9</sup> Hart v. Hawkins, 3 Bibb, 502; 6  
Am. Dec. 667.

<sup>10</sup> Nelson v. Clay, 7 J. J. Marsh. 138;  
23 Am. Dec. 387; Seale v. Soto, 35  
Cal. 102; Louville v. Menard, 1 Gilm.  
39; 41 Am. Dec. 161; Howey v. Goings,  
13 Ill. 95; 54 Am. Dec. 427; Buck v.  
Martin, 21 S. C. 590; 53 Am. Rep.  
702; Ford v. Knapp, 102 N. Y. 135;  
55 Am. Rep. 782; Collet v. Hender-  
son, 80 N. C. 337; Sarbach v. Newell,  
28 Kan. 642; Kinsey's Appeal, 113 Pa.  
St. 119; 57 Am. Rep. 444.

according to the value which they have imparted to the premises.<sup>1</sup> A tenant in common who makes improvements on lands, believing himself the sole owner, should, it seems, on partition, be allotted that portion of the land on which the improvements are, or be compensated therefor if such allotment cannot be made with due regard to the rights of his co-tenants.<sup>2</sup> And he should not be charged with the rent of them.<sup>3</sup> And a court of equity has no power to cause improvements to be made at the expense of the part owners, and against the will of one of them.<sup>4</sup> If one of the tenants in common has rightfully paid money for taxes, or to relieve the premises of a legal encumbrance resting on the entire interest of all, the others should be required to contribute their just proportion of the same.<sup>5</sup> A crop growing on the property of each co-tenant at the time of partition becomes thereafter the property of each in severalty.<sup>6</sup>

ILLUSTRATIONS. — There had been two partitions, and on final judgment the former was re-established, and it then appeared that the distributees under the second and rejected partition had alienated or sold a portion of the property. *Held*, that the distributees under the second partition should give an equivalent to the distributees under the first partition for the property so alienated or sold: *Dunman v. Hartwell*, 9 Tex. 495; 60 Am. Dec. 176. On a bill in equity for partition between two tenants in common, the estate of one being unencumbered, and that of the other being subject to various mortgages, covering the mortgagor's undivided interest in various parcels, *held*, that a decree of partition could not extend any mortgage to property not described and included in such mortgage. *Held further*, that the aggregate parcels covered by each single mortgage of the one tenant in common must, for purposes of partition, be considered as one separate estate: *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466.

<sup>1</sup> *Moore v. Williamson*, 10 Rich. Eq. 323; 73 Am. Dec. 93; *Patrick v. Marshall*, 2 Bibb, 41; 4 Am. Dec. 670.

<sup>2</sup> *Robinson v. McDonald*, 11 Tex. 385; 62 Am. Dec. 480; *Kurtz v. Hitter*, 56 Ill. 514.

<sup>3</sup> *Johnson v. Pelot*, 24 S. C. 254; 58 Am. Rep. 253.

<sup>4</sup> *Field v. Leiter*, 117 Ill. 413.

<sup>5</sup> *Illinois L. & L. Co. v. Bonner*, 75 Ill. 315.

<sup>6</sup> *Calhoun v. Curtis*, 4 Met. 134; 33 Am. Dec. 380.

### § 2738. Requisites and Effect of Judgment or Decree.

—A judgment or decree awarding partition must set forth the estate and interest of each party,<sup>1</sup> and point out the manner in which the partition shall be made.<sup>2</sup> And a simple order that "partition be awarded" is void.<sup>3</sup> The difference between a judgment and writ of partition at common law, and a partition by decree in chancery, as it affects the title, is, that the former operates by way of delivery of possession and estoppel, while in the latter the transfer of title can be effected only by the execution of conveyances between the parties which may be decreed by the court and compelled by attachment. In some of the states of the Union, the chancery courts have been authorized to make such conveyances by commissioners, or it has been enacted that the decree itself shall operate as such conveyance. But where, in a partition in equity, no such decree for conveyance has been made, and no such statute exists, the proceeding is incomplete; and while it may be effectual as a division and allotment of the property, no title passes, and that remains as it was before.<sup>4</sup> A decree of partition establishes the title and concludes the parties.<sup>5</sup> It is notice to purchasers of the land embraced in the shares.<sup>6</sup> It cannot be attacked collaterally;<sup>7</sup> but a decree of partition bad in part is bad as to the whole.<sup>8</sup> It imports a seisin of the lands by the parties.<sup>9</sup> But an original bill may be filed to impeach a judgment

<sup>1</sup> *Ledbetter v. Gash*, 8 Ired. 462; *Kilgour v. Crawford*, 51 Ill. 249; *Tibbs v. Allen*, 27 Ill. 119.

<sup>2</sup> *Harrell v. Harrell*, 12 La. Ann. 549; *Young v. Frost*, 1 Md. 377.

<sup>3</sup> *Greenup v. Sewell*, 18 Ill. 53. And see *Tibbs v. Allen*, 27 Ill. 119.

<sup>4</sup> *Gay v. Poupart*, 106 U. S. 679; *Nicely v. Boyles*, 4 Humph. 177; 40 Am. Dec. 638; *Wade v. Deray*, 50 Cal. 376; *Crane v. Kimmer*, 77 Ind. 215; *Harlan v. Langham*, 69 Pa. St. 235; *Bolling v. Seel*, 76 Va. 487; *Allen v. Gault*, 27 Pa. St. 473; 67 Am. Dec. 485.

<sup>5</sup> *Mills v. Witherington*, 2 Dev. & B.

434; *Colton v. Smith*, 11 Pick. 311; 22 Am. Dec. 275; *Jenkins v. Fahey*, 73 N. Y. 355; *Christy v. Spring Valley Co.*, 68 Cal. 73; *Bobb v. Graham*, 89 Mo. 200.

<sup>6</sup> *Richards v. Rote*, 68 Pa. St. 253; *Wilson v. Smith*, 22 Gratt. 493; *Marshall v. McLean*, 3 G. Greene, 363; *Word v. Dourthett*, 44 Tex. 365.

<sup>7</sup> *Wright v. Marsh*, 2 G. Greene, 94; *Merklein v. Trapnell*, 34 Pa. St. 42; 75 Am. Dec. 634; *Grassmeyer v. Beeson*, 18 Tex. 753; 70 Am. Dec. 309; *Stark v. Carroll*, 66 Tex. 393.

<sup>8</sup> *Corwithe v. Griffing*, 21 Barb. 9.

<sup>9</sup> *Greenleaf v. R. R. Co.*, 37 Hun, 435.

in partition for fraud.<sup>1</sup> A purchaser at a chancery sale acquires no title to the estate until confirmation of the sale. He is not liable in the *interim* to any loss or injury that may happen to the estate, and may, on proper grounds, refuse to execute the purchase. Before confirmation of the sale, biddings may be opened on an offer to advance the price in a sum deemed adequate, supported by other reasons in favor of the application. He becomes the owner of the estate after confirmation, is subject to any loss or injury it may sustain, and is bound to execute the terms of his contract. After confirmation of sale, his title will not be disturbed by opening biddings upon an offer of an advance in price, however large, except in case of fraud, accident, mistake, or the existence of some relation of trust between the parties.<sup>2</sup> He takes the land discharged from the lien of a judgment rendered after the order of sale, although the judgment creditor may have the proceeds of the sale appropriated upon due application to the court to the payment of the judgment.<sup>3</sup>

§ 2739. **Effect of Partition Deed.**—A deed of partition merely fixes the boundaries, and does not affect the title of the parties.<sup>4</sup> Where partition has been made by law, each partitioner becomes the warrantor of the other to the extent of the portion allotted to him, whether there be an express warranty in the deed or not.<sup>5</sup> And since a warrantor is barred or estopped to claim against his own warranty, no party to a partition can be permitted to assert an adverse title for the purpose of ousting another party from his portion allotted to him by the same

<sup>1</sup> *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491.

<sup>2</sup> *Houston v. Aycock*, 5 Sneed, 406; 73 Am. Dec. 131.

<sup>3</sup> *Cradlebaugh v. Pritchett*, 8 Ohio St. 646; 72 Am. Dec. 611.

<sup>4</sup> *Gouldie v. Water Works*, 7 Pa. St. 233.

<sup>5</sup> *Walker v. Hall*, 15 Ohio St. 362; 86 Am. Dec. 482; *Venable v. Beau-*

*champ*, 3 Dana, 321; 28 Am. Dec. 74. There is an implied warranty that in case of an eviction from any portion by paramount title, the party evicted shall have a right of contribution against the other for the loss sustained; and this remedy exists against alienees, though not in their favor: *Sawyers v. Cator*, 8 Humph. 256; 47 Am. Dec. 608.

partition.<sup>1</sup> There is an implied warranty of title in a partition between tenants in common who derive their estate by descent,<sup>2</sup> but not where the tenancy has been created by will.<sup>3</sup> Where co-tenants divide land by giving quit-claim deeds to each other of a portion thereof, if the title to the part conveyed to either afterwards fails, he must, in the absence of any fraud on the part of the other, bear the loss himself.<sup>4</sup> Tenants in common making mutual deeds of bargain, sale, and release, expressing nominal considerations, do not thereby acquire or lose any title, but obtain defined boundaries to the land they previously held in common.<sup>5</sup>

§ 2740. **Estates in Remainder.**—Estates in remainder and reversion are estates in expectancy; the former being created by the act of the parties, the latter by the act of the law.<sup>6</sup> A remainder is a remnant of an estate in lands or tenements expectant on a particular estate created together with the same at one time.<sup>7</sup> It is an estate limited to commence in possession at a future day, on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.<sup>8</sup> When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.<sup>9</sup> Thus where a man seised of lands in fee-simple grants them to A for twenty years, and after the determination of that term to B and his

<sup>1</sup> *Venable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec. 74.

<sup>2</sup> *Patterson v. Lanning*, 10 Watts, 135; 36 Am. Dec. 154; *Feather v. Strohoecker*, 3 Penr. & W. 505; 24 Am. Dec. 342. The common law implied no warranty when partition was made between joint tenants and tenants in common: *Rector v. Waugh*, 17 Mo. 13; 57 Am. Dec. 251.

<sup>3</sup> *Weiser v. Weiser*, 5 Watts, 279; 30 Am. Dec. 313.

<sup>4</sup> *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193.

<sup>5</sup> *Dawson v. Lawrence*, 13 Ohio, 543; 42 Am. Dec. 211.

<sup>6</sup> 2 Bla. Com. 163; 4 Kent's Com. 197.

<sup>7</sup> *Fearne on Remedies*, 11, 12; *Sayward v. Sayward*, 7 Me. 210; 22 Am. Dec. 191; 2 Washburn on Real Property, 222; 4 Kent's Com. 197; 2 Bla. Com. 163. In construing a devise in remainder to be a fee, it is of weight that there is no limitation over: *Huber's Appeal*, 80 Pa. St. 348.

<sup>8</sup> 1 N. Y. Rev. Stats., p. 723, sec. 10.

<sup>9</sup> Cal. Civ. Code, sec. 769.

heirs forever, A is tenant for twenty years, with remainder to B in fee. An estate for years is created or carved out of the fee, and given to A, and the residue or remainder of the estate is given to B.<sup>1</sup> There may be any number of remainders over, one after the other, as in the case of a grant to A for years, remainder to B for life, remainder to C in tail, remainder to D in fee.<sup>2</sup> Therefore, where the whole fee is first limited, there can be, strictly speaking, no remainder over.<sup>3</sup> A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.<sup>4</sup> The particular estate must be created by one and the same deed or instrument which creates the remainder;<sup>5</sup> and therefore an estate for life given by one deed will not support a remainder given by another.<sup>6</sup> But a particular estate may be created by a will, and the remainder by a codicil, and *vice versa*.<sup>7</sup> A remainder cannot be limited upon a conditional fee.<sup>8</sup> A remainder in personalty created by oral gift is inoperative and void.<sup>9</sup>

§ 2741. **Vested and Contingent Remainders.** — A remainder is either vested or contingent. It is vested when there is some person *in esse*, known and ascertained, who would have an immediate right to take and enjoy the estate upon the ceasing of the intermediate or precedent estate.<sup>10</sup> The person entitled to such an estate, i. e.,

<sup>1</sup> 2 Bla. Com. 163, 164.

<sup>2</sup> 4 Kent's Com. 198; Williams on Real Property, 208.

<sup>3</sup> Sayward v. Sayward, 7 Me. 210; 22 Am. Dec. 191; Jackson v. Delancey, 13 Johns. 536; 7 Am. Dec. 403.

<sup>4</sup> Cal. Civ. Code, sec. 772. See Sayward v. Sayward, 7 Me. 210; 22 Am. Dec. 191. So, also, by the statutes of Dakota, Georgia, and New York.

<sup>5</sup> 1 Greenl. Cruise, 750; Co. Lit. 49 a.

<sup>6</sup> Moore v. Parker, Ld. Raym. 37; 4 Mod. 316; 4 Kent's Com. 212.

<sup>7</sup> Hayes v. Foorde, 2 W. Black. 698; 1 Greenl. Cruise, 750, note.

<sup>8</sup> Deas v. Horry, 2 Hill Ch. 244.

<sup>9</sup> Ragsdale v. Norwood, 38 Ala. 21; 79 Am. Dec. 79.

<sup>10</sup> 4 Kent's Com. 202; Moore v. Littell, 41 N. Y. 72; Croxall v. Shererd, 5 Wall. 268. An estate is vested if there is a present right to future posses-

the remainderman, has an estate *in præsentī* to take effect *in futuro*. When the estate in remainder is vested, he is "seised" of it.<sup>1</sup> A remainder is contingent when it is limited to take effect on an event which may never happen, or which may not happen till after the preceding particular estate ends, or is limited to a person not *in esse* or not ascertained.<sup>2</sup> Contingent remainders are divided by Blackstone into two classes, viz., those limited to take effect to a dubious or uncertain person, and those limited to take effect upon a dubious and uncertain event.<sup>3</sup> An instance of the first class is where a remainder is limited to the first son of B, who has no son then born; this is a contingent remainder, for it is uncertain whether B will have a son, or not. So if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, because it is uncertain which of them will be the survivor. An instance of the second class is where land is given to A for life, and in case B survives him, then with remainder to B in fee. Here B is a person certain, but the remainder depends upon an uncertain event, viz., that he will survive A.<sup>4</sup> At common law, the remainder must vest either during the continuance of the particular estate, or at the very instant of its determination. Nevertheless an infant *en ventre sa mere* was held by the courts to be *in esse* within this rule.<sup>5</sup> In several of the states it is declared by statute that no con-

sion, though that right may be defeated by some future event, contingent or certain. An unpossessed estate is vested if it is certain to take effect in possession by continuing longer than the precedent estate. Any additional contingency destroys its vested character: *Manderson v. Lukens*, 23 Pa. St. 31; 62 Am. Dec. 313. An interest may be none the less vested because subject to be defeated by the happening of a contingency: *Lenz v. Prescott*, 144 Mass. 505.

<sup>1</sup> *Jenkins v. Fahey*, 73 N. Y. 363.

<sup>2</sup> *Williamson v. Field*, 2 Sand. Ch. 552; *Lealie v. Marshall*, 31 Barb. 564.

See 2 Bla. Com. 169; 4 Kent's Com. 206; *Brown v. Lawrence*, 3 Cush. 397; *Moore v. Lyons*, 25 Wend. 144; *Thomson v. Ludington*, 104 Mass. 193; *Price v. Hall*, L. R. 5. Eq. 399; *Smith v. Rice*, 130 Mass. 441. Courts lean toward construing remainders vested rather than contingent: *Dan v. Demorest*, 21 N. J. L. 525; *Manderson v. Lukens*, 23 Pa. St. 31; 62 Am. Dec. 312; *Chew's Appeal*, 37 Pa. St. 23; *Young v. Stoner*, 37 Pa. St. 106.

<sup>3</sup> 2 Bla. Com. 169.

<sup>4</sup> 2 Bla. Com. 170.

<sup>5</sup> 4 Kent's Com. 247.

tingent remainder shall be defeated by the determination of the precedent estate before the happening of the contingency, but it will take effect at any time after such termination.<sup>1</sup> At common law, a freehold contingent remainder cannot be limited on an estate for years, or any other particular estate less than freehold.<sup>2</sup> It is not, however, necessary that such preceding estate continue in the actual seisin of its rightful tenant; it is sufficient if there subsists a right of entry at the time the remainder should vest.<sup>3</sup> A contingent remainder for years does not require a preceding freehold to support it, since no seisin passes out of the grantor when he creates it.<sup>4</sup> And where the legal estate is in trustees, there is no necessity for any preceding particular estate of freehold to support contingent remainders, because the legal estate in the general trustees will be sufficient for that purpose.<sup>5</sup> In several of the states, by statute, a remainder, vested or contingent, may be created expectant on the determination of a term of years.<sup>6</sup> But the contingency must occur within the rule against perpetuities, or upon the termination of the term of years.<sup>7</sup> A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such that the remainder must vest in interest during the continuance or at the termination of lives in being at the creation of such remainder.<sup>8</sup> In several states, by statute, no estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate.<sup>9</sup> The event on which the remainder is limited must not operate

<sup>1</sup> California, Dakota, Minnesota, Michigan, New York, and Wisconsin.

<sup>2</sup> 2 Bla. Com. 171; 1 Greenl. Cruise, 745.

<sup>3</sup> 1 Greenl. Cruise, 749.

<sup>4</sup> Fearn on Remedies, 285; 1 Greenl. Cruise, 748. See Corbet v. Stone, T. Raym. 140.

<sup>5</sup> Hopkins v. Hopkins, 1 Ves. Sr. 268; 1 Atk. 581; Davies v. Bush, 1

McClel. & Y. 82; Gale v. Gale, 2 Cox, 136.

<sup>6</sup> Indiana, California, Dakota, Michigan, New York, Tennessee, and Wisconsin.

<sup>7</sup> California, Dakota, Minnesota, Michigan, New York, and Wisconsin.

<sup>8</sup> Cal. Civ. Code, sec. 778.

<sup>9</sup> California, New York, Michigan, Wisconsin, and Minnesota.

so as to abridge, defeat, or determine the particular estate.<sup>1</sup> But this rule is abolished in California and New York, where a remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.<sup>2</sup> The event upon which the contingency rests must be a legal one.<sup>3</sup> So at common law the event must be within a common possibility, such as the death of a person, or death without issue, or coverture, and the like;<sup>4</sup> and if it extend beyond such a possibility, a limitation thereon in the way of remainder would be void at common law.<sup>5</sup> Thus an estate made to A for life, remainder to the heirs of B, is good; for, by common possibility, B may die before A, and the remainder then immediately vests in his heir, who will be entitled to the land on the death of A.<sup>6</sup> But a remainder to the right heirs of B, when there is no such person as B *in esse*, would be void, as being too remote.<sup>7</sup>

§ 2742. **Remainders — How Defeated.**—At common law the remainder is defeated, when contingent, if the preceding estate is determined before the contingency happens.<sup>8</sup> But a person who has merely a trust estate cannot, by any mode of conveyance, destroy a contingent remainder expectant on his estate. The legal estate being in his trustees, there remains a right of entry in them which will support the remainders.<sup>9</sup> A contingent remainder to take effect on the death of a married woman who is tenant for life may be defeated by a feoff-

<sup>1</sup> 1 Greenl. Cruise, 737.

<sup>2</sup> Cal. Civ. Code, sec. 778; 1 N. Y. Rev. Stats. 725, sec. 27.

<sup>3</sup> Cholmley v. Case, 2 Rep. 51 b; Blodwell v. Edwards, Cro. Eliz. 509.

<sup>4</sup> Cholmley's Case, 2 Rep. 51 b; Mayor etc. v. Alford, Cro. Car. 576.

And see Cole v. Sewell, 2 H. L. Cas. 186; 4 Dru. & Walsh, 27; Dennett v. Dennett, 40 N. H. 503; Brudenell v. Litwies, 1 East, 452.

<sup>5</sup> Hay v. Coventry, 3 Term Rep. 86.

<sup>6</sup> Cholmley's Case, 2 Rep. 51 b; 2 Bla. Com. 169, 170.

<sup>7</sup> 2 Bla. Com. 170; 1 Greenl. Cruise, 734. See Jackson v. Brown, 13 Wend. 437.

<sup>8</sup> See *ante*. But this rule, as we have seen, has been allowed in some states by statute.

<sup>9</sup> 1 Greenl. Cruise, 777.

ment with livery of seisin by husband and wife.<sup>1</sup> A quitclaim deed from a contingent remainderman to the tenant in tail in possession enlarges the latter's estate to a fee-simple.<sup>2</sup> Where a tenant for life obtains, under proceedings in partition in which the remainder is not represented, the interests in fee of other owners in the estate, upon payment to them of their share of the valuation of the property, and thereupon receives a deed purporting to convey, in addition to the interests which he has acquired by purchase, the fee in which he holds the particular estate, the remainder is not determined, but goes upon his death to the persons entitled.<sup>3</sup>

§ 2743. **Rule in Shelley's Case.**—Where lands are granted or given by devise or otherwise to one for life, and afterwards to his heirs, or the heirs of his body, these latter words are to be taken as words of limitation, and not of purchase; and, consequently, the first taker has an estate in fee-simple or fee-tail, as the case may be. This is known as the rule in Shelley's Case,<sup>4</sup> and is the common law of many of the states.<sup>5</sup> But in Alabama, California, Dakota, Connecticut, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, New York, Tennessee, Virginia, West Virginia, Wisconsin, the rule in Shelley's Case has been abolished; and where an estate is limited, either by deed or will,<sup>6</sup> to a person, and remainder to his heirs, the heirs of his body,

<sup>1</sup> *McElwee v. Wheeler*, 10 S. C. Dec. 314; *Polk v. Faria*, 9 Yerg. 209; 30 Am. Dec. 400; *Smith v. McCormick*, 46 Ind. 135; *Butler v. Huestis*, 68 Ill. 594; 23 Am. Rep. 589; *Thomas v. Higgins*, 47 Md. 439; *Brooks v. Evetta*, 33 Tex. 732; *Hileman v. Bonslaugh*, 13 Pa. St. 344; 53 Am. Dec. 474. See note to *Polk v. Faria*, 30 Am. Dec. 415-417.

<sup>2</sup> *Smith v. Pendell*, 19 Conn. 107; 48 Am. Dec. 146.

<sup>3</sup> *Doe v. Dugan*, 8 Ohio, 87; 31 Am. Dec. 432.

<sup>4</sup> *Shelley's Case*, 1 Rep. 94, 104.

<sup>5</sup> *Dot v. Cunningham*, 1 Bay, 453; 1 Am. Dec. 624; *Findley v. Riddle*, 3 Binn. 139; 5 Am. Dec. 355; *Carr v. Porter*, 1 McCord Ch. 60; *Bishop v. Sellick*, 1 Day, 299; *Lyles v. Digges*, 6 Har. & J. 364; 14 Am. Dec. 281; *McFeely v. Moore*, 5 Ohio, 464; 24 Am.

<sup>6</sup> In Kansas, New Hampshire, New Jersey, Ohio, Oregon, and Rhode Island, the statute extends only to wills: See 1 *Stimson's American Statute Law*, sec. 1406.

or his issue, he takes a life estate only, and the person or persons who shall at his death be such heir or heirs take a contingent remainder by purchase.<sup>1</sup> Where it is apparent that the testator used the word "heirs" in the sense of "children," the rule in Shelley's case will not be permitted to defeat the intent.<sup>2</sup>

**§ 2744. Reversions.**—A reversion is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.<sup>3</sup> A reversion, in its legal significance, is applicable only to an estate which remains in the grantor and his heirs, and which is to take effect in possession upon the determination by its own limitation of an outstanding particular estate, an estate for life or years. A right to enter and resume the possession for the breach of a condition is not a reversion.<sup>4</sup> In a general devise of lands without limitation or restriction, the reversion will not pass under a general residuary clause, but descends to the heir.<sup>5</sup>

**§ 2745. Executory Devises—The Different Classes of.**—An executory devise is a limitation of a future estate or interest in land which, by the rules of law, would be void if by deed.<sup>6</sup> "Although the law will not recognize a remainder to take effect after the expiration of a fee, yet by way of indulgence to a man's last will and testament, conformably to the liberal intention of the statutes of wills and in favor of devisors, when otherwise the words of a will would be void, it permits, under certain restrictions, a fee or other estate to be submitted as an

<sup>1</sup> See 1 Stimson's American Statute Law, sec. 1406.      <sup>2</sup> Kennon v. McRoberts, 1 Wash. 466.

<sup>3</sup> Millett v. Ford, 109 Ind. 159.

<sup>4</sup> Cal. Civ. Code, sec. 768; 2 Bla. Com. 175.

<sup>5</sup> Phoenix v. Commissioners of Emi-

gration, 12 How. Pr. 1; 1 Abb. Pr. 466.

<sup>6</sup> Kennon v. McRoberts, 1 Wash. (Va.) 96; 1 Am. Dec. 429.

<sup>7</sup> Richardson v. Noyes, 2 Mass. 56; 3 Am. Dec. 33.

alternative in the place of a fee before limited, provided the substitution be to take place within a reasonable period of time. Devises of this nature are called executory because the estates thereby limited to take place have no present existence in consideration of law, but merely a capacity of existence and being executed, taking effect when the contingency upon which they are limited occurs."<sup>1</sup> Executory devises are of two kinds: 1. A substitution of one fee for another which fails, or in other words, where an estate is given by will to one, but upon some future event that estate is determined, and the estate thereupon is to go to another;<sup>2</sup> 2. Where the estate is limited to commence *in futuro*, contrary to the rules of the common law.<sup>3</sup> As an executory devise was allowed only to give effect to the intent of a testator, when such intent would otherwise have wholly failed as not being conformable to the rules of the common law in regard to the transmission of real property, it has been adopted as a fixed and settled rule that whenever a future interest in lands is so devised that, conformably to the rules of law, it can take effect as a remainder, it shall be construed to be a remainder, and not an executory devise.<sup>4</sup> To make an executory devise good to a second legatee, the gift to the first taker must be restricted to a life interest,

<sup>1</sup> Richardson v. Noyes, 2 Mass. 56; 3 Am. Dec. 33; Hawley v. Northampton, 8 Mass. 3; 5 Am. Dec. 66; Anderson v. Jackson, 16 Johns. 382; 8 Am. Dec. 330. A valid executory devise cannot, at common law, be limited after a fee, upon the contingency of the non-execution of an absolute power of disposition vested in the first taker, and such a limitation over is void. An absolute power of disposition annexed to a primary devise in fee is deemed conclusive of the existence in the devisee of an absolute estate: Van Horne v. Campbell, 100 N. Y. 287; 53 Am. Rep. 166.

<sup>2</sup> Richardson v. Noyes, 2 Mass. 56; 3 Am. Dec. 33; Nightingale v. Burrell, 15 Pick. 111. An estate in fee, lim-

ited by will, after an estate-tail, is a remainder, and not an executory devise: Hall v. Priest, 6 Gray, 18.

<sup>3</sup> Richardson v. Noyes, 2 Mass. 56; 3 Am. Dec. 33; Nightingale v. Burrell, 15 Pick. 111; Beard v. Rowan, 1 McLean, 135.

<sup>4</sup> Roach v. Martin, 1 Harr. (Del.) 548; 27 Am. Dec. 746; Purefoy v. Rogers, 2 Wms. Saund. 388; Doe v. Morgan, 3 Term Rep. 763; Wolfe v. Van Nostrand, 2 N. Y. 436; Johnson v. Valentine, 4 Sand. 36; Willis v. Beecher, 3 Wash. C. C. 369; Mander-son v. Lukens, 23 Pa. St. 31; 62 Am. Dec. 312; Hawley v. Northampton, 8 Mass. 3; 5 Am. Dec. 66; Nightingale v. Burrell, 15 Pick. 110.

or must be something less than an absolute gift. If an absolute right of property is given to the first taker, a limitation over is void.<sup>1</sup> Charging the estate with the payment of money in the hands of the devisees does not prevent its limitation over by way of executory devise.<sup>2</sup> An executory devise may be limited to take effect after several intervening estates, either vested or contingent, if the final contingency upon which it is to vest be not too remote; that is, it must happen, if at all, within a life or lives in being, and a competent time afterwards.<sup>3</sup> Executory devises, and all possibilities coupled with an interest, where the person to take is ascertained and *in esse*, may be assigned or devised, and are transmissible to the representatives of the devisee, if he dies before the contingency happens;<sup>4</sup> and when the contingency does happen, they vest in the representative of the real or personal estate, as the case may be.<sup>5</sup> But it is otherwise if the person who is to take is not ascertained.<sup>6</sup> An executory devise cannot be prevented or destroyed by any alteration in the estate, out of which or after which it is limited.<sup>7</sup> Where an executory devise is void for remoteness, or any other cause, the prior devise will be absolute.<sup>8</sup>

§ 2746. **Illustrations of.**—Thus the following are instances of valid executory devises, viz.: A devise to A and his heirs, provided that if he die within age, then the

<sup>1</sup> *Slaughter v. Slaughter*, 23 Ark. 356; 79 Am. Dec. 111.

<sup>2</sup> *Jackson v. Staats*, 11 Johns. 337; 6 Am. Dec. 376.

<sup>3</sup> *Lovett v. Lovett*, 10 Phila. 537.

<sup>4</sup> *Goodtitle v. Wood*, Willes, 211; *Jones v. Rowe*, 3 Term Rep. 88; *Goodright v. Searle*, 7 Wils. 29; *Goodtitle v. White*, 15 East, 174; *Purefoy v. Rogers*, 2 Wms. Saund. 388; *Hall v. Robinson*, 3 Jones Eq. 348; *Kean v. Hoffecker*, 2 Harr. (Del.) 103; 29 Am. Dec. 336.

<sup>5</sup> *Pinbury v. Elkin*, 1 P. Wms. 563; *Kean v. Hoffecker*, 2 Harr. (Del.) 103;

29 Am. Dec. 336. And see *Edwards v. Varick*, 5 Denio, 682; *Lewis v. Smith*, 1 Ired. 145.

<sup>6</sup> *Kean v. Hoffecker*, 2 Harr. (Del.) 103; 29 Am. Dec. 336.

<sup>7</sup> *Holmes v. Williams*, 1 Root, 335; 1 Am. Dec. 49; *Pells v. Brown*, Cro. Jac. 590; *Bullock v. Bennett*, 24 L. J., N. S., 397; 31 Eng. L. & Eq. 463; *Boyd v. Bingham*, 4 Pa. St. 102; *Jackson v. Robins*, 16 Johns. 537; *Proprietors etc. v. Grant*, 3 Gray, 150; *Downing v. Wherin*, 19 N. H. 9; 49 Am. Dec. 139.

<sup>8</sup> *Drummond v. Drummond*, 26 N. J. Eq. 234.

land should remain to B and his heirs;<sup>1</sup> where A devised lands to B in fee, to commence and take effect at the end of six months after the testator's death;<sup>2</sup> a devise to an infant, when he should be born;<sup>3</sup> a devise of a remainder after a fee;<sup>4</sup> a devise of a remainder without a particular estate to precede and support it;<sup>5</sup> the limiting over of a term of years after the expiration of a life estate in the same;<sup>6</sup> a devise to A "and his family, if he should have one";<sup>7</sup> a devise to a wife "during her natural life, and at her decease to be left to" the testator's son.<sup>8</sup>

§ 2747. **Must not Create a Perpetuity.**—A settled rule in regard to an executory devise to prevent this mode of devising from being resorted to as a means of creating a perpetuity is that it must vest within the compass of a life or lives in being at the time the devise takes effect, that is, at the death of the testator, and twenty-one years and the fraction of a year after; otherwise, such executory devise is wholly void.<sup>9</sup> And in the application of this rule, regard is had, not to any event which has taken place after the death of the testator, but the question is, whether by possibility the estate is so limited upon a contingency that it may remain more than the allowed period before the contingent interest will become vested, and if it can, it is not a good executory devise.<sup>10</sup> But when a limitation is made to take effect on the happening of either of two events, one of which is too remote, but the other is not, it will be allowed to take effect on the happening of the latter event.<sup>11</sup> An executory devise

<sup>1</sup> *Nightingale v. Burrell*, 15 Pick. 110.

<sup>2</sup> *Clarke v. Smith*, 1 Lutw. 798.

<sup>3</sup> *Greenl. Cruise*, 468.

<sup>4</sup> *Nightingale v. Burrell*, 15 Pick. 110.

<sup>5</sup> 2 Bla. Com. 173.

<sup>6</sup> 2 Bla. Com. 173; 4 Kent's Com. 270.

<sup>7</sup> *Flournoy v. Johnson*, 7 B. Mon. 693.

<sup>8</sup> *Farley v. Gilmer*, 12 Ala. 141; 46 Am. Dec. 249.

<sup>9</sup> *Nightingale v. Burrell*, 15 Pick. 110.

<sup>10</sup> *Nightingale v. Burrell*, 15 Pick. 110.

<sup>11</sup> *Longhead v. Phelps*, 2 W. Black. 704; *Minter v. Wraith*, 13 Sim. 62; *Evers v. Challis*, 7 H. L. Cas. 555; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Fowler v. Depan*, 26 Barb. 238.

to take effect on indefinite failure of issue is void, because the contingency on which it is to take place is too remote.<sup>1</sup> But an executory devise to take effect at the death of the devisee, if there is no issue of his living at that time, is a good executory devise.<sup>2</sup> So a devise over, if the first taker "should die without issue at his decease," is good as an executory devise, as it does not import an indefinite failure of issue.<sup>3</sup> A limitation by way of executory devise, which may possibly not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years, or in case of a child *en ventre sa mere*, twenty-one years and nine months afterward, is void as being too remote, and tending to create a perpetuity.<sup>4</sup> A contingent limitation over upon the death of all the testator's three children under twenty-two, without issue, where the estate is first limited to those children, the shares of any who should die without issue before attaining twenty-two to go to the survivor or survivors, is too remote, and therefore void.<sup>5</sup> A contingent limitation made to depend upon the dying of a person unmarried, and without children, is not too remote under the Virginia statute, and cannot be regarded as a contingent limitation made to depend on an indefinite failure of issue or children, but must be regarded as confined to the time of the death of the person, or the statutory period of ten months thereafter.<sup>6</sup> A devise which is subject to a conditional limitation void for remoteness vests in the first taker an absolute title.<sup>7</sup> When the gift is to A and his issue, or to A and the heirs of his body, and the limitation over is upon an indefinite failure, the estate vests absolutely in the first taker. But when the limitation over is upon a

<sup>1</sup> Bell v. Scammon, 15 N. H. 381; 41 Am. Dec. 706.

<sup>2</sup> Downing v. Wherrin, 19 N. H. 9; 49 Am. Dec. 139.

<sup>3</sup> Heard v. Horton, 1 Denio, 165; 43 Am. Dec. 659.

<sup>4</sup> Brattle Square Church v. Grant, 3 Gray, 142; 63 Am. Dec. 725.

<sup>5</sup> Wood v. Wood, 5 Paige, 596; 28 Am. Dec. 451.

<sup>6</sup> Schultz v. Schultz, 10 Gratt. 358; 60 Am. Dec. 335.

<sup>7</sup> Brattle Square Church v. Grant, 3 Gray, 142; 63 Am. Dec. 725.

definite, not an indefinite, failure of issue, the first legatee takes an estate for life only, and the limitation over is good.<sup>1</sup>

§ 2748. **Powers—Defined and Classified.**—A power is an “authority enabling a person to dispose, through the medium of the statute of uses, of an interest vested either in himself or in another person.”<sup>2</sup> A power, technically speaking, is not an estate, but is a mere authority.<sup>3</sup> The one who confers the power is called the donor; the one who executes it, the appointor or donee; and the one in whose favor it is executed, the appointee.<sup>4</sup> Powers are either general or particular; the former are such as are to be exercised in favor of any one whom the appointor may choose; the latter, those which are to be exercised in favor only of particular persons or objects.<sup>5</sup> A power general in terms will not be cut down to a particular power, unless an intent to do so is apparent from the instrument conferring the power.<sup>6</sup> A power is deemed general for the purpose of subjecting the estate, after appointment, to the claims of the appointor’s creditors, whenever the donee may appoint to whom he pleases, although he can appoint only by deed or will to take effect at his death, and cannot appoint to any use in his lifetime.<sup>7</sup> Powers are also divided into those which relate to the land, and those which are simply collateral to it. The former are again subdivided into powers appendant or appurtenant, and powers in gross. A power appendant or appurtenant is one which the donee of the power is authorized to execute out of the estate limited

<sup>1</sup> *Cleveland v. Havens*, 13 N. J. Eq. 101; 78 Am. Dec. 90.

<sup>2</sup> 4 Kent’s Com. 316; Sugden on Powers, 82; 2 Washburn on Real Property, 312.

<sup>3</sup> *Burleigh v. Clough*, 52 N. H. 267; 13 Am. Rep. 23.

<sup>4</sup> 4 Kent’s Com. 316.

<sup>5</sup> *Thompson v. Garwood*, 3 Whart. 287; 31 Am. Dec. 502; *Bergen v. Ben-*

*nett*, 1 Caines Cas. 1; 2 Am. Dec. 231. A power authorizing an alienation in fee to any one is a general power: *Syracuse Savings Bank v. Porter*, 36 Hun, 168.

<sup>6</sup> *Thompson v. Garwood*, 3 Whart. 287; 31 Am. Dec. 502.

<sup>7</sup> *Johnson v. Cushing*, 15 N. H. 298; 41 Am. Dec. 694.

to him; as, for instance, where a tenant for life has a power of making leases in possession. A power in gross is one which does not attach on the interest of the party, but which enables him to create an interest independent of his own.<sup>1</sup> Where an express estate for life is given by will, and a power of disposition is afterwards conferred, the devisee takes but a life estate, with a power of disposition, and if no disposition is made, the reversion will go to the heirs of the deviser. But if there is no previous devise of a life estate, but a simple power of disposition is given, then the devisee takes an absolute estate. And this rule applies to both real and personal estate.<sup>2</sup> Where a person takes by execution of a power, he takes under the authority of the power equally as if the power and its execution had been incorporated in one instrument.<sup>3</sup> A power of disposal by will does not enlarge an interest in the donee of the power beyond what is expressly limited.<sup>4</sup> Property appointed under a general power forms assets in equity for the payment of the appointor's debts, in preference to all claims upon him by volunteers, either as legatees or appointees.<sup>5</sup>

**§ 2749. How Created.**—Powers may be created by deed or by will, by grant or by reservation.<sup>6</sup> A general power to sell, lease, etc., given to stranger in a deed to grantor's children is void, and a sale under such a power is of no effect.<sup>7</sup> In construing a power, the intention of the parties is to govern, but that intention is to be gathered from the instrument itself, though a reference may sometimes be had to the circumstances under which it was given.<sup>8</sup> But a particular intent will be made to

<sup>1</sup> 2 Greenl. Cruise, 475; 4 Kent's Com. 316; 2 Washburn on Real Property, 305.

<sup>2</sup> Ruby v. Barnett, 12 Mo. 3; 49 Am. Dec. 113.

<sup>3</sup> Doolittle v. Lewis, 7 Johns. Ch. 45; 11 Am. Dec. 390.

<sup>4</sup> Ward v. Amory, 1 Curt. 419.

<sup>5</sup> Leigh v. Smith, 3 Ired. Eq. 442; 42 Am. Dec. 182.

<sup>6</sup> 4 Kent's Com. 319.

<sup>7</sup> Smith v. Smith, 1 Jones, 135; 59 Am. Dec. 581.

<sup>8</sup> Capal v. McMillan, 8 Port. 197.

yield to the general intent, where they are inconsistent with each other.<sup>1</sup> The whole scope and tenor of a conveyance in trust implying a power to sell, the power will be deemed to exist, irrespective of any particular form of words used or omitted.<sup>2</sup>

§ 2750. **Who may Execute Powers.**—Every person having the capacity to dispose of an estate actually vested in himself may execute a power over land.<sup>3</sup> An infant may execute a power simply collateral,<sup>4</sup> and a married woman may execute any kind of power<sup>5</sup> without her husband's consent, and whether it was given to her before or after marriage.<sup>6</sup> Where two or more persons are named as donees, all must ordinarily join in the execution of the power, unless the contrary is expressed.<sup>7</sup> When the power given to several persons is a mere naked power to sell, not coupled with an interest, it must be executed by all,<sup>8</sup> and does not survive;<sup>9</sup> but when the power is coupled with an interest, it may be executed by the survivor.<sup>10</sup> The power, when coupled with a trust, cannot be delegated, unless so authorized by its terms.<sup>11</sup>

§ 2751. **Powers, how Executed — Form.**—Where the mode of executing a power is not prescribed, it may be done by deed, by will, or by writing not under seal.<sup>12</sup> Where, on the other hand, the form of executing the power is prescribed by the donor, that mode must be strictly followed.<sup>13</sup> Conditions annexed to the exercise of

<sup>1</sup> *Pearce v. Van Lear*, 5 Md. 85; *Franklin v. Osgood*, 14 Johns. 553; 2 *Bartlett v. Sutherland*, 24 Miss. 395; *Johns. Ch. 19*; *Tainter v. Clark*, 13 *Wilson v. Troup*, 7 Johns. Ch. 25. *Met. 225*; *Brassey v. Chalmers*, 16 *Beav. 231*.

<sup>2</sup> *Cherry v. Greene*, 115 Ill. 591.

<sup>3</sup> 4 *Kent's Com.* 324.

<sup>4</sup> 4 *Kent's Com.* 324.

<sup>5</sup> 4 *Kent's Com.* 324.

<sup>6</sup> 2 *Greenl. Cruise*, 485; 4 *Kent's Com.* 324.

<sup>7</sup> *Co. Lit.* 112 b; 2 *Washburn on Real Property*, 322.

<sup>8</sup> *Atter* where one has renounced:

*Ex parte Bailey*, 15 R. I. 60.

<sup>9</sup> *Peter v. Beverly*, 10 Pet. 564;

<sup>10</sup> *Franklin v. Osgood*, 14 Johns. 553; *Peter v. Beverly*, 10 Pet. 564.

<sup>11</sup> *Tainter v. Clark*, 13 Met. 226; *Berger v. Duff*, 4 Johns. Ch. 368; *Hood v. Hoden*, 82 Va. 588. See *ante*, Division I., Principal and Agent—Delegation of Authority.

<sup>12</sup> 4 *Kent's Com.* 320.

<sup>13</sup> *Morrison v. McMillan*, 4 Litt. 210; 14 Am. Dec. 115.

a power must be strictly complied with.<sup>1</sup> A power to sell, either in a will or a deed, to be exercised on the happening of a particular event, cannot be lawfully exercised until that event happens.<sup>2</sup> Those who claim under a contingent power of sale in a will must show that the power was well executed, and that the contingency happened; and it is for the jury to decide whether it happened or not.<sup>3</sup> A power to appoint by deed cannot be executed by will, nor *vice versa*.<sup>4</sup> If a power is required to be exercised by a writing, "under hand and seal, attested by witnesses," it is sufficient that witnesses actually attested it, though not stated to be so done in an attestation clause.<sup>5</sup> The power of disposition after a life estate may be executed by deed as well as by will. In such case, whether the deed is an execution of the power, or merely a conveyance of the life interest, is a question of intention.<sup>6</sup> A mortgage is an execution of a power to appoint by deed or will, or by any writing in the nature of a will or other instrument under hand and seal executed in the presence of two credible witnesses.<sup>7</sup> A power of appointment is not executed unless some steps are taken, or some acts done with this sole and definite intention, which must be such as are properly referable to the power.<sup>8</sup> The old English rule, which regarded the appointment as a good execution of the power only in three cases,—viz.: 1. Where there was a reference to the power in the will of the donee; or 2. Where there was a reference to the property covered by the power in the will of the donee; or 3. Where the instrument would be inoperative without the aid of the power,—is rejected in this

<sup>1</sup> *Bakewell v. Ogden*, 2 Bush, 265; *Cleveland v. Boerum*, 27 Barb. 252.

<sup>2</sup> *Ervine's Appeal*, 16 Pa. St. 256; 55 Am. Dec. 499.

<sup>3</sup> *Stevens v. Winship*, 1 Pick. 318; 11 Am. Dec. 179.

<sup>4</sup> *Darlington v. Pulteny*, Cowp. 260; *Bentham v. Smith*, Cheves Eq. 33; 34 Am. Dec. 599.

<sup>5</sup> *Vincent v. Bishop of Sodor*, 5 Ex. 683.

<sup>6</sup> *Benesch v. Clark*, 49 Md. 497.

<sup>7</sup> *Lancaster v. Dolan*, 1 Rawle, 231; 18 Am. Dec. 625; *Steifel v. Clark*, 9 Bart. 466.

<sup>8</sup> *Mitchell v. Denson*, 29 Ala. 327; 65 Am. Dec. 403.

county as too narrow,<sup>1</sup> where it is manifestly the intention of the party to execute the power.<sup>2</sup> Where property has been devised by will to one for life, with power to dispose of by will, or otherwise, before his death, the only thing to be regarded, in determining whether the disposal made is a sufficient execution of the power conferred, is the question of the intention of the donee of the power as shown by the language of the will or by evidence *aliunde*.<sup>3</sup> The intent to appoint, although not expressly declared, may be determined by the gifts and directions made, and if their purpose be to execute the power, the instrument must be regarded as an execution.<sup>4</sup> A power may be executed, though not referred to by the will disposing of the property, where there is nothing for the will to act on except in execution of the power.<sup>5</sup> A power to dispose of the proceeds of a sale of land may be executed by disposing of the land itself.<sup>6</sup> But where the maker has an estate which will pass without executing the power, and the instrument is silent on that point, the law will presume that he intended to convey such estate, and no more.<sup>7</sup> Thus where A's will makes no reference to a power or to the subject of the power, and it appears that A had other property, and his will will be operative without the aid of the power, it will not be regarded as an execution of the power.<sup>8</sup> The execution of a power will not be presumed from the fact that the bequests in a will exceed the testator's estate.<sup>9</sup> A power to convey lands in fee is well executed by a warranty deed upon full consideration, although it does not refer to the will in which the power is

<sup>1</sup> *Funk v. Eggleston*, 92 Ill. 515; 34 Am. Rep. 136; *Hay v. Mayer*, 8 Watts, 203; 34 Am. Dec. 453; *Hood v. Hoden*, 82 Va. 588.

<sup>2</sup> *Pease v. Iron Co.*, 49 Mo. 124; *Drusadow v. Wilde*, 63 Pa. St. 170; *Campbell v. Johnson*, 65 Mo. 439.

<sup>3</sup> *Funk v. Eggleston*, 92 Ill. 515; 34 Am. Rep. 136.

<sup>4</sup> *Blake v. Hawkins*, 98 U. S. 315.

<sup>5</sup> *Cathey v. Cathey*, 9 Humph. 470; 49 Am. Dec. 715; *Thomas v. Snyder*, 43 Hun, 14.

<sup>6</sup> *Boyd v. Satterwhite*, 10 S. C. 45.

<sup>7</sup> *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Hollister v. Shaw*, 46 Conn. 240.

<sup>8</sup> *Patterson v. Wilson*, 64 Md. 193.

<sup>9</sup> *Bingham's Appeal*, 64 Pa. St. 345.

contained.<sup>1</sup> Where a power is created by deed empowering a husband to appoint to whom the land shall be conveyed, and in case of his death before his wife, empowering her to do it, there must be an actual appointment in the mode indicated, and not merely an intention in the husband in order to defeat the wife's right of appointment.<sup>2</sup>

ILLUSTRATIONS.—A deed declared that the power of appointment contained in it should be executed by writing, under hand and seal, in the nature of a last will and testament, and duly attested by two or more witnesses, and it was in writing, and in the presence of two witnesses, but not under seal. *Held*, not a good execution of the power: *In re Pepper*, 1 Pars. Sel. Cas. 436. A will giving a life estate to the wife contained these words: "I further will and request that at her death she makes such a disposition of it as she thinks best." *Held*, that such power could not be executed by a conveyance by deed, but only by an appointment by will: *Porter v. Thomas*, 23 Ga. 467. A conveyed in trust all her property, real and personal, for her own use during her life, and to such uses afterwards as she should appoint by will. Her will made no reference in terms to the trust or power, but it was apparent that she intended to devise the trust property. *Held*, that the will should be deemed an execution of the power, both as to the real and personal estate: *Hutton v. Benkard*, 92 N. Y. 295. The trustee, having a power to sell lands with the assent in writing of the first *cestui que trust* for life, but no interest whatever in the property, joins with her and her children, subsequent *cestui que trust* for life, in a conveyance of the property, on valuable consideration, with covenants of warranty; this is a good execution of the power, although the conveyance does not mention or refer to it: *Gindrat v. Gas Co.*, 82 Ala. 596; 60 Am. Rep. 769. A life tenant under a will had power thereby to convey a fee-simple. *Held*, that her deed conveying a fee would be construed to be in the exercise of that power: *Baird v. Boucher*, 60 Miss. 326. A deed purported to convey a fee, which the grantor could only convey by virtue of a certain power in her husband's will, and containing a warranty of the title conveyed. *Held*, to show an intent of the grantor to execute the power conferred by the will: *Yates v. Clark*, 56 Miss. 212. A gold watch and other articles had come to a testatrix under the will of her husband, and she had no power to bequeath them except in execution of the power given her by

<sup>1</sup> *South v. South*, 91 Ind. 221; 46 Am. Rep. 591.

<sup>2</sup> *Haslen v. Kean*, N. C. Term Rep. 279; 7 Am. Dec. 719.

that will. *Held*, that her bequeathing thereof manifested an intention to execute that power: *Funk v. Eggleston*, 92 Ill. 515; 34 Am. Rep. 136. A testator devised the whole of his estate to his wife during her life, and afterwards to be equally divided between whoever his wife should think proper to make her heir or heirs, and the testator's brother. The wife died without making any appointment. It was *held* that she took a fee-simple in the moiety which descended after her death to her heir at law: *Shermer v. Shermer*, 1 Wash. (Va.) 266; 1 Am. Dec. 461.

§ 2752. **Powers, how Construed—What is a Good Execution.**—The intention of the person creating it is the test, and governs the construction to be given it.<sup>1</sup> Where a party has power to appoint a fee, if there are no words of positive restriction, a less estate may be appointed.<sup>2</sup> A power to M. to appoint "among" certain persons, and "in such proportions as M. may appoint," authorizes M. to exclude some of such persons.<sup>3</sup> A power to borrow money and grant a mortgage to secure it, in order to pay the debts for which the trust estate is liable, authorizes a mortgage to such creditors themselves.<sup>4</sup> A power to dispose of property embraces all powers necessary to effect the disposition.<sup>5</sup> A power of appointment to children does not embrace grandchildren.<sup>6</sup> A power to a trustee "to invest and change the investment of said moiety, and for that purpose to sell, convey, and dispose thereof, or any part thereof, as often as he may think proper," gives no power to mortgage.<sup>7</sup> A power "to grant and convey the said premises, . . . and for such estate and estates and interest" as the grantor might by will direct, includes the right to create a trust and to direct a sale of the premises.<sup>8</sup> A power "to sell and convey" does not

<sup>1</sup> *Pomeroy v. Partington*, 3 Term Rep. 665; *Jackson v. Veeder*, 11 Johns. 169.

<sup>2</sup> *Butler v. Huestis*, 68 Ill. 594; 18 Am. Rep. 589.

<sup>3</sup> *Ingraham v. Meade*, 3 Wall. Jr. 32.

<sup>4</sup> *Magraw v. Pennock*, 2 Grant Cas. 69.

<sup>5</sup> *Kinnan v. Guernsey*, 64 How. Fr. 253.

<sup>6</sup> *Cruse v. McKee*, 2 Head, 1; 73 Am. Dec. 186.

<sup>7</sup> *Wilson v. Maryland Life Ins. Co.*, 60 Md. 150.

<sup>8</sup> *Harker v. Reilly*, 4 Del. Ch. 72.

confer a power to mortgage.<sup>1</sup> And a power to "sell" for a specific sum means a cash sale, and not one for approved notes.<sup>2</sup>

A power to sell land can only be exercised in the manner and for the precise purpose declared and intended by the donor; when the purpose becomes wholly unattainable, the power ceases; and this is so, although the purpose is defeated by the voluntary act of the person for whose benefit the power was created.<sup>3</sup> Under a power to sell land without warranty, a sale with warranty is void.<sup>4</sup> A power to sell a mill and other improvements authorizes a sale of the water rights attached to the mill.<sup>5</sup> A power to "sell" or to "sell and dispose" of an estate gives no right to mortgage it;<sup>6</sup> nor does a power given to sell the trust property and reinvest on the same limitations and trusts.<sup>7</sup> But authority to manage and control the estate in his discretion, and "sell, exchange, and dispose" of it, includes the power to mortgage.<sup>8</sup> A "power to sell and exchange" gives a power to partition.<sup>9</sup> A power to "sell" does not give power to exchange.<sup>10</sup> A power to "sell" includes a power to convey.<sup>11</sup> A power in a creditor to sell his debtor's land in order to obtain funds wherewith to pay the indebtedness due to himself must be exercised by sale of the land to third persons.<sup>12</sup> A general power to appoint a fund among children in such proportions as shall be thought fit enables the gift

<sup>1</sup> *Bloomer v. Waldron*, 3 Hill, 366; *Hoyt v. Jaques*, 129 Mass. 286; *Stokes v. Payne*, 58 Miss. 614; 38 Am. Rep. 340; *Price v. Courtney*, 87 Mo. 387; 56 Am. Rep. 453. See *ante*, Division L, Principal and Agent.

<sup>2</sup> *Ives v. Davenport*, 3 Hill, 373.

<sup>3</sup> *Hetzel v. Barber*, 69 N. Y. 1.

<sup>4</sup> *Dellet v. Whitner*, 1 Cheves, 213.

<sup>5</sup> *McDonald v. Bear River etc. Co.*, 13 Cal. 220.

<sup>6</sup> *Stokes v. Payne*, 58 Miss. 614; 38 Am. Rep. 340; *Hirschman v. Broshars*, 79 Ky. 258. Under a power to

sell and reinvest, a mortgage may not be given to secure borrowed money: *Butler v. Gazzam*, 81 Ala. 491.

<sup>7</sup> *Patapsco Guano Co. v. Morrison*, 2 Wood, 395.

<sup>8</sup> *Faulk v. Dashiell*, 62 Tex. 642; 50 Am. Rep. 542.

<sup>9</sup> *Phelps v. Harris*, 101 U. S. 370.

<sup>10</sup> *City of Cleveland v. State Bank*, 16 Ohio St. 268; *Taylor v. Galloway*, 1 Ohio, 232; 13 Am. Dec. 605.

<sup>11</sup> *Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715.

<sup>12</sup> *Engles v. Engles*, 4 Ark. 286; 38 Am. Dec. 37.

of particular interests, and the apportionment of such interests at discretion; as, for instance, an interest for life may be given to one child in a particular share, and the capital of the same share may be limited to another child, or a share may even be limited to a child upon a contingency. The distribution need not be made in gross sums.<sup>1</sup> The presumption that a power of appointment has been legally exercised exists in favor of innocent purchasers or meritorious claimants.<sup>2</sup> A power to sell property to pay the debts of the trustor given in a deed of trust is an absolute power as to purchasers, and they are not obliged to show that there were debts existing at the time of the sale, in order to acquire a good title.<sup>3</sup> Appointments of a wife in conformity with the power conferred upon her are not void because others invalid are included in her will. Those in accordance with the power will be sustained, others will be rejected.<sup>4</sup>

**ILLUSTRATIONS.** — A testator gave land to his wife for her life for her maintenance, "but not to sell the same, the said real estate to go to A at her death, if any remains." *Held*, that she had no power of disposition: *Birmingham v. Lesan*, 76 Me. 482. A's will, appointing his wife executrix, provided that "all the rest of my real estate . . . be held and controlled by my wife during her lifetime; . . . it is my will that my wife shall have full and entire control of all my effects, of whatever kind." *Held*, that the executrix had no power of sale: *Rakestraw v. Rakestraw*, 70 Ga. 806. A will devised property to a certain trustee and his personal representatives, to hold for the use of the testator's son during his life, and for the use of his children after his death, with power to the trustee, but not to his representatives, to lease. *Held*, that a lease for ninety-nine years, renewable forever, was not void: *Collins v. Foley*, 63 Md. 158; 52 Am. Rep. 505. A will directed the executors to operate certain factories, which constituted a part of the residuum devised to them in trust during the limitation, or so long within that period as in their discretion could be done without injury to the interests of the estate. *Held*, that this did not imply a power to

<sup>1</sup> *Beardsley v. Hotchkiss*, 96 N. Y. 201; 30 Hun, 605.

<sup>2</sup> *Marshall v. Stephens*, 8 Humph. 159; 47 Am. Dec. 601.

<sup>3</sup> *Williams v. Otey*, 8 Humph. 563; 47 Am. Dec. 633.

<sup>4</sup> *Cruse v. McKee*, 2 Head, 1; 73 Am. Dec. 186.

sell before the expiration of the period limited, but only gave a discretion to suspend business: *Downing v. Marshall*, 1 Abb. App. 525. A testator directed his estate to be sold by the executors at such time, in such manner, and on such conditions as, in their judgment, should be best for those interested, if an equal, valid, and satisfactory division could not otherwise be made. *Held*, that the judgment of the executors, if made in good faith, was conclusive as to the necessity for a sale: *Bunner v. Storm*, 1 Sand. 357.

§ 2753. **Appointments Set Aside for Fraud.** — “No point is better established than that a person having a power of appointment must exercise it *bona fide* for the end designed, otherwise it is corrupt and void.”<sup>1</sup> While equity will not control the exercise of a real discretion given to the donee, yet it will set aside a fraudulent appointment made under color of such discretion.<sup>2</sup> Where a parent, having a power of appointment among his children, appoints to one or more of them, to the exclusion of the others, upon a bargain for his own advantage, equity will relieve against the appointment, on the ground of fraud, as where there is a secret understanding that the child should assign a part of the fund to a stranger,<sup>3</sup> or the father’s debtors.<sup>4</sup> So if a parent, having a power to raise portions for children, and even to fix the time when they are to be raised, appoints to a child during infancy, and while not in want of a portion, especially if the death of the child at the time of the appointment is expected, he will not be allowed, on the child’s death, to derive any benefit from the appointment as the personal representative of that child.<sup>5</sup> So a conveyance to a child, that he

<sup>1</sup> *Couts v. Ackworth*, L. R. 8 Eq. 558; *Cruse v. McKee*, 2 Head. 1; 73 Am. Dec. 186; *Pepper’s Appeal*, 120 Pa. St. 235; 6 Am. St. Rep. 702.

<sup>2</sup> *Pomeroy’s Eq. Jur.*, sec. 920; *Lipincott v. Ridgway*, 10 N. J. Eq. 164; *Buddington v. Munson*, 33 Conn. 481; *Williams’s Appeal*, 73 Pa. St. 249; *Graef v. De Turk*, 44 Pa. St. 527; *Jackson v. Veeder*, 11 Johns. 169; *Melvin v. Melvin*, 6 Md. 541; *Haynesworth v. Cox*, Harp. Eq. 117; *Cloud v. Mar-*

*tin*, 2 Dev. & B. 274; *Fronty v. Fronty*, 1 Bail. Eq. 517; *Cruse v. McKee*, 2 Head. 1; 73 Am. Dec. 186.

<sup>3</sup> *Daubeny v. Cockburn*, 1 Mer. 626.

<sup>4</sup> *Farmer v. Martin*, 2 Sim. 502; *Carver v. Richard*, 1 De Gex, F. & J. 548; *Salmon v. Gibbs*, 3 De Gex & S. 343.

<sup>5</sup> *Hinchinbroke v. Seymour*, 1 Brown Ch. 395; *Wellesly v. Mornington*, 2 Kay & J. 143; *Roach v. Trood*, L. R. 3 Ch. Div. 429.

may have sufficient property to become bail for the father, the appointor, and to become security for the father's debts, with the understanding that the land is to be reconveyed, is not such an appointment in good faith as will defeat the remainders.<sup>1</sup> But a power of disposition of property in the testator's widow, wholly unlimited as to beneficiaries, may be exercised in favor of her second husband.<sup>2</sup> That the exercise of a limited power given by will in respect to one half of the property was illusory or collusive would not make void the exercise of an unlimited power as to the other half, it not appearing that the latter power would have been differently exercised if the former had not been perverted.<sup>3</sup>

**§ 2754. Defective Execution of Powers — Relief.** — While the non-execution of a power will not be aided in equity,<sup>4</sup> the defective execution of a power will be,<sup>5</sup> and equity will enjoin one from taking an inequitable advantage of the defect.<sup>6</sup> Where there is a defective execution of a power, it makes no difference, so far as regards equitable relief, whether the error came by a mistake of law or a mistake of fact.<sup>7</sup> Equity cannot relieve against defects in the execution of a statutory power by dispensing with or supplying any of the formalities required for the legal execution thereof,<sup>8</sup> as against the omission of the word "inheritance," essential, under the statute, to a married woman's relinquishment of her title to land.<sup>9</sup>

<sup>1</sup> *Bostick v. Winton*, 1 Sneed, 524; *Denson*, 29 Ala. 327; 65 Am. Dec. Cruse v. McKee, 2 Head. 1; 73 Am. 403.

<sup>2</sup> *New v. Potts*, 55 Ga. 420.

<sup>3</sup> *New v. Potts*, 55 Ga. 420.

<sup>4</sup> *Arundell v. Philpott*, 2 Vern. 69; *Bull v. Vardy*, 1 Ves. Jr. 272; *Pomero's Eq. Jur.*, secs. 590, 834. Equity will not aid an execution of power of appointment held by one who intended to execute it, but failed to do so because erroneously advised by her attorney that it was unnecessary to exercise it. This is not a defective execution of the power: *Mitchell v.*

<sup>5</sup> *Lines v. Darden*, 5 Fla. 51; *Wilkinson v. Getty*, 13 Iowa, 157; 81 Am. Dec. 428; *Howard v. Carpenter*, 11 Md. 259; *Lippincott v. Stokes*, 6 N. J. Eq. 122; *Harrison v. Battle*, 1 Dev. & B. Eq. 213.

<sup>6</sup> *Mutual Life Ins. Co. v. Everett*, 40 N. J. Eq. 345.

<sup>7</sup> *Love v. Sierra Nevada etc. Mining Co.*, 32 Cal. 639; 91 Am. Dec. 602.

<sup>8</sup> *Smith v. Bowes*, 28 Md. 463.

<sup>9</sup> *Williams v. Cudd*, 26 S. C. 213; 4 Am. St. Rep. 714.

So want of power to convey cannot be supplied in chancery. Thus if executors convey without power, their conveyance cannot be aided in equity.<sup>1</sup> The defects which a court will aid are those which are not of the very essence and substance of the power. Thus a defect by executing the power by will, when it is required to be by deed or other instrument *inter vivos*, will be aided;<sup>2</sup> but not *vice versa*, for if the power is required to be executed only by will, and it is executed by an absolute and irrevocable deed, no relief will be granted.<sup>3</sup> Nor will equity aid where the power is executed without the consent of parties who are required to consent to it,<sup>4</sup> unless when their consent has become immaterial or impossible to obtain. But equity will supply such defects as the want of a seal, or of witnesses, or of a signature, or defects in the limitations of the property.<sup>5</sup> And the court will relieve against the defective execution of a power only in favor of certain persons who are regarded by a court of equity with peculiar favor, and where there are no opposing equities in the case. The aid of equity will be afforded to a purchaser,<sup>6</sup> which term includes a mortgagee and a lessee;<sup>7</sup> to a creditor;<sup>8</sup> to a wife;<sup>9</sup> to a legitimate child,<sup>10</sup> for wives and children are in some degree considered as creditors by nature;<sup>11</sup> and to a charity.<sup>12</sup> But it has been decided that a defective execution will not be aided in favor of the donee of the power,<sup>13</sup> nor of a husband,<sup>14</sup> nor of a natural child,<sup>15</sup> nor of a grandchild,<sup>16</sup> nor of remote rela-

<sup>1</sup> *Tiernan v. Beam*, 2 Ohio, 383; 15 Am. Dec. 557.

<sup>2</sup> *Tollet v. Tollet*, 1 Smith's Lead. Cas. 254.

<sup>3</sup> *Reid v. Shergold*, 10 Ves. 370.

<sup>4</sup> *Snell's Equity*, 365.

<sup>5</sup> *Schenck v. Ellingwood*, 3 Edw. Ch. 175.

<sup>6</sup> *Fothergill v. Fothergill*, 2 Freem. 257.

<sup>7</sup> *Barker v. Hill*, 2 Ch. 218; *Reid v. Shergold*, 10 Ves. 370.

<sup>8</sup> *Follard v. Greenvil*, 1 Ch. Cas. Ch. 10; *Wilkes v. Holmes*, 9 Mod. 485.

<sup>9</sup> *Earl of Darlington v. Pulteney*, Cowp. 267; *Clifford v. Burlington*, 2 Vern. 379.

<sup>10</sup> *Sarath v. Blanfrey*, Gilb. Eq. 166; *Sneed v. Sneed*, Amb. 64; *Bruce v. Bruce*, L. R. 11 Eq. 371.

<sup>11</sup> *Hervey v. Hervey*, 1 Atk. 561.

<sup>12</sup> *Innes v. Sayer*, 7 Hare, 377; 3 Macn. & G. 659; *Attorney-General v. Sibthorp*, 2 Russ. & M. 107.

<sup>13</sup> *Ellison v. Ellison*, 6 Ves. 656.

<sup>14</sup> *Watt v. Watt*, 3 Ves. 244.

<sup>15</sup> *Tudor v. Anson*, 2 Ves. Sr. 582.

<sup>16</sup> *Watts v. Bullas*, 1 P. Wms. 60.

tions or volunteers.<sup>1</sup> But the non-execution of a power coupled with a trust will be aided in equity.<sup>2</sup>

§ 2755. **Powers by Statutes.**—In Dakota, Michigan, Minnesota, New York, and Wisconsin, powers as they exist at common law are expressly abolished by statute, and in their place a power is defined to be an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon which the owner, granting or reserving such power, might himself lawfully perform; and they classify powers as general or special, and beneficial or in trust. A power is general when it authorizes a conveyance, devise, or charge in fee to any person whatever. It is special when the appointee is designated, or a lesser interest than a fee is authorized to be conveyed. It is beneficial when no person other than the grantee is interested. A general power is in trust when some designated third person is to be benefited by the execution, wholly or in part. A special power is in trust when it authorizes dispositions only to some person or class other than the grantee of the power, or for the benefit of such person or class. Every power is absolute by which the donee can in his lifetime dispose of his entire fee for his own benefit. The statutes prescribe the mode of creation of such powers, their execution, revocation, and effect.<sup>3</sup> Powers conferred by statute can be constructively enlarged only in conformity with the principles governing legal construction, and because something is imported into the statute by a necessary, or at least reasonable, implication. When a subject-matter is named, all things directly appertaining to it are included by necessary implication. So when an act is required to be performed, whatever constitutes a necessary or ordinary means to the performance of such act is, in like manner, included. The

<sup>1</sup> *Smith v. Ashton*, 1 Freem. 309.

<sup>2</sup> See 1 *Stimson's American Stat-*

<sup>3</sup> *Pomeroy's Eq. Jur.*, sec. 835; *note Law*, secs. 1651 et seq.

*Withers v. Yeaton*, 1 Rich. Eq. 324.

question in all these cases is, not whether the matter of implication will add to the efficiency of what is conferred in terms, but whether, without such matter, the statute will be wholly or in part inoperative.<sup>1</sup>

§ 2756. **How Extinguished.**—Powers relating to land or collateral to it are extinguished by a complete execution of them.<sup>2</sup> So when the purpose for which a power was created has been accomplished or becomes impossible, the power itself ceases.<sup>3</sup> A power relating to land is extinguished by a total alienation of the estate.<sup>4</sup> But a conveyance of a part of the land is an extinguishment of the power as to that part only, and the power remains as to the residue.<sup>5</sup> A power given to one having a particular estate in the land is merged or extinguished by his acquiring the fee.<sup>6</sup>

§ 2757. **Estates upon Condition—In General.**—An estate upon condition is one “which may be created, enlarged, or defeated by the happening or not happening of some contingent event.”<sup>7</sup> Conditions are either express or implied,<sup>8</sup> present or subsequent.<sup>9</sup> A condition may be annexed to any species of estate or interest in real property, whether an estate in fee, in tail, for life, or years, in any lands or tenements.<sup>10</sup> A condition must be created and annexed to the estate at the time of making it;<sup>11</sup> and if a condition is made by a separate deed, it must be sealed and delivered at the same time with the principal deed.<sup>12</sup> But things executory, as rents, leases, etc., may be restrained by conditions annexed to them by consent of both parties, after the execution of the instruments of con-

<sup>1</sup> State v. Charleston, 1 S. C. 30.

<sup>2</sup> 2 Greenl. Cruise, 576.

<sup>3</sup> Smyth v. Taylor, 21 Ill. 296.

<sup>4</sup> 4 Kent's Com. 347; Ex parte Elliott, 5 Whart. 524; 34 Am. Dec. 573.

<sup>5</sup> 2 Greenl. Cruise, 578.

<sup>6</sup> Boone on Real Property, sec. 196.

<sup>7</sup> 4 Kent's Com. 121; 1 Washburn on Real Property, 445.

<sup>8</sup> 4 Kent's Com. 121.

<sup>9</sup> See post.

<sup>10</sup> 1 Co. Lit. 201 a; 2 Bla. Com. 152; 1 Greenl. Cruise, 468.

<sup>11</sup> 1 Greenl. Cruise, 468.

<sup>12</sup> Rogers v. Sebastian, 21 Ark. 440.

veyance.<sup>1</sup> Where a conveyance is made upon a condition, the condition expressed in the deed must be conclusively presumed, in the absence of fraud, accident, or mistake, to be the only condition.<sup>2</sup> And though an estate may be made to depend upon one of two or more alternative contingencies, the general rule is, that when an estate depends upon a double contingency, both must concur.<sup>3</sup>

**§ 2758. Conditions Precedent.** — Conditions precedent are such as must happen or be performed before the estate can vest or be enlarged.<sup>4</sup> No form of words will constitute a condition precedent, when the intention to be collected from every part of the instrument clearly indicates a different purpose.<sup>5</sup> Whether a condition is precedent or subsequent depends upon the intention of the parties as shown by the construction of the whole instrument.<sup>6</sup> If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, the condition is subsequent.<sup>7</sup> A condition in a deed "that this deed is to have effect and be operative only upon the express condition and understanding" that the railroad conveyed be completed within a certain time, and a transfer by the vendee of its capital stock equal to the paid-up stock of the vendor, is not a condition subsequent.<sup>8</sup> So where a testator gave land to A

<sup>1</sup> 1 Greenl. Cruise, 468.

<sup>2</sup> Dunbar v. Stickler, 45 Iowa, 384.

<sup>3</sup> Phelps v. Bates, 54 Conn. 11; 1 Am. St. Rep. 92.

<sup>4</sup> Moore v. Sanders, 15 S. C. 440; Van Horne v. Dorrance, 2 Dall. 317; Bostwick v. Hess, 80 Ill. 138; Taylor v. Bullen, 6 Cow. 627; Moakeley v. Riggs, 19 Johns. 71; 10 Am. Dec. 196.

<sup>5</sup> Stark v. Smiley, 25 Me. 201.

<sup>6</sup> Sheppard v. Thomas, 26 Ark. 617; Underhill v. R. R. Co., 20 Barb. 455; Gardiner v. Corson, 15 Mass. 500; Finlay v. King, 3 Pet. 346; Rogan v. Walker, 1 Wis. 527.

<sup>7</sup> Underhill v. R. R. Co., 20 Barb. 455; Bell County v. Alexander, 22 Tex. 350; 73 Am. Dec. 269.

<sup>8</sup> Tennessee etc. R. R. Co. v. R. R. Co., 73 Ala. 426.

“upon the express condition” that A pay to B seven hundred dollars before the first day of April after testator’s decease, this was held not a condition precedent.<sup>1</sup>

As the estate does not vest, when dependent upon a condition precedent, until the performance of the condition, and therefore, if the condition is not strictly performed, or if it is unlawful or impossible in performance, the dependent estate fails, the grant or devise becomes wholly void, and no estate vests.<sup>2</sup> Where the condition precedent is copulative, consisting of several branches, the entire condition must be performed before the estate can vest.<sup>3</sup> The grantee in a conditional deed, if he refuses or neglects to perform all the conditions upon which his title depends, forfeits his estate none the less because he may have paid some portion of its value. The estate reverts to the grantor as a matter of legal right; and if he sees fit to enter for the breach of condition, and to claim a forfeiture, the estate reverts to him to all intents and purposes, without regard to the part performance or outlays which the conditional grantee may have made on account of it.<sup>4</sup>

Where a deed contains a provision that it is not to take effect and operate as a conveyance until the grantor’s decease, and not then if the grantee does not survive him, but if the grantee do survive, it is to convey the premises in fee-simple, with words appropriate and consistent with this provision in the *habendum* and covenants, it will be upheld as creating a feoffment to commence *in futuro*, and will give the estate in fee-simple to the grantee on the happening of the contingency named, the execution and record of the deed operating in the same manner as a livery of seisin at the grantor’s decease. Such a deed

<sup>1</sup> *Casey v. Casey*, 55 Vt. 518.

<sup>2</sup> *Van Horn v. Dorrance*, 2 Dall. 317; *Marten v. Ballou*, 13 Barb. 119; *Taylor v. Mason*, 9 Wheat. 325; *Mizell v. Burnett*, 4 Jones, 249; 69 Am. Dec.

744. *Contra*, *Jones v. Bramblet*, 2 Ill. 278.

<sup>3</sup> *Van Horn v. Dorrance*, 2 Dall. 317.

<sup>4</sup> *Rowell v. Jewett*, 71 Me. 408.

is something more than a devise in a will; it conveys to the grantee a contingent right which, unlike the interest of a devisee in the lifetime of the testator, cannot be taken from him.<sup>1</sup>

ILLUSTRATIONS.—A devise of an estate is made to the sons of the testator, “they jointly and severally paying” to his daughters a certain sum within a specified time. *Held*, a condition precedent upon the payment of the money within the time limited: *Wheeler v. Walker*, 2 Conn. 196; 7 Am. Dec. 265. A devise requires that the devisee should remain with the testator and his wife during their lives, and the life of the survivor. *Held*, a condition precedent, which, being unperformed, prevents the estate from vesting in him: *Den v. Messenger*, 33 N. J. L. 499.

§ 2759. Conditions Subsequent—In General.—A condition subsequent is one that operates upon an estate already vested, and renders it liable to be defeated.<sup>2</sup> Where there is a general devise in words importing a present interest, in a will making no other disposition of the property, on a condition which may be performed at any time, the condition is subsequent.<sup>3</sup> A condition subsequent cannot be attached to a deed by means of parol evidence.<sup>4</sup> A deed of land upon condition subsequent conveys the fee with all its qualities of transmission. The condition has no effect to limit the title until it becomes operative to defeat it.<sup>5</sup> The following have been held to be conditions subsequent, viz.: A condition in a deed that, after the grantor's death, the grantee should pay a certain sum to a third person;<sup>6</sup> a condition that the grantee “shall allow all people to pass and repass, to fish, fowl, and hunt,” etc., on the granted premises;<sup>7</sup> a conveyance of a right of way for a railroad, the consideration of which is its maintenance and the maintenance of a depot

<sup>1</sup> *Abbott v. Holway*, 72 Me. 298.

<sup>2</sup> *Memphis etc. R. R. Co. v. Neighbors*, 51 Miss. 412.

<sup>3</sup> *Finlay v. King*, 3 Pet. 346.

<sup>4</sup> *Galveston etc. R. R. Co. v. Pfeuffer*, 56 Tex. 68.

<sup>5</sup> *Shattuck v. Hastings*, 99 Mass. 23.

<sup>6</sup> *Weinreich v. Weinreich*, 18 Mo. App. 364.

<sup>7</sup> *Parsons v. Miller*, 15 Wend. 564.

on land adjoining;<sup>1</sup> a deed containing the clause "provided always, and this deed is upon the express condition," that a certain system of drainage be kept up by the grantee;<sup>2</sup> a condition that the grantee shall maintain and support the grantor and the grantor's wife during the terms of their natural lives;<sup>3</sup> a devise of land "for the purpose of building a school-house for the use of a school, provided it be built" at a certain place;<sup>4</sup> a bequest to a religious society on condition that within three years it shall erect a chapel;<sup>5</sup> a deed to land upon condition that the grantee, within a specified time, shall build a house thereon, or the grant be defeated.<sup>6</sup> But the contrary has been held of the following: A devise to A, "in consideration" of testator being taken good care of and well treated by A for the remainder of testator's life;<sup>7</sup> a devise, in terms, "to my wife, in lieu of dower, after paying my just debts, and she paying the items to other parties mentioned, in . . . the house," etc.;<sup>8</sup> a recital that the land should be used for a certain special use, and none other;<sup>9</sup> a clause in a deed, stating that it is made on the express stipulation that a dwelling-house of not less than a certain value shall be put upon the land within a certain time;<sup>10</sup> an agreement by the grantee in a deed, forming part of the consideration therefor, to assume and pay a mortgage previously executed on the land by the grantor;<sup>11</sup> a grant of land for a consideration to a trustee upon trust that he "shall at all times permit all the white religious societies of Christians and the members of such societies to use the land as a common burying-ground, and for no other purpose";<sup>12</sup> a grant of land, which has

<sup>1</sup> *Cleveland etc. R. R. Co. v. Coburn*, 91 Ind. 557. But see *Berkley v. R. R. Co.*, 33 Fed. Rep. 794.

<sup>2</sup> *Hammond v. R. R. Co.*, 15 S. C. 10.

<sup>3</sup> *Thomas v. Record*, 47 Me. 500; 74 Am. Dec. 500.

<sup>4</sup> *Hayden v. Stoughton*, 5 Pick. 528.

<sup>5</sup> *Tappan's Appeal*, 52 Conn. 412.

<sup>6</sup> *O'Brien v. Wagner*, 94 Mo. 93; 4 Am. St. Rep. 363.

<sup>7</sup> *Martin v. Martin*, 131 Mass. 547.

<sup>8</sup> *Lausman v. Drahos*, 12 Neb. 102.

<sup>9</sup> *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142.

<sup>10</sup> *Stone v. Houghton*, 153 Mass. 175.

<sup>11</sup> *Martin v. Splivalo*, 69 Cal. 611.

<sup>12</sup> *Brown v. Caldwell*, 23 W. Va. 187; 48 Am. Rep. 378.

been used as a burying-place to a town, "for a burying-place forever," in consideration of love and affection, "and divers other valuable considerations";<sup>1</sup> in a conveyance of land to a religious corporation, the words "for the purpose of erecting a church thereon only," following the description of the property;<sup>2</sup> the words, "it being expressly understood by the parties that the said tract or parcel of land is not to be put to any other use than that of a depot square," inserted in a conveyance in fee-simple immediately after the description of the land.<sup>3</sup>

ILLUSTRATIONS.—A deed conveyed a leasehold and personal estate upon the terms that the indenture is to be void if the grantee, his executors or assigns, should omit to pay certain debts. *Held*, not a mortgage, but a conveyance upon condition subsequent, to be avoided by proof of the omission to pay the debts: *Hagthorp v. Neale*, 7 Gill & J. 13; 26 Am. Dec. 595. M. devised his farm to his wife for life, "the said real estate to go to J. M. at her death, if any remains, providing J. M. maintains and provides for her decently from the proceeds of the farm, or otherwise; and providing the said J. M. fails to provide for her, then she is empowered to call on selectmen to provide for her in her own house." *Held*, that J. M. took on condition subsequent: *Birmingham v. Lesan*, 77 Me. 494. A and wife made a deed to B, "and his heirs and assigns forever, after the life estate of the grantors, as well for, and in consideration of, the natural love and affection" for B, "as for the better support and maintenance of him, the said" A. *Held*, that it was not a condition subsequent that B should thereafter maintain and support the grantors: *Risley v. McNiece*, 71 Ind. 434.

§ 2760. Conditions, how Created — Form of Words not Material. — No particular form of words is necessary to create a condition,<sup>4</sup> the intention of the parties being the test.<sup>5</sup> When it is clear that technical words have been used to express ideas different from their technical signi-

<sup>1</sup> *Rawson v. School District*, 7 Allen, 125; 83 Am. Dec. 670.

<sup>2</sup> *Farnham v. Thompson*, 34 Minn. 331; 57 Am. Rep. 59.

<sup>3</sup> *Thornton v. Trammell*, 39 Ga. 202.

<sup>4</sup> *Sheppard v. Thomas*, 26 Ark. 617; *Wonnacott v. Teagarden*, 2 Ohio St. 380.

<sup>5</sup> *Collins v. Lavelle*, 44 Vt. 230;

*Episcopal City Mission v. Appleton*, 117 Mass. 326; *Krantz v. McKnight*, 51 Pa. St. 232; *Saunders v. Hanes*, 44 N. Y. 253; *Walker v. Douglas*, 70 Ill. 445; *Skinner v. Shepard*, 130 Mass. 180; *Sohier v. Church*, 109 Mass. 1; *Underhill v. R. R. Co.*, 20 Barb. 455; *Rogan v. Walker*, 1 Wis. 527.

fication, courts will always construe them according to such intent.<sup>1</sup> The use of technical words which in themselves import conditions will ordinarily be held to create the same; for technical words are presumed to be used in their legal sense, unless there is a plain intent to the contrary.<sup>2</sup> The terms "provided however," "upon the express condition," etc., have always been held sufficient to create an estate upon condition, unless the context or something in the deed tends to negative this idea; while the words "if," "if it shall so happen," or other equivalent expressions, when relating to conditions depending on contingencies, have been taken and held to operate in the same manner.<sup>3</sup> Land granted to a person "on condition," or "provided always," or "if it shall so happen," or "so that he pay to another a specific sum within a specified time," vests a conditional estate in the grantee.<sup>4</sup> The addition of a clause for re-entry or forfeiture is generally decisive evidence of its being a condition.<sup>5</sup> But it is held that this clause is not necessary if the character of the condition is otherwise established; for forfeiture follows a condition subsequent, upon its breach, by operation of law;<sup>6</sup> yet the presence or absence of this clause has an important bearing upon the question whether the recital constitutes a condition or a covenant, and may be considered with other matters in determining it.<sup>7</sup> A covenant or condition may be created by the same words,<sup>8</sup> and when a covenant in form is followed by a clause of

<sup>1</sup> Cent. Pac. R. R. Co. v. Beal, 47 Cal. 151; Churchill v. Reamer, 8 Bush, 256.

<sup>2</sup> Butler v. Huestis, 68 Ill. 594; 23 Am. Rep. 589; France's Estate, 75 Pa. St. 220; De Kay v. Irving, 5 Denio, 646; Episcopal Mission v. Appleton, 117 Mass. 326.

<sup>3</sup> 2 Washburn on Real Property, 3; 4 Kent's Com. 122; Sohler v. Trinity Church, 109 Mass. 1; Hammond v. R. R. Co., 15 S. C. 10; Hooper v. Cummings, 45 Me. 359; Gibert v. Peteler, 38 N. Y. 168.

<sup>4</sup> Bagshawe v. Spencer, 1 Ves. Sr. 147.

<sup>5</sup> Emerson v. Simpson, 43 N. H. 475; 82 Am. Dec. 168; Collins v. Marcy, 24 Conn. 242; Thomas v. Record, 47 Me. 500; 74 Am. Dec. 500; Plumb v. Tubbs, 41 N. Y. 442; Cowell v. Colo. Springs Co., 3 Col. 82; Adams v. Lindell, 5 Mo. App. 197.

<sup>6</sup> Jackson v. Allen, 3 Cow. 220; Gray v. Blanchard, 8 Pick. 284.

<sup>7</sup> Hartung v. Witte, 59 Wis. 285.

<sup>8</sup> Hartung v. Witte, 59 Wis. 285; Parmelee v. R. R. Co., 6 N. Y. 80; Chapin v. Harris, 8 Allen, 594.

forfeiture, it will be construed a condition.<sup>1</sup> Where the grant is expressly made "on condition," and there are no words controlling or modifying it, or which negative in any way the force of these words, they will, even in a recital, be construed as a condition.<sup>2</sup> Where the recital, though not using the word "condition" at all, yet clearly shows that the performance or non-performance of the act named is the only consideration or inducement for the deed, it should ordinarily be construed a condition.<sup>3</sup>

§ 2761. **Conditions Subsequent not Favored.**—Conditions subsequent, because they tend to defeat estates, and because forfeitures are not to be extended, are not favored by the courts,<sup>4</sup> and will always be construed strictly as against the grantor, and liberally in favor of the grantee.<sup>5</sup> The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it.<sup>6</sup> Only upon clear evidence of fraud, accident, or mistake, will the court permit a contemporaneous condition to be ingrafted on a deed.<sup>7</sup> But however injudicious conditions annexed to a gift may be, if they are unambiguous, and not unlawful, they may not be rejected.<sup>8</sup> In a leading case,<sup>9</sup> it is said:

<sup>1</sup> *Moore v. Pitta*, 53 N. Y. 85; *Gray v. Blanchard*, 8 Pick. 284; *Ayer v. Emery*, 14 Allen, 69.

<sup>2</sup> *Sperry v. Pond*, 5 Ohio, 389; 24 Am. Dec. 296; *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Chapman v. Pingree*, 67 Me. 198; *Ruch v. Rock Island*, 97 U. S. 693.

<sup>3</sup> *Indianapolis Railroad Co. v. Hood*, 66 Ind. 580; *Austin v. Cambridgeport*, 21 Pick. 215.

<sup>4</sup> *Craig v. Wells*, 11 N. Y. 315; *Palmer v. Ford*, 70 Ill. 196; *Warner v. Bennett*, 31 Conn. 478; *Taylor v. Sutton*, 15 Ga. 103; 60 Am. Dec. 682; *Whitton v. Whitton*, 38 N. H. 127; 75 Am. Dec. 163; *Brothers v. McCurdy*, 36 Pa. St. 407; 78 Am. Dec. 388; *Emerson v. Simpson*, 43 N. H. 475; 80 Am. Dec. 184; *Wier v. Simmons*, 55 Wis. 637; *Peden v. R. R. Co.*, 73 Iowa, 328; 5 Am. St. Rep. 680.

<sup>5</sup> *Hoyt v. Kimball*, 49 N. H. 322; *Moore v. Pitta*, 53 N. Y. 85; *Duryea v. Mayor*, 62 N. Y. 592; *Gadberry v. Shepherd*, 27 Miss. 203; *Woodworth v. Payne*, 74 N. Y. 196; 30 Am. Rep. 298; *Glenn v. Davis*, 35 Md. 208; 6 Am. Rep. 389; *Nicoll v. R. R. Co.*, 12 N. Y. 131; *Hooper v. Cummings*, 45 Me. 359; *Bradstreet v. Clark*, 21 Pick. 389; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Wheeler v. Walker*, 2 Conn. 200; 7 Am. Rep. 264; *Wilson v. Galt*, 18 Ill. 431; *Southard v. R. R. Co.*, 26 N. J. L. 13.

<sup>6</sup> *Laberee v. Carleton*, 53 Ma. 211; *Emerson v. Simpson*, 43 N. H. 475; 82 Am. Dec. 168; *Southard v. R. R. Co.*, 26 N. J. L. 13.

<sup>7</sup> *East Line etc. R. R. Co. v. Garrett*, 52 Tex. 133.

<sup>8</sup> *In re Cole*, 3 Demarest, 203.

<sup>9</sup> *Whitton v. Whitton*, 38 N. H. 127; 75 Am. Dec. 163.

"The party who claims a title derived from the non-performance of a condition subsequent is bound to show his title complete and perfect. No presumptions are ordinarily to be made in his favor;<sup>1</sup> if he has defeated or prevented the performance by any act or omission of his own, he must fail. He must, therefore, show that he has done all that he is bound to do to entitle himself to the performance of the condition.<sup>2</sup> Generally, the party who is bound to perform a condition must do it at his peril, and the other party is not bound to do anything; but if, by the terms of the condition, it is made the duty of the party to do any act before the condition is to be performed,—as to give notice of any fact, or to make a demand, or the like,—and he fails to do it, the condition is not broken. And if, in pleading in any such case, the party fails to aver the performance of such act, with the time, place, etc., when these are material, his title will be deficient.<sup>3</sup> In many cases, there is nothing in the terms of the condition which requires the party who claims the benefit of it to do anything; and yet the law implies, from the nature of the contract itself, that certain things must be done by him before the condition is broken, because it would otherwise be out of the power of the other party to perform it; and in such cases the effect of a neglect to do anything thus implied is the same as if it was expressed.<sup>4</sup> The act implied must be done, and its performance alleged and proved, or the party can take no advantage of the supposed breach of the condition.<sup>5</sup> And it is in this view that the questions of notice and request are material in this case. As to the first of these, the law implies that the parties must have agreed or intended that notice should be given by

<sup>1</sup> *Livingston v. Tompkins*, 4 Johns. Ch. 415; 8 Am. Dec. 598; 4 Kent's Com. 130; 2 Cru. Dig. 35, sec. 29.

<sup>2</sup> 2 Cru. Dig. 33, sec. 28; Com. Dig., tit. Condition, L, 4-9.

<sup>3</sup> Com. Dig., tit. Pleader, C, 69, 73;

tit. Condition, 10, 11; Gould's Pl., c. 4, sec. 15; *Birks v. Trippet*, 1 Saund. 33, note 2.

<sup>4</sup> *Watson v. Walker*, 23 N. H. 491.

<sup>5</sup> Gould's Pleading, c. 4, sec. 15; Archbold's Civil Pleading, 102.

the party entitled to the benefit of a condition of every fact necessary for the other party to know, to enable him to perform the condition, and of every material circumstance connected with it which is within his peculiar and personal knowledge, or which depends on his choice, so that the other party has no means, or no reasonable means, to arrive at that knowledge, except from the party himself. But where the condition depends on any act of a third person, no notice is implied, and the party who is bound to perform is bound to take notice of such act. In the class of cases where the performance of the condition depends on anything to be done by the party entitled to the performance to or with any third person, who is distinctly named or designated, or by any such third person to or with him, though it is apparent that what is done is more properly and particularly within the knowledge of the plaintiff, yet, because the defendant may obtain knowledge of it otherwise than from him, notice is not required to be given nor averred; for the party who is bound must take notice of it at his peril."<sup>1</sup>

### § 2762. Doubtful Conditions Construed as Covenants.

—Therefore where the language is doubtful, the courts will endeavor to construe it as a covenant, rather than as a condition.<sup>2</sup> Covenants do not require any particular or technical words to create them.<sup>3</sup> Whatever shows the intent of the parties to bind themselves to the performance of a stipulation may be deemed a covenant, without regard

<sup>1</sup> *Dix v. Flanders*, 1 N. H. 427; *Watson v. Walker*, 23 N. H. 491; *Lent v. Padelford*, 10 Mass. 238; 6 Am. Dec. 119; *Hobart v. Hilliard*, 11 Pick. 144; *Farwell v. Smith*, 12 Pick. 87; *Clough v. Hoffman*, 5 Wend. 500; *King v. Holland*, 5 Term Rep. 621; *Cutler v. Southern*, 1 Saund. 116, note 2; *Hodsdon v. Harridge*, 2 Saund. 62 a, note 4. See also *Vin. Abr.*, tit. Condition, A (d); B (d); tit. Notice, 1-5; *Com. Dig.*, tit. Condition, L, 8-10; tit.

*Pleaser*, C, 73-75; *Archbold's Civil Pleading*, 102-104, where the ancient cases are collected.

<sup>2</sup> *Board of Education v. Trustees*, 63 Ill. 204; *Wheeler v. Dascomb*, 3 Cush. 285; *Hoyt v. Kimball*, 49 N. H. 322; *Gallaher v. Herbert*, 117 Ill. 160; *Pownall v. Taylor*, 10 Leigh, 172; 34 Am. Dec. 725.

<sup>3</sup> *Meyers v. Burns*, 33 Barb. 401; *Newcomb v. Presbrey*, 8 Met. 406; *Davis v. Lyman*, 6 Conn. 252.

to the form of expression.<sup>1</sup> Where a recital, although importing a condition, does not expressly and in terms declare so, and provides only for the performance of some act, or imposes some burden or duty upon the grantee, but does not stipulate for a re-entry or declare a forfeiture, the recital will be construed as a covenant.<sup>2</sup> Though the restriction may be in the most positive and emphatic terms, if it clearly imports an agreement, and does not provide for re-entry or forfeiture, it is always to be construed as a covenant, and not as a condition.<sup>3</sup> Where the recital, although importing a condition, provides for its breach a penalty or compensation other than forfeiture, the recital should be construed as a covenant.<sup>4</sup>

**§ 2763. Conditional Limitations.** — A conditional limitation is defined to be a limitation which vests an interest in the estate granted in some third person on a condition, or upon an event which may or may not happen.<sup>5</sup> An estate on condition leaves in the grantor a vested right, which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs;<sup>6</sup> while a limitation passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person on a future uncertain contingency.<sup>7</sup>

**ILLUSTRATIONS.** — A testator gave property to a daughter, and provided that in case of the daughter's death "without issue" the property was to go to certain persons named, the devise over "to depend upon the contingency of my daughter dying without issue." The daughter survived the testatrix. *Held*,

<sup>1</sup> *Taylor v. Preston*, 79 Pa. St. 436; *Hallett v. Wylie*, 3 Johns. 44; 3 Am. Dec. 457; *Bull v. Follett*, 5 Cow. 170.

<sup>2</sup> *Conger v. R. R. Co.*, 15 Ill. 366; *Thornton v. Trammell*, 39 Ga. 202; *Randall v. Latham*, 36 Conn. 48; *Labaree v. Carleton*, 53 Me. 213.

<sup>3</sup> *Fuller v. Ames*, 45 Vt. 400; *Thornton v. Trammell*, 39 Ga. 202; *Anthony v. Stephens*, 46 Ga. 241.

<sup>4</sup> *Board of Education v. Trustees*, 63 Ill. 204; *Hartung v. Witte*, 59 Wis. 285.

<sup>5</sup> *Proprietors v. Grant*, 3 Gray, 149; *Outland v. Bowen*, 115 Ind. 150; 7 Am. St. Rep. 420.

<sup>6</sup> *Outland v. Bowen*, 115 Ind. 150; 7 Am. St. Rep. 420; *Proprietors v. Grant*, 3 Gray, 147. Compare *Cornelius v. Ivins*, 26 N. J. L. 386; *Nicoll v. R. R. Co.*, 12 N. Y. 139; *Hooper v. Cummings*, 45 Me. 359.

<sup>7</sup> *Proprietors v. Grant*, 3 Gray, 147; *Portington's Case*, 10 Rep. 42.

that she took a conditional fee: *In re New York etc. R. R. Co.*, 105 N. Y. 89. A fund is bequeathed to trustees to be paid to A upon her majority or marriage, if she shall have been raised and educated in the Roman Catholic faith, but if she "is not educated in a Catholic seminary or school, or raised as a Roman Catholic, in the faith of the Roman Catholic Church," then to testator's daughters. *Held*, a conditional limitation: *Magee v. O'Neil*, 19 S. C. 170; 45 Am. Rep. 765. A testator directed that the rents of certain property should be applied to the support of a certain charity, and that if otherwise applied, the property should revert to his estate. *Held*, not a condition, but a conditional limitation: *Theological Education Society v. Attorney-General*, 135 Mass. 285.

§ 2764. **Restrictions as to Use of Property or Premises.**—Partial restrictions as to the use to be made of the property are legal and valid.<sup>1</sup> A condition is valid, that all buildings erected on the land shall be set back a certain distance from the street.<sup>2</sup> So the following conditions are valid: That the grantees should keep a saw-mill and grist-mill doing business on the premises;<sup>3</sup> that the property should not be used for any except educational, religious, and other public purposes.<sup>4</sup> Where a deed or lease contains a covenant not to carry on certain trades on, or not to make a certain use of, the premises, an assignee with notice is bound like a party to the covenant.<sup>5</sup> The condition will follow them into the hands of subsequent purchasers with notice, and may be enforced by injunction.<sup>6</sup> A stipulation in a deed of conveyance whereby the grantee, in part consideration for the conveyance, agrees for himself, his heirs and assigns, that the

<sup>1</sup> *Plumb v. Tubbs*, 41 N. Y. 442.

<sup>2</sup> *Linzee v. Mixer*, 101 Mass. 512; *Skinner v. Shepard*, 130 Mass. 180; *Sanborn v. Rice*, 129 Mass. 387; *Hamlen v. Werner*, 144 Mass. 396. Such a restriction refers to the street as existing at the time the restriction is imposed, and not to it as subsequently altered by public authority: *Tobey v. Moore*, 130 Mass. 448. A restriction that no building should be erected thereon within ten feet of the street

is not violated by the erection of a brick wall six feet high, with a coping one foot high, to be used as a fence or wall on the line of the street: *Nowell v. Boston Academy of Notre Dame*, 130 Mass. 209.

<sup>3</sup> *Sperry v. Pond*, 5 Ohio, 387; 24 Am. Dec. 296.

<sup>4</sup> *Warner v. Bennett*, 31 Conn. 468.

<sup>5</sup> *Richards v. Revett*, 26 Week. Rep. 166.

<sup>6</sup> *Webb v. Robbins*, 77 Ala. 176.

premises conveyed shall not be used or occupied as a hotel so long as certain other property owned by the grantor shall be used for that purpose, binds both the grantee and all claiming under him, and may, in equity, be enforced by injunction.<sup>1</sup> A grantee under a conveyance with a restriction that none but a dwelling-house shall be erected on the premises, and that the "building, when erected, is not to be occupied for the purpose of carrying on any offensive trade or calling whatever," cannot use a part of a dwelling so erected as a grocery store.<sup>2</sup> Carrying on coal-yard is a business offensive to the neighborhood within the meaning of a covenant in a deed against erecting or carrying on upon the premises any livery-stable, slaughter-house, tallow-chandlery, smith's forge, furnace, etc., or any other manufactory, trade, or business whatsoever which should or might be "in any wise offensive to the neighboring inhabitants."<sup>3</sup> A condition that land shall be used only for "court-house purposes," is not broken by a failure to inclose it wholly, or by allowing hitching-posts and a temporary structure for posting bills to be put up on the uninclosed portion.<sup>4</sup> A condition "to have and to hold for the use of said religious Society of Friends so long as it may be needed for meeting purposes, then said premises to fall back to the original tract," is not broken by removal of the church property to adjacent land, where the premises were still to be used in connection with meetings of the society.<sup>5</sup>

Where the covenant was, not to carry on any trade, business, or calling whatever on the premises conveyed, it was held that using the house for a girls' school was a

<sup>1</sup> *Stines v. Dorman*, 25 Ohio St. 580.

<sup>2</sup> *Dorr v. Harrahan*, 101 Mass. 531;  
3 Am. Rep. 398. But the sale of groceries and provisions is not within a restriction forbidding the use of a building for the trade of a butcher, or for any "nauseous or offensive trade whatsoever," or for a purpose "which

shall tend to disturb the quiet or comfort of the neighborhood": *Tobey v. Moore*, 130 Mass. 448.

<sup>3</sup> *Barrow v. Richard*, 8 Paige, 351; 35 Am. Dec. 713.

<sup>4</sup> *Henry v. Etowah County*, 77 Ala. 538.

<sup>5</sup> *Carter v. Branson*, 79 Ind. 14.

breach.<sup>1</sup> Where the words were, "any trade or business whatsoever," a boys' school was decided to be within them.<sup>2</sup> To use a house as a private lunatic asylum was not a breach of the covenant, where the words "trade or business" were explained by an enumeration of particular trades, and by the general words "or any offensive trade," showing that only trades conducted by buying and selling were meant.<sup>3</sup> Where the lessee was not to carry on any public trade or business whatsoever, and the house was to be used as a private dwelling-house only, it was held that using the house as a school could not be said to be using it as a private dwelling-house only.<sup>4</sup> Where a deed contained a covenant not to use any building erected on the land "otherwise than as and for a private residence only, and not for any purpose of trade," the court granted an injunction restraining the erection of a building to be used as a school or home for orphan daughters of missionaries, holding that the words "not for any purpose of trade," were words of addition, and not of limitation.<sup>5</sup> Conditions to use the premises solely for a railroad depot, not to use other premises within a mile for similar purposes, not to erect any public-house, nor any other building, except for the ordinary purposes of a railroad depot, and for accommodating, victualing, and lodging passengers and others, and for the sole accommodation of the railroad company, are not broken by selling refreshments and lodging passengers on the premises;<sup>6</sup> nor by permitting merchants in the village to load and unload their own goods, upon their own premises, on the line of the road; nor by a transfer, under authority of an act of the legislature, to another company; nor by an extension of the road beyond its original terminus, at the

<sup>1</sup> *Kemp v. Sober*, 1 Sim., N. S., 517.

<sup>5</sup> *German v. Chapman*, 26 Week.

<sup>2</sup> *Doe v. Keeling*, 1 Maule & S. 95. Rep. 149.

<sup>3</sup> *Doe v. Bird*, 2 Ad. & E. 161.

<sup>6</sup> *Southard v. R. R. Co.*, 26 N. J. L.

<sup>4</sup> *Wickenden v. Webster*, 6 El. & B. 13.

time of the deed, by the second company.<sup>1</sup> Where, on a lease of a public-house, the lessee covenanted with the plaintiff to purchase all the beer which should be consumed upon the premises from the plaintiff, the court ruled that an assignee was bound in equity by the covenant in the lease, but that such covenant was conditional on the fulfillment of an implied covenant to supply good beer, and that evidence to show a breach of this implied covenant on the plaintiffs' part was admissible.<sup>2</sup> Where land was conveyed subject to a restriction in the deed as to the carrying on of certain business on the premises, unless the grantor, his heirs or assigns, should sell other land in the same village without such restriction, a conveyance, without such restriction, by another grantee from the same grantor, of a lot in the same village, the grant to him having contained the same restriction, was held not within the exception, and did not relieve from the condition of the deed.<sup>3</sup>

ILLUSTRATIONS. — Plaintiff conveyed to W. land by warranty deed, signed only by plaintiff. The deed contained a covenant on behalf of W. and his heirs and assigns that they would not erect upon the land any distillery. A portion of the land came into possession of defendants through various conveyances. Defendants' deed did not contain the covenant against building a distillery, and they subsequently erected one. *Held*, that an action would lie by plaintiff to restrain defendants from using the distillery. The covenant bound W. and his assigns, although he did not sign the deed from plaintiff to him: *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556. A removal of a depot from a lot conveyed to the company "in consideration of the permanent location and construction of the depot" thereon, *held*, a reversion of the lot to the grantor: *Indianapolis etc. R. R. Co. v. Hood*, 66 Ind. 580. A deed contained the condition that "no buildings which may be erected on said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone, or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house for

<sup>1</sup> Southard v. R. R. Co., 26 N. J. L. 13.

<sup>2</sup> Luker v. Dennis, 26 Week. Rep. 167.

<sup>3</sup> Plumb v. Tubbs, 41 N. Y. 442.

the term of twenty years" from a certain day. *Held*, that the limitation of time applied only to the mode of use and occupation, and not to the height of the buildings or the materials of the outer walls: *Keening v. Ayling*, 126 Mass. 404. A deed conveyed land to be used for the purpose of a street only, the title to revert if the land should be used for any other purpose. An intruder obstructed the street for ten months, and the owner claimed a forfeiture. *Held*, that the title was not forfeited under the condition: *Carpenter v. Graber*, 66 Tex. 465. Land was conveyed with the restriction that no building should be erected "within twenty feet of C. Street." The front wall of a building erected was twenty feet from C. Street, but a part of the roof and a dormer window were less than twenty feet from C. Street. *Held*, a violation of the restriction: *Bagnall v. Davies*, 140 Mass. 76. A, the owner of land, conveyed it to C, "its successors and assigns," to be used for school purposes only. C subsequently sold the land, and A entered for condition broken. *Held*, that the terms of the grant authorized the sale: *Taylor v. Binford*, 37 Ohio St. 262. A deed conveying premises for church purposes provided that the seats in the church should be forever free; "if the seats of the church . . . shall be rented or sold, then" the premises should revert to the grantor or her heirs. The church was sold for the debts of the society under an order of court. *Held*, no breach of the condition: *Woodworth v. Payne*, 74 N. Y. 196; 30 Am. Rep. 298. A lease described the premises, consisting of five acres, by metes and bounds, and concluded as follows: "Containing a certain steam saw-mill, dwelling-house," etc., with the privilege of using all the timber on the premises, but restricting the use of the valuable timber to mill purposes or the improvement of the premises. *Held*, not to restrict the use of the premises to mill purposes: *Reed v. Lewis*, 74 Ind. 433; 39 Am. Rep. 88.

§ 2765. **As to Intoxicating Liquors.**—A condition that the grantee shall not use or suffer the premises to be used for the manufacture or sale of intoxicating liquors thereon is valid.<sup>1</sup> So is a condition that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises.<sup>2</sup> Where a condition was, that the grantee

<sup>1</sup> *Plumb v. Tubbs*, 41 N. Y. 442; N. Y. 35; 13 Am. Rep. 556; *Smith v. Collins Mfg. Co. v. Marcy*, 25 Conn. Barrie, 56 Mich. 314; 56 Am. Rep. 242; *O'Brien v. Wetherill*, 14 Kan. 391.  
<sup>2</sup> *Watrous v. Allen*, 57 Mich. 362; 616; *Cowell v. Springs Co.*, 100 U. S. 58 Am. Rep. 363; *Cowell v. Colorado* 55; *Atlantic Dock Co. v. Leavitt*, 54

shall not sell liquor on the land, unless the grantor shall permit it to be done in the same place, a sale of a glass of liquor upon another lot conveyed by the grantor, in his presence, and without objection by him, was held not a "permission" by him within the condition.<sup>1</sup>

§ 2766. **Other Restrictions Valid.**—A grant of land upon condition that the grantee shall settle thereon a specific number of families within a specified time is a good condition subsequent, and its breach forfeits the estate.<sup>2</sup> So the following conditions have been held valid: A condition that the land shall be used for a cemetery;<sup>3</sup> a condition the said R. "shall maintain myself and my wife during our natural lives";<sup>4</sup> a condition annexed to a conveyance in fee for re-entry of the grantor on non-

Springs Co., 100 U. S. 55, the court saying: "The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate; such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons, or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character: Shep. Touch. 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been up-

held. In this way slaughter-houses, soap-factories, distilleries, livery-stables, tanneries, and machine-shops, have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods. The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage, at any place of public resort on the premises, was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but on the contrary, it was imposed in the interest of public health and morality."

<sup>1</sup> Plumb v. Tubbs, 41 N. Y. 442.

<sup>2</sup> Chapman v. Pingree, 67 Me. 198.

<sup>3</sup> Bennett v. Culver, 97 N. Y. 250.

<sup>4</sup> Thomas v. Record, 47 Me. 500; 74 Am. Dec. 500; Blake v. Blake, 56 Wis. 392; Delong v. Delong, 56 Wis. 514.

payment of rent;<sup>1</sup> a condition in a deed conveying a fee that the conveyance is to be void upon failure to pay the purchase-money;<sup>2</sup> a condition that the grantee shall save the grantor harmless from certain debts;<sup>3</sup> a condition that the grantee shall pay the yearly interest on a certain sum, until the covenants before mentioned are complied with;<sup>4</sup> a condition that the land shall revert unless within a certain time the town shall erect thereon a certain building proper for municipal purposes, including a "public hall";<sup>5</sup> a condition in a conveyance to a road corporation that they should reasonably maintain their road;<sup>6</sup> a condition that none of the property shall be given, paid, or lent to the devisee, a nephew's father;<sup>7</sup> a condition that a son is not to make any changes in the property without his father's consent, and not to contract any debt that might involve it, and to divide it, with his father's other property, upon his father's death, with his father's other children;<sup>8</sup> a condition that a bequest is to be paid to a grandson on his arrival at thirty years of age, if he has learned a useful trade, business, or profession, and is of good moral character, all of which the executors are to determine;<sup>9</sup> a condition that in no case is the general conference of the Methodist Episcopal Church to have any right in said premises and building, or take any control or direction of the same;<sup>10</sup> a condition that if any or either of my children shall enter a *caveat* against this my will, he or they shall pay expenses of both sides;<sup>11</sup> a devise of a tract of land to a son of a testator, "if he be living and returns to the county of Orange."<sup>12</sup>

<sup>1</sup> Van Rensselaer v. Ball, 19 N. Y. 100.

<sup>2</sup> Taylor v. Sutton, 15 Ga. 103; 60 Am. Dec. 682.

<sup>3</sup> Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225; 41 Am. Dec. 549; Michigan State Bank v. Hammond, 1 Doug. (Mich.) 527.

<sup>4</sup> Carter v. Chaudron, 21 Ala. 72.

<sup>5</sup> Clarke v. Brookfield, 81 Mo. 503; 51 Am. Rep. 243.

<sup>6</sup> Cornelius v. Ivins, 26 N. J. L. 376.

<sup>7</sup> In re Hohman, 37 Hun. 250.

<sup>8</sup> Wilson v. Wilson, 86 Ind. 472.

<sup>9</sup> Webster v. Morris, 66 Wis. 366; 57 Am. Rep. 278.

<sup>10</sup> Guild v. Richards, 16 Gray. 309.

<sup>11</sup> Hoit v. Hoit, 42 N. J. Eq. 388; 59 Am. Rep. 43.

<sup>12</sup> Reeves v. Craig, 1 Wina. L. No. 1; 209.

ILLUSTRATIONS.—A testatrix, living in the family of B, wills as follows: "I will that, loath to offend by the word 'pay' the generous feelings of my friends, whose kindnesses to me have been many and long continued, etc., to B and his wife" a certain lot of land. *Held*, a conditional devise, forfeited by B's commencing a suit for board of the testatrix, and that the condition did not affect a residuary bequest in the same will: *Hapgood v. Houghton*, 22 Pick. 480. After a devise to another for life, land is devised to one in fee, provided that he pay the legacies given by the will, and the legacies are directed to be paid by the devisee, his heirs, executors, etc., on his or their coming into possession. *Held*, that the payment of the legacies is a condition of the devise, and upon the refusal of the devisee or his heirs to accept the devise, and pay the legacies, the land descends to the testator's heirs, chargeable in equity, however, with payment of the legacies: *Birdsall v. Hewlett*, 1 Paige, 32; 19 Am. Dec. 392. Land was purchased for the purpose of erecting a hotel by an association, and was conveyed to the individual members in undivided shares, upon condition that the premises should be held by them, their heirs and assigns, in common with each other, without partition or division. *Held*, that the condition was not invalid, and that the parties claiming under the deeds were estopped from demanding partition: *Hunt v. Wright*, 47 N. H. 396; 93 Am. Dec. 451.

§ 2767. What Conditions are Void — In General. — Conditions are void which are impossible or unlawful.<sup>1</sup> Under this rule the following conditions have been held invalid, viz.: Conditions in general restraint of marriage;<sup>2</sup> a condition annexed to a devise to a married woman, that she shall not live with her husband;<sup>3</sup> a condition attached to a devise to a son, that he shall not live with or contribute anything to the support of his wife;<sup>4</sup> a condition that the land shall not be subject to attachment or levy on execution.<sup>5</sup> So conditions subsequent are void which

<sup>1</sup> *Whitney v. Spencer*, 4 Cow. 39; *People etc. v. Society etc.*, 1 Paine, 652; *Hughes v. Edwards*, 9 Wheat. 493; *Mitchel v. Reynolds*, 1 P. Wms. 189; *Harvey v. Aston*, 1 Atk. 361.

<sup>2</sup> See *ante*, Division, I., Husband and Wife; *Randall v. Marble*, 69 Me. 310; 31 Am. Rep. 281. A devise to the testator's widow, "so long as she remains my widow," is not a condition

in restraint of marriage, and is valid: *Summit v. Yount*, 109 Ind. 506.

<sup>3</sup> *Conrad v. Long*, 33 Mich. 78.

<sup>4</sup> *In re Potter*, 3 Demarest, 108.

<sup>5</sup> *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241; *McCleary v. Ellis*, 54 Iowa, 311; 37 Am. Rep. 205; *De Peyster v. Michael*, 6 N. Y. 467; 57 Am. Dec. 470; *Walker v. Vincent*, 19 Pa. St. 369; *Hall v. Tufts*, 18 Pick. 455.

are repugnant to the estate granted or devised.<sup>1</sup> If the terms of a devise empower the devisee to dispose of the property, a limitation over is void for repugnancy.<sup>2</sup> So a devise to one's children, "in case they inhabit the town of H.," has been held void as repugnant to the estate given;<sup>3</sup> so has a condition annexed to a devise, that the person who may have the right is to procure an act of the legislature for the change of his name, "together with his taking an oath, before he has possession, that he will not make any change during his life," in the will, relative to the real estate;<sup>4</sup> so has a condition that the legatee shall not dispute or contest the will, on penalty of forfeiting his legacy, unless the testator provides that the legacy shall go to another person on breach of the condition.<sup>5</sup>

**ILLUSTRATIONS.**—A testatrix gave her whole estate to her son, and in another clause directed that if her son should die without leaving a will, then the whole estate should go to her grandchildren. *Held*, that the condition was repugnant to the estate in fee granted to her son, and was void: *Moore v. Sanders*, 15 S. C. 440; 40 Am. Rep. 703. A brother gratuitously deeded to his two sisters a leasehold property, to hold the same as tenants in common for both lives, with remainder to the survivor for life, or so long as both should remain unmarried, and from and after the marriage of either, then to the one remaining unmarried for life. *Held*, not invalid as in restraint of marriage: *Arthur v. Cole*, 56 Md. 100; 40 Am. Rep. 409. A testator declared the provision made for his son by his will to be upon the condition that he should not marry a daughter of A. J. Cameron, of R. There were two persons residing at R. named A. J. Cameron, one of whom had a daughter, to whom the son of the testator was, at the time of the will, engaged to be married; the other of whom had no daughters. *Held*, that

But a condition in a devise of a life interest, that it shall cease on judgment against devisee being recovered in a creditor's suit instituted to reach it, and that the executors shall thereafter apply the income to the support of the devisee's family, is not repugnant to the estate devised, nor contrary to public policy, and is valid, and a creditor cannot reach such interest, unless the income exceeds what is necessary

for support: *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113.

<sup>1</sup> *Rona v. Meier*, 47 Iowa, 607; 29 Am. Rep. 493.

<sup>2</sup> *Rona v. Meier*, 47 Iowa, 607; 29 Am. Rep. 493.

<sup>3</sup> *Newkerk v. Newkerk*, 2 Caines, 345.

<sup>4</sup> *Taylor v. Mason*, 9 Wheat. 325.

<sup>5</sup> *Mallet v. Smith*, 6 Rich. Eq. 12; 60 Am. Dec. 107.

the condition was not void, but the son, by contracting the prohibited marriage, forfeited the estate: *Graydon v. Graydon*, 23 N. J. Eq. 229.

§ 2768. **As to Alienation.**—A condition in a grant in fee that the grantee shall not alien is void.<sup>1</sup> Thus the following conditions have been held invalid, viz.: A condition that the grantee shall not alienate the land, or that it shall not be sold for his debts;<sup>2</sup> a condition that the grantee shall not alien, or that he shall pay a sum of money to the grantor upon alienation;<sup>3</sup> a condition requiring a devisee to pay a sum of money upon aliening the estate;<sup>4</sup> a restriction upon a devisee in fee that he should not dispose of the estate during a period named,<sup>5</sup> or until his son comes of age.<sup>6</sup> The rule, however, is not infringed by providing in a deed to several that the estate shall not be subject to partition, as the right of alienation still remains;<sup>7</sup> nor to grants from the United States, which, under the constitution, may impose any restriction;<sup>8</sup> nor to a deed of a pew in a church pursuant to a by-law of the society.<sup>9</sup> A condition in partial restraint of alienation, as that the grantee shall not alienate for a particular time or to a particular person or persons, is good.<sup>10</sup> The alien-

<sup>1</sup> *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241; Co. Lit. 206; *Brandon v. Robinson*, 18 Ves. 429; *Gadberry v. Sheppard*, 27 Miss. 203; *McWilliams v. Nisly*, 2 Serg. & R. 513; 7 Am. Dec. 654; *Doebler's Appeal*, 64 Pa. St. 623; *Rochford v. Hackman*, 18 Jur. 212; 10 Eng. L. & Eq. 64; *McCleary v. Ellis*, 54 Iowa, 311; 37 Am. Rep. 205; *De Peyster v. Michael*, 6 N. Y. 467; 57 Am. Dec. 470. "A condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void": *Mandlebaum v. McDonell*, 29 Mich. 78; 18 Am. Rep. 61. See note to *De Peyster v. Michael*, in 57 Am. Dec. 488-479.

<sup>2</sup> *McCleary v. Ellis*, 54 Iowa, 311; 37 Am. Rep. 205; *Verdier v. Youngblood*, Rich. Eq. Cas. 220; 24 Am. Dec.

417; *Brothers v. McCurdy*, 36 Pa. St. 407; 78 Am. Dec. 388.

<sup>3</sup> *De Peyster v. Michael*, 6 N. Y. 467; 57 Am. Dec. 470. But see *Jackson v. Schutz*, 18 Johns. 174; 9 Am. Dec. 195.

<sup>4</sup> *King v. Burchell*, Amb. 379.

<sup>5</sup> *Mandlebaum v. McDonell*, 29 Mich. 78; 18 Am. Rep. 61.

<sup>6</sup> *Roosevelt v. Thurman*, 1 Johns. Ch. 220.

<sup>7</sup> *Hunt v. Wright*, 47 N. H. 396; 93 Am. Dec. 451.

<sup>8</sup> *Farrington v. Wilson*, 29 Wis. 383.

<sup>9</sup> *French v. Old South Soc.*, 106 Mass. 479.

<sup>10</sup> *De Peyster v. Michael*, 6 N. Y. 467; 57 Am. Dec. 470; *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241; *Atwater v. Atwater*, 18 Beav. 330; *Smithwick v. Jordan*, 15

ation of a separate equitable estate may be restrained during the grantee's coverture, and it is no objection to the validity of the restriction that it was made while she was unmarried.<sup>1</sup> A condition in a will that a certain farm "fall into possession of W., laying this injunction and prohibition, not to leave the same to any but the legitimate heirs of W.'s family at W.'s death," is a void condition.<sup>2</sup> But a devise of the income from property, to cease on the insolvency or bankruptcy of the devisee, is good.<sup>3</sup>

ILLUSTRATIONS. — Lands were devised to the testator's sons, subject to the right of the testator's widow to one third of the rents and profits during widowhood, and upon condition that the devisees shall not sell within a specified time, nor mortgage or encumber the lands. *Held*, that the devise is absolute, and the conditions are void: *Anderson v. Cary*, 36 Ohio St. 506; 38 Am. Rep. 602. A testator devised land to his children and their "heirs" by separate clauses. By a subsequent clause, he declared that none of his children should have a right to sell or encumber the lands, but "the lands shall remain free for their children or heirs, and they, my said children, shall have the use, income, and profit of the said lands and farms during their lifetime." By still later clause, he gave them the power to dispose of their interests "by will as aforesaid." *Held*, that the testator's children took but life estates: *Urich's Appeal*, 86 Pa. St. 386; 27 Am. Rep. 707. A testatrix, after bequeathing legacies to her several children, directed that "the balance of my estate be equally divided among the heirs of my body," and closed the will with the direction that "the portion that goes to my sons I give to the heirs of their bodies, and hereby appoint each of my sons trustees, without bond, of his respective portion." *Held*, that, the two clauses being in conflict, the latter must prevail, and the absolute estate devised by the former was annulled by the latter, and converted into a trust estate for the benefit of the grandchildren: *Pierce v. Ridley*, 1 Baxt. 145; 25 Am. Rep. 769.

§ 2769. **Performance of Conditions.** — Any person who has an interest in the condition or the estate has a right

Mass. 113; *Langdon v. Ingram*, 28 Ind. 360; *McWilliams v. Nisley*, 2 Serg. & R. 513; 7 Am. Dec. 654; *McCullough v. Gilmore*, 11 Pa. St. 370.

<sup>1</sup> *Robinson v. Randolph*, 21 Fla. 629; 58 Am. Rep. 692.

<sup>2</sup> *McCullough v. Gilmore*, 11 Pa. St. 370.

<sup>3</sup> *Nichols v. Eaton*, 91 U. S. 704.

to perform the condition.<sup>1</sup> Where no time is fixed for the performance of a condition, it must be performed either during the life of the person in whose favor it is reserved, or within a reasonable and convenient time, according to the circumstances of the case;<sup>2</sup> but if such person dies without performing it, the right will not descend to his heir,<sup>3</sup> though it is otherwise where a particular time is appointed for the performance.<sup>4</sup> A condition in a devise to keep a house in good repair is broken by omitting to rebuild the house within a reasonable time if destroyed by fire.<sup>5</sup> Where a deed is made by a father to his son in consideration of a covenant on the part of the grantee to maintain the grantor and pay his debts, on condition that if he fails to do so the grantor shall have a right of re-entry, the grantee may insist on having the justice of an alleged debt of the grantor established before paying it; but if he refuses to pay after it has been established by a board of arbitrators, there is a breach of the covenant and condition in the deed.<sup>6</sup> An estate by deed, defeasible if the grantee die with children living, is saved if one child survives.<sup>7</sup>

**ILLUSTRATIONS.**—A devise of real estate was upon the condition that the devisee should remove to and reside upon the land, and make it his permanent home, with remainder over in case of breach of the condition. *Held*, that the removal of

<sup>1</sup> *Simonds v. Simonds*, 3 Met. 558; *Vermont v. Society*, 2 Paine, 548; *Wilson v. Wilson*, 38 Me. 18; 61 Am. Dec. 227. A condition in a deed for the support of the grantor during his life may be performed by another than the grantee, unless it be expressly stipulated that the support shall be furnished by the grantee personally: *Joslyn v. Parlin*, 54 Vt. 670; *Wilson v. Wilson*, 38 Me. 18; 61 Am. Dec. 227. An interest was given to each one of a class of persons severally, upon a condition that they respectively release a joint claim against the testator. *Held*, that each individual was to perform the condition for himself, and further, that a forfeiture arising from a non-

performance of the condition fell into the undisposed of surplus: *Dunlap v. Ingram*, 4 Jones Eq. 178.

<sup>2</sup> *Finlay v. King*, 3 Pet. 374; *Roas v. Tremain*, 2 Met. 495; *Hamilton v. Elliott*, 5 Serg. & R. 375; *Hayden v. Stoughton*, 5 Pick. 528; *Wheeler v. Walker*, 2 Conn. 196; 7 Am. Dec. 284; *Mead v. Bullard*, 7 Wall. 290. Performance may be presumed from lapse of time: *Fox v. Phelps*, 17 Wend. 393.

<sup>3</sup> 1 Greenl. Cruise, 493.

<sup>4</sup> *Marks v. Marks*, 1 Abr. Cas. Eq. 106.

<sup>5</sup> *Tilden v. Tilden*, 13 Gray, 103.

<sup>6</sup> *Jackson v. Topping*, 1 Wend. 388; 19 Am. Dec. 515.

<sup>7</sup> *Pierson v. Armstrong*, 1 Iowa, 232; 63 Am. Dec. 440.

the devisee to the lands within the time specified, and his residence thereon with the *bona fide* intention of making it his permanent home, fulfilled and forever discharged the condition, and vested the title entirely in him. His subsequent removal from the premises did not defeat the title: *Brundage v. Domestic etc. Missionary Soc.*, 60 Barb. 204. A devise was of all the testator's property to O., "after his mother shall cease to be my widow, providing he shall live on the place, and carry it on till that time in a workmanlike manner." *Held*, that the devisee loses all his rights if, during the time his mother remains the testator's widow, he voluntarily quits the place and neglects to carry it on: *Marston v. Marston*, 47 Me. 495.

§ 2770. **When Performance Excused or Waived.**—The performance of the condition is excused where performance becomes impossible,<sup>1</sup> or is prohibited by law,<sup>2</sup> or the party to be benefited by the condition refuses to accept performance,<sup>3</sup> or has rendered it impossible or unnecessary.<sup>4</sup> Performance may be waived by the party who is to have the benefit of a condition.<sup>5</sup> Acts which are inconsistent with the claim of forfeiture are held to be sufficient evidence of such waiver,<sup>6</sup> though it is otherwise as to a mere silent acquiescence.<sup>7</sup> And where the condition is once performed or waived, it is gone forever, and the grantee cannot enter for a subsequent breach.<sup>8</sup> A condition may be broken, entitling the grantor to claim a forfeiture, yet if he afterward accept a performance, he will be held to have waived the forfeiture.<sup>9</sup> Where the grantor is in possession at the time of condition broken,

<sup>1</sup> *Vanhorne v. Dorrance*, 2 Dall. 317; *Merrill v. Emery*, 10 Pick. 507. See *Laughter's Case*, 5 Rep. 21; *Bonner v. Young*, 68 Ala. 35; *Bangs v. Potter*, 135 Mass. 245; *Jeffersonville etc. R. R. Co. v. Barbour*, 89 Ind. 375.  
<sup>2</sup> *Anglesea v. Church Wardens*, 6 Q. B. 114.

<sup>3</sup> *Jackson v. Crafts*, 18 Johns. 110.  
<sup>4</sup> *Jones v. R. R. Co.*, 14 W. Va. 514; *Cape Fear etc. R. R. Co. v. Wilcox*, 7 Jones, 481; 78 Am. Dec. 260; *Elkhart Cor. Works v. Ellis*, 113 Ind. 215.

<sup>5</sup> *Bailey v. Homan*, 3 Bing. N. C. 915; *Farley v. Farley*, 14 Ind. 331;

*Enfield Co. v. R. R. Co.*, 7 Conn. 45.

<sup>6</sup> *Andrews v. Senter*, 32 Me. 294; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341.

<sup>7</sup> *Merrifield v. Cobleigh*, 4 Cush. 184; *Jackson v. Chrysler*, 1 Johns. Cas. 126.

<sup>8</sup> 1 Greenl. Cruise, 495; *Dickey v. McCollough*, 2 Watts & S. 100; *Ludlow v. R. R. Co.*, 12 Barb. 440; *Southard v. R. R. Co.*, 26 N. J. L. 13.

<sup>9</sup> *Chalker v. Chalker*, 1 Conn. 79; 6 Am. Dec. 206; *Jackson v. Chrysler*, 1 Johns. Cas. 126; *Coom v. Breckett*, 2 N. H. 163.

he waives the forfeiture if he makes no express claim to hold for condition broken.<sup>1</sup> Where land is conveyed with certain restrictions on the power of alienation, and the grantee aliens in violation thereof, but by subsequent events such restrictions are at end, his heirs are estopped from contesting the validity of the conveyance.<sup>2</sup> A forfeiture will not be enforced where the language of the grant makes it doubtful whether the condition claimed to exist was created by the language of the grant, especially where the grantor's conduct for a long period of time has been at variance with his claim of right to enforce a forfeiture.<sup>3</sup> If the condition subsequent is void or impossible of performance, the grantee takes an absolute estate free from the condition.<sup>4</sup>

ILLUSTRATIONS.—A testator in Pennsylvania left lands to his heirs in Germany, "provided they transmitted to his executors, within six years of his death, proofs of their being alive." The proofs were made out before the six years expired, but were not delivered till after, owing to inevitable accident. *Held*, a sufficient compliance: *Englefried v. Woelpart*, 1 Yeates, 41. Lots were sold at auction from a tract of land. One of the terms of sale was that a strip between the lots should be used for a railroad only. The deeds conveyed the fee to the middle of the strip, subject to the said restriction and easement. The project of a railroad was afterwards abandoned. More than twenty years afterwards, an owner of one lot sought to compel the removal of a building from that part of the strip on the lot of another owner. *Held*, that the suit could not be maintained, the restriction no longer existing, and defendant having the right to use his land as he saw fit: *Bangs v. Potter*, 135 Mass. 245. D. conveyed to Y. an undivided third of a lot of land on condition that Y. agreed to recover possession of the lot at his own expense, and Y. employed an attorney to conduct the case. Afterwards, on motion of D., against the will of Y., another attorney was substituted, who dismissed the action and

<sup>1</sup> Willard v. Henry, 2 N. H. 120.

<sup>2</sup> McWilliams v. Nisley, 2 Serg. & R. 507; 7 Am. Dec. 654.

<sup>3</sup> Duryee v. New York, 96 N. Y. 477.

<sup>4</sup> Anderson v. Cary, 36 Ohio St. 506; 38 Am. Rep. 602; Moore v. Sanders, 15 S. C. 440; 40 Am. Rep. 703; Blackstone Bank v. Davis, 21 Pick. 42; 32

Am. Dec. 241; Martin v. Ballou, 13 Barb. 132; United States v. Arredondo, 6 Pet. 745; Barksdale v. Elam, 30 Miss. 694; Taylor v. Sutton, 15 Ga. 103; 60 Am. Dec. 682; Nunnery v. Carter, 5 Jones Eq. 370; 78 Am. Dec. 231. *Aliter* as to conditions precedent: See *ante*, § 2768.

commenced another, in which he recovered the land. *Held*, that this action on D.'s part prevented its performance by Y., and excused the non-performance: *Houghton v. Steele*, 58 Cal. 421.

**§ 2771. Enforcement of Condition—And by Whom.—**

Upon breach of the condition, the party who has a right to enforce it becomes at once entitled to the estate to which it was annexed.<sup>1</sup> But before there can be a forfeiture of an estate held on condition subsequent, there must be a demand on the part of the persons entitled to insist upon its performance, and a refusal on the part of the person in whom the title is vested, whether the condition consist in the payment of money or the performance of some other act.<sup>2</sup> So where the condition is broken, the estate does not *ipso facto* revert, but requires an entry, or some action equivalent thereto, by the grantor, or the third person, who was to take the estate by limitation over, in order that the estate in the grantee be defeated.<sup>3</sup> But if the grantor or the party entitled to the benefit of the condition is in the actual possession of the land, an entry is unnecessary.<sup>4</sup> Conditions subsequent being for the benefit only of the grantor and his heirs, they only

<sup>1</sup> 1 Greenl. Cruise, 504; Woodruff v. Water Co., 10 N. J. Eq. 487; Ellis v. Elkhart Car Works, 97 Ind. 247. Land deeded for a consideration to aid in establishing an academy reverted by non-user. *Held*, that it reverted to those who contributed the land, not to him who sold it and received pay in part from subscribers to the academy fund: *Clark v. Chelsea Academy*, 56 Vt. 734.

<sup>2</sup> *Lindsey v. Lindsey*, 45 Ind. 552; *Cory v. Cory*, 86 Ind. 567.

<sup>3</sup> *Norris v. Milner*, 20 Ga. 563; *Chalker v. Chalker*, 1 Conn. 79; 6 Am. Dec. 206; *Dewey v. Williams*, 40 N. H. 222; 77 Am. Dec. 708; *Lincoln etc. v. Drummond*, 5 Mass. 321; *Smith v. Brannon*, 13 Cal. 107; *Ruch v. R. R. Co.*, 97 U. S. 693; *Sperry v. Sperry*, 8 N. H. 477; *Southard v. R. R. Co.*, 26 N. J. L. 13; *Reimer v. American Con-*

*tract Co.*, 9 Bush, 202; *Osgood v. Abbott*, 58 Me. 73; *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638; *Adams v. Lindell*, 5 Mo. App. 197; *Berryman v. Schumaker*, 67 Tex. 312; *Spofford v. True*, 33 Me. 283; 54 Am. Dec. 621; *O'Brien v. Wagner*, 94 Mo. 93; 4 Am. St. Rep. 362. A clause reserving a right of re-entry for forfeiture is not necessary to the validity of a condition: *Jackson v. Allen*, 3 Cow. 220. The right of entry in case the condition should be broken at a future time is not an assignable interest: *Bethlehem v. Annis*, 40 N. H. 34; 77 Am. Dec. 700.

<sup>4</sup> *Frost v. Butler*, 7 Greenl. 225; 22 Am. Dec. 199; *Adams v. Ore Knob Copper Co.*, 4 Hughes, 589; *O'Brien v. Wagner*, 94 Mo. 93; 4 Am. St. Rep. 362.

can take advantage of their breach.<sup>1</sup> A stranger cannot take advantage of the breach of a condition in a deed.<sup>2</sup> Thus in a conveyance upon condition that the grantee and his heirs maintain the grantor's idiot son for life, if upon refusal of the heirs to support such idiot, a stranger maintains him, he cannot in equity make his claim therefor a charge on the land in the hands of the heirs.<sup>3</sup>

§ 2772. **Equitable Relief against Forfeitures.**—Equity will in some cases relieve where a forfeiture has been incurred by the breach of a condition.<sup>4</sup> But these cases are those only "where payment of money is a complete compensation, and will put the party in the same situation as he would have been if there had been no breach."<sup>5</sup> Thus equity will relieve against the forfeiture of a lease for non-payment of rent on the lessee paying what is due, that being a mere money demand.<sup>6</sup> But where the grantor, or the landlord, or his heirs, could not by any payment of money be put into the same situation as he was entitled to be under the covenant, equity will not relieve, as where the forfeiture is incurred by the grantee's or tenant's aliening or assigning a term;<sup>7</sup> or by his ne-

<sup>1</sup> 4 Kent's Com. 122; Gray v. Blanchard, 8 Pick. 284; Nicholl v. R. R. Co., 12 N. Y. 131; Hooper v. Cummings, 45 Me. 359; Vermont v. Society for the Propagation of the Gospel, 2 Paine, 545; Underhill v. R. R. Co., 20 Barb. 455; Copeland v. Copeland, 89 Ind. 29.

<sup>2</sup> Norris v. Milner, 20 Ga. 563; Dewey v. Williams, 40 N. H. 222; 77 Am. Dec. 708; Cross v. Carson, 8 Blackf. 138; Buckalew v. Estell, 5 Cal. 108; Smith v. Brannan, 13 Cal. 107; Boyer v. Tressler, 18 Ind. 260; Bangor v. Warren, 34 Me. 324; 56 Am. Dec. 658.

<sup>3</sup> Cross v. Carson, 8 Blackf. 138; 44 Am. Dec. 742.

<sup>4</sup> Hayward v. Angel, 1 Vern. 222; Popham v. Bampfled, 1 Vern. 83; Bethlehem v. Annis, 40 N. H. 34; 77

Am. Dec. 700; Lockett v. White, 10 Gill & J. 480; City Bank v. Smith, 3 Gill & J. 265; Bacon v. Huntington, 14 Conn. 92. Especially where the neglect appears to have arisen through inadvertence, and no serious injury has been done: Henry v. Tupper, 29 Vt. 358.

<sup>5</sup> Page v. Bennett, 2 Giff. 117; Green v. Bridges, 4 Sim. 96; Woodman v. Blake, 2 Vern. 222; Henry v. Tupper, 29 Vt. 358; Walker v. Wheeler, 2 Conn. 299; Stone v. Ellis, 9 Cush. 95; Dunklee v. Adams, 20 Vt. 415; 50 Am. Dec. 44; Carpenter v. Westcott, 4 R. I. 225.

<sup>6</sup> Smith v. Parks, 10 Mod. 383; Hill v. Barclay, 16 Ves. 405; 18 Ves. 56; Atkins v. Chilson, 11 Met. 112; Hancock v. Carlton, 6 Gray, 52.

<sup>7</sup> Hill v. Barclay, 18 Ves. 56; Wafer v. Mocato, 9 Mod. 112.

glecting to repair<sup>1</sup> or insure the premises;<sup>2</sup> or by exercising a forbidden trade thereon,<sup>3</sup> and the like.<sup>4</sup> Equity will, however, require the covenantee to be satisfied with a substantial performance on the part of the covenantor, where the nature of the covenant admits of such performance. But if the contract be such that the court cannot secure its substantial performance, or where it is of the very essence of the contract that it should be strictly performed (in which case, the strict performance is matter of substance, and not of form merely), equity will not relieve against a forfeiture for non-performance.<sup>5</sup>

<sup>1</sup> *Hill v. Barclay*, 18 Ves. 56.

<sup>2</sup> *Rolfe v. Harris*, 2 Price, 206, note; *Green v. Bridges*, 4 Sim. 96.

<sup>3</sup> *Macher v. Foundling Hospital*, 1 Ves. & B. 188.

<sup>4</sup> *Descarlett v. Dennett*, 9 Mod. 22; *Lovat v. Lord Ranelagh*, 3 Ves. & B.

24; *Wadman v. Calcraft*, 10 Ves. 67.

<sup>5</sup> *Hill v. Barclay*, 16 Ves. 402; 18 Ves. 62; *Gregory v. Wilson*, 9 Hare, 683; *Nokes v. Gibbon*, 3 Drew. 681; *Bamford v. Creasy*, 3 Giff. 675; *Croft v. Goldsmid*, 24 Beav. 312.



**TITLE XXVII.**  
**EASEMENTS.**



# TITLE XXVII.

## EASEMENTS.

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### CHAPTER CXXXI.

#### EASEMENTS.

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§ 2773. **Easements — Defined.** — An easement is the right of making use of the land of others, whether it be that of the public or of individuals, to some profit, benefit, or beneficial use, not inconsistent with a general right of property in the owner.<sup>1</sup> Therefore in the case of an ease-

<sup>1</sup> *Boston Water Power Co. v. R. R.* Cal. 135; *City of Dubuque v. Maloney, Co.*, 16 Pick. 525; *Cave v. Crafts*, 53 9 Iowa, 451; 74 Am. Dec. 359; *Ritger*

ment there are two distinct tenements; namely, the dominant, to which the right belongs, and the servient, upon which the obligation rests.<sup>1</sup> The owner of land cannot have an easement in his own estate in fee.<sup>2</sup> Easements, though imposed upon corporeal property, confer no right to a participation in the profits arising from such property.<sup>3</sup> Herein they are to be distinguished from *profits a prendre*, which consist of a right to take the fruit or products of the land, or the materials which compose it.<sup>4</sup> An easement differs from a license in these respects: 1. The latter may be created by parol,<sup>5</sup> the former can only be created by writing or acquired by prescription;<sup>6</sup> 2. The latter is a mere authority without any interest;<sup>7</sup> 3. The latter is revocable at the will of the licensor, and is not assignable,<sup>8</sup> the former is an estate which cannot be defeated by the grantor, and is assignable.<sup>9</sup> The grantee of the servient estate takes subject to the easement.<sup>10</sup> But easements generally impose no obligations upon those whose lands are in servitude to do anything for their protection.<sup>11</sup>

§ 2774. **Easements Illustrated.**—A very common easement, for example, is the right to pass or repass over the

*v. Parker*, 8 Cush. 145; 45 Am. Dec. 744; *Atkins v. Boardman*, 2 Met. 457; 57 Am. Dec. 101.

<sup>1</sup> *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732; *Wagner v. Hanna*, 38 Cal. 116; 99 Am. Dec. 354; *Child v. Chappel*, 9 N. Y. 246; *Wolf v. Frost*, 4 Sand. Ch. 89; *Meek v. Breckenridge*, 29 Ohio St. 642.

<sup>2</sup> *Ritger v. Parker*, 8 Cush. 145; 54 Am. Dec. 744; *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410; *Mabie v. Mattison*, 17 Wis. 1; *Murphy v. Welch*, 128 Mass. 489.

<sup>3</sup> *Hewlins v. Shippam*, 5 Barn. & C. 221; *Wolfe v. Frost*, 4 Sand. Ch. 72; *Wagner v. Hanna*, 38 Cal. 116; 99 Am. Dec. 354; *Bowen v. Team*, 6 Rich. 298; 60 Am. Dec. 127.

<sup>4</sup> *Waters v. Lilley*, 4 Pick. 145; 16

Am. Dec. 333; *Hill v. Lord*, 48 Me. 99; *Huff v. McCauley*, 53 Pa. St. 209; 91 Am. Dec. 203; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 37; 100 Am. Dec. 597; *Pierce v. Keator*, 70 N. Y. 419; 26 Am. Rep. 612.

<sup>5</sup> See *ante*, Title Licenses.

<sup>6</sup> See next section; *Hazelton v. Putnam*, 3 Pinn. 107; 54 Am. Dec. 158.

<sup>7</sup> See *ante*, Title Licenses; *Dolittle v. Eddy*, 7 Barb. 74.

<sup>8</sup> See *ante*, Title Licenses; *Forbes v. Balenseper*, 74 Ill. 183.

<sup>9</sup> *Rowbotham v. Wilson*, 8 El. & B. 123; *Wallis v. Harrison*, 4 Mees. & W. 538; *Van Ohlen v. Van Ohlen*, 56 Ill. 528.

<sup>10</sup> *Hair v. Downing*, 96 N. C. 172.

<sup>11</sup> *Prescott v. Williams*, 5 Met. 429; 39 Am. Dec. 688.

land of another,<sup>1</sup> or to maintain a building or landing on it,<sup>2</sup> or that a railroad shall continue to stop with their cars at a particular place adjacent to the property as a permanent arrangement.<sup>3</sup> So besides a right of way for persons or vehicles, one may have an easement to carry water-pipes, gas, steam, etc., or for drains, and for any purpose whatsoever, for which one might have occasion to make use of a passage across his neighbor's land for the greater or more convenient enjoyment of his own.<sup>4</sup> Contracts controlling the use that may be made of a particular lot, or the manner in which it is built upon, establish rights in the nature of easements which may be enforced in equity at the instance of the owners of the lands for the benefit of which they are established.<sup>5</sup> So the proprietor of a town plat may, in his deeds, restrict the use of the premises, or the character of the buildings that may be erected thereon, or the location of buildings;<sup>6</sup> such as that a business regarded as offensive shall never be permitted on the premises;<sup>7</sup> or that the buildings shall be constructed a certain distance from the streets;<sup>8</sup> or that no intoxicating liquors shall ever be sold on the premises.<sup>9</sup> All the purchasers from such a proprietor have an easement in this respect which they may enforce by injunction.<sup>10</sup>

**§ 2775. How Acquired — By Grant.** — An easement can be acquired only by grant; for even an easement by

<sup>1</sup> See *post*, Ways.

<sup>2</sup> *McMahon v. Williams*, 79 Ala. 288; *Voorhis v. Burchard*, 55 N. Y. 98.

<sup>3</sup> *Pitkin v. R. R. Co.*, 2 Barb. Ch. 221.

<sup>4</sup> *Cooley on Torts*, 370; *Green v. Collins*, 86 N. Y. 246; 40 Am. Rep. 531; *Sanderlin v. Baxter*, 76 Va. 299; 44 Am. Rep. 165; *McPherson v. Acker*, *McA. & Mack*, 150; 48 Am. Rep. 749.

<sup>5</sup> *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 218; *Gibert v. Peteler*, 38 Barb. 488; *Trustees etc. v. Cowen*, 4 Paige, 510; 27 Am. Dec. 80; *Whitney*

*v. R. R. Co.*, 11 Gray, 359; 71 Am. Dec. 715.

<sup>6</sup> *Grogan v. Hayward*, 6 Saw. 498.

<sup>7</sup> *Kemp v. Sober*, 1 Sim., N. S., 517; *Barrow v. Richard*, 8 Paige, 351; 35 Am. Dec. 713.

<sup>8</sup> *Hubbell v. Warren*, 8 Allen, 173; *Herrick v. Marshall*, 66 Me. 435.

<sup>9</sup> *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363.

<sup>10</sup> *Mann v. Stephens*, 15 Sim. 377; *High on Injunctions*, sec. 547; *Brewer v. Marshall*, 19 N. J. Eq. 539, 543; 97 Am. Dec. 679.

prescription is presumed to be founded on a grant.<sup>1</sup> Being an interest in land, it can be acquired and released only by deed.<sup>2</sup> The grant of an easement need not be in express words; for upon a conveyance of land all its incidents and appurtenances pass with it.<sup>3</sup> The grant of the principal thing carries with it everything necessary to its beneficial enjoyment which the grantor has power to convey.<sup>4</sup> The easement may also be by reservation in a deed; that is, by the deed narrowing and limiting what would otherwise pass by the general words of the grant.<sup>5</sup> So an exception out of a grant includes all that is necessary to the enjoyment of the thing excepted.<sup>6</sup> A reservation of an easement by the grantor is implied only where it is absolutely necessary to the enjoyment of the land retained.<sup>7</sup> So an easement may be created by reservation, as in the case of a grant of land bounding on or near a pond and stream, reserving the mill and water privilege, which is a reservation of the right of flowing those lands, so far as is necessary or convenient, or so far as it has been usual to flow them for that purpose.<sup>8</sup> But easements

<sup>1</sup> *Rowbotham v. Wilson*, 8 H. L. Cas. 362; *Adams v. Andrews*, 15 Q. B. 284; *Lobdell v. Hall*, 3 Nev. 507; *Fuhr v. Dean*, 26 Mo. 116; 69 Am. Dec. 484; *Cook v. Pridgen*, 45 Ga. 331; 12 Am. Rep. 582; *Garland v. Furber*, 47 N. H. 304; *Wiseman v. Lucksinger*, 84 N. Y. 31; 38 Am. Rep. 479; *Strickler v. Todd*, 10 Serg. & R. 69; 13 Am. Dec. 649; *Wallace v. Hamstad*, 44 Pa. St. 496; *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190; *Thompson v. Gregory*, 4 Johns. 81; 4 Am. Dec. 255; *Huff v. McCauley*, 53 Pa. St. 206; 91 Am. Dec. 203; *Morse v. Copeland*, 2 Gray, 302. A tenant in common cannot create an easement by grant: *Crippen v. Morse*, 49 N. Y. 63.

<sup>2</sup> *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399; *Pitkin v. R. R. Co.*, 2 Barb. Ch. 221; 47 Am. Dec. 320; *Ward v. Farwell*, 6 Col. 66. Or by estoppel: *Harrison v. Boring*, 44 Tex. 255.

<sup>3</sup> *Huttemeier v. Albro*, 2 Bosw. 546; 18 N. Y. 48; *Berry v. Billings*, 44 Me.

416; 69 Am. Dec. 107; *Hall v. Lawrence*, 2 R. I. 218; 57 Am. Dec. 715; *Morgan v. Mason*, 20 Ohio, 401; 55 Am. Dec. 464; *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188. Provided they are known and visible: *Simmons v. Cloonan*, 81 N. Y. 557; *Butterworth v. Crawford*, 46 N. Y. 349; 7 Am. Rep. 352.

<sup>4</sup> *Hammond v. Woodman*, 41 Me. 177; 66 Am. Dec. 219; *Hathorn v. Stinson*, 10 Me. 224; 25 Am. Dec. 228; *Prescott v. Williams*, 5 Met. 429; 39 Am. Dec. 688; *Lamar v. Booth*, 50 Miss. 410; *Jackson v. Trullinger*, 9 Or. 393; *Seymour v. Lewis*, 13 N. J. Eq. 439; 78 Am. Dec. 108; *Wilson v. Hunter*, 14 Wis. 683; 80 Am. Dec. 795.

<sup>5</sup> *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399.

<sup>6</sup> *Allen v. Scott*, 21 Pick. 25; 32 Am. Dec. 238.

<sup>7</sup> *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758.

<sup>8</sup> *Pettee v. Hawes*, 13 Pick. 323.

which will pass by implication in a grant will not be implied by a reservation.<sup>1</sup> Thus where the owner of land conveys away a portion of his premises, a part of which at the time of the conveyance is flowed by a mill-dam belonging to him, and makes no reservation of the right to continue to flow the land, he loses the right, and cannot set up an implied reservation.<sup>2</sup>

§ 2776. **By Prescription.** — Easements are also acquired by prescription; by long possession raising a presumption of an old grant lost or withheld.<sup>3</sup> And a grantee of an easement for a specific purpose may use it for a different purpose, and thereby obtain a right by prescription to the whole extent of his user.<sup>4</sup> The possession or use necessary to confer a title by prescription must be long, continuous, peaceable, open, by the knowledge and tacit consent and without the express permission of the true owner.<sup>5</sup> But it is held that, to constitute an easement by prescription, is not essential that the user should have been with the actual knowledge of the owner of the servient tenement. Where the user has been for the requisite time open, notorious, visible, uninterrupted, undisputed, and under claim of right adverse to such owner, he is charged with notice, and his acquiescence is implied.<sup>6</sup> In early times the use must have extended beyond the mem-

<sup>1</sup> *Burr v. Mills*, 21 Wend. 290.

<sup>2</sup> *Burr v. Mills*, 21 Wend. 290.

<sup>3</sup> *Powell v. Bagg*, 8 Gray, 443; 69 Am. Dec. 262; *Tyler v. Wilkinson*, 4 Mason, 397; *Tracy v. Atherton*, 36 Vt. 503; *Campbell v. Wilson*, 3 East, 294; *Hillary v. Waller*, 12 Ves. 239; *Wallace v. Fletcher*, 30 N. H. 446; *Sherwood v. Burr*, 4 Day, 244; 4 Am. Dec. 211; *Cooper v. Smith*, 9 Serg. & R. 26; 11 Am. Dec. 658; *Melvin v. Whiting*, 10 Pick. 296; 20 Am. Dec. 524; *Mills v. Hall*, 9 Wend. 315; 24 Am. Dec. 160; *French v. Marsten*, 24 N. H. 440; 57 Am. Dec. 294; *Nicholls v. Wentworth*, 100 N. Y. 455.

<sup>4</sup> *Wheatley v. Chrisman*, 24 Pa. St. 296; 64 Am. Dec. 657.

<sup>5</sup> *Powell v. Bagg*, 8 Gray, 441; 69 Am. Dec. 262; *Parker v. Foote*, 19 Wend. 309; *Wheeler v. Clark*, 58 N. Y. 267; *Campbell v. West*, 44 Cal. 646; *Williams v. James*, L. R. 2 Com. P. 581; *Haag v. Delorme*, 30 Wis. 591; *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188; *Johnson v. Jordan*, 2 Met. 234; 37 Am. Dec. 86; *Kirchner v. R. R. Co.*, 67 Ga. 760; *Lehigh Valley R. R. Co. v. McFarlan*, 30 N. J. Eq. 180; *Richart v. Scott*, 7 Watts, 460; 32 Am. Dec. 779. See *Bird v. Smith*, 5 Watts, 434; 34 Am. Dec. 483.

<sup>6</sup> *Ward v. Warren*, 82 N. Y. 265; *Reimer v. Stuber*, 20 Pa. St. 458; 59 Am. Dec. 744.

ory of man,<sup>1</sup> but the modern rule, derived by analogy from the limitation prescribed by statute for actions of ejectment, is, that an enjoyment, as above described, for the term of twenty years, raises a legal presumption that the right was originally acquired by title.<sup>2</sup> And an easement may exist by custom.<sup>3</sup>

§ 2777. **By Dedication.**—The public, as distinguished from individuals, can at common law acquire an easement in the lands of another only by dedication.<sup>4</sup> Dedication is, therefore, an act by which the owner of the fee gives to the public, for some proper object, an easement in his lands.<sup>5</sup> As a rule, all kinds of easements and rights to the enjoyment of land, whether of use or of pleasure, which may be acquired by an individual by grant or prescription, may also be acquired by the public by actual dedication.<sup>6</sup>

§ 2778. **Construction of Easements — Extent of.**—Where an easement is granted by deed without fixed and definite limits, the practical location and use of such way or easement by the grantee under his deed, acquiesced in by the grantor at the time of the grant, and for a long time subsequent thereto, operate as an assignment of the right, and are deemed to be that which was intended to be conveyed by the deed, and are the same in legal effect as if it had been fully described by the terms of the

<sup>1</sup> *Edson v. Munsell*, 10 Allen, 560; *Mayor v. Horner*, Cowp. 109; *American Co. v. Bradford*, 27 Cal. 367.

<sup>2</sup> *Coe v. Wolcottville Mfg. Co.*, 35 Conn. 175; *Hoy v. Sterrett*, 2 Watts, 330; 27 Am. Dec. 313; *Ricard v. Williams*, 7 Wheat. 110; *Bright v. Walker*, 1 Cramp. M. & R. 217; *Parker v. Foote*, 19 Wend. 309; *Manier v. Myers*, 4 B. Mon. 514; *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. L. 604.

<sup>3</sup> See *Lawson's Usages and Customs*, c 1.

<sup>4</sup> *Post v. Pearsall*, 22 Wend. 444;

*Curtis v. Keesler*, 14 Barb. 551; *Warren v. Jacksonville*, 15 Ill. 236.

<sup>5</sup> *Curtis v. Keesler*, 14 Barb. 521; *Rives v. Dudley*, 3 Jones Eq. 126; 67 Am. Dec. 231.

<sup>6</sup> *Post v. Pearsall*, 22 Wend. 482; *Mowry v. City of Providence*, 10 R. I. 52. And see *Blundell v. Caterall*, 5 Barn. & Ald. 268; *Gould v. Boston*, 120 Mass. 302; *Rowan v. Portland*, 8 B. Mon. 232; *Hoadley v. San Francisco*, 50 Cal. 265; *Price v. Plainfield*, 40 N. J. L. 608; *Mankato v. Willard*, 13 Minn. 23; 97 Am. Dec. 208; *Boyce v. Kalbaugh*, 47 Md. 334; 28 Am. Rep. 464.

grant.<sup>1</sup> Under a grant of the use of water for a certain purpose, with a prohibition against certain other uses specified, the grantee may use it for any purpose not prohibited.<sup>2</sup> But where an easement is particularly located and described in the grant, it is limited to the defined locality and to the defined purpose. The owner of the dominant tenement cannot change it for convenience or necessity, and any substantial change in place or manner of enjoyment will be restrained by injunction.<sup>3</sup> An easement cannot be subsequently altered or enlarged for uses not contemplated at the time of the grant.<sup>4</sup> Where, under a grant of a right to lay water-pipe across lands, without specifying the place or size of pipe, after the grantee has laid the pipe, the easement cannot thereafter be exercised in any other place, nor the size of the pipe increased.<sup>5</sup> Under an easement by prescription of an aqueduct and reservoir, the land-owner, in improving his grounds, may change the form of the cover of the reservoir, doing no injury to the proprietor.<sup>6</sup> Under a reservation in a deed of the right to "a supply of spring water by means of a hydraulic ram, wheel, or other process of forcing water," the party entitled may substitute a wind-mill for a wheel previously used.<sup>7</sup>

**§ 2779. Easements — How Extinguished — By Act of God.**—An easement may be extinguished by the act of God,<sup>8</sup> though it has been held that an easement in an alley is not lost by the destruction of the houses for the benefit of which the easement was created.<sup>9</sup> Where an

<sup>1</sup> *Bannon v. Angier*, 2 Allen, 128.

<sup>2</sup> *Izard v. May's Landing Water-power Co.*, 31 N. J. Eq. 511.

<sup>3</sup> *Jaqui v. Johnson*, 27 N. J. Eq. 526, 552; *Emans v. Turnbull*, 2 Johns. 313; 3 Am. Dec. 427. A grant of the "right of drainage" does not include the right to pass house-sewage through the drain: *Wetmore v. Fiske*, 15 R. I. 354.

<sup>4</sup> *Carty v. Shields*, 5 Week. Not. Cas. 241.

<sup>5</sup> *Outhank v. R. R. Co.*, 71 N. Y. 194; 27 Am. Rep. 35.

<sup>6</sup> *Olcott v. Thompson*, 59 N. H. 154; 47 Am. Rep. 184.

<sup>7</sup> *Richardson v. Clements*, 89 Pa. St. 503; 33 Am. Rep. 784.

<sup>8</sup> *Taylor v. Hampton*, 4 McCord, 96; 17 Am. Dec. 710.

<sup>9</sup> *Chew v. Cook*, 39 N. J. Eq. 396.

easement is extinguished by the act of God, it may subsequently revive, as where a spring dries up and afterwards flows again; but where it is extinguished by the act of the party, it is lost forever.<sup>1</sup>

§ 2780. **By Operation of Law.** — An easement may be extinguished by operation of law.<sup>2</sup> If the servient and dominant estates become united in the same owner, the easement is extinguished by unity of title and possession, and cannot afterwards be claimed without a new grant.<sup>3</sup> But in order to operate as an extinguishment, the estates thus united must be respectively equal in duration, and not liable to be again disjoined by the act of the law.<sup>4</sup> If a person holds one estate in severalty, and only a fractional part of the other, as a leasehold for 999 years, the easement is not extinguished.<sup>5</sup> One having an easement over certain lands to reach a parcel of his real property is not obliged to surrender such right on becoming the owner of other realty over which he might pass to the first-mentioned land.<sup>6</sup> So an easement is not extinguished by the unity of title in the dominant and servient estates in the same person, where it is essential to the enjoyment of the estate, as in case of an easement of drainage, unless while the estates are united the easement is actually severed.<sup>7</sup> So a right of way appurtenant is not extinguished by merger in the mortgagee taking possession of the dominant and servient estates under separate mortgages for the purpose of foreclosure, but conveying one of the

<sup>1</sup> Taylor v. Hampton, 4 McCord, 96; 17 Am. Dec. 710.

<sup>2</sup> Taylor v. Hampton, 4 McCord, 96; 17 Am. Dec. 710.

<sup>3</sup> Coleman's Appeal, 62 Pa. St. 274; McAllister v. Doane, 76 N. C. 57; Screven v. Gregoire, 8 Rich. 158; 64 Am. Dec. 747; Howell v. Estes, 71 Tex. 690; Mott v. Mott, 15 N. Y. Sup. Ct. 474; Ritger v. Parker, 8 Cush. 147; 54 Am. Dec. 744; Plympton v. Converse, 42 Vt. 712; Atwater v. Bodfish, 11 Gray, 150; Warren v. Beaks, 54 Me. 276;

Livingston v. Ten Brock, 16 Johns. 14; 8 Am. Dec. 287.

<sup>4</sup> Ritger v. Parker, 8 Cush. 147; 54 Am. Dec. 744; Bradley Fish Co. v. Dudley, 37 Conn. 136; Ivimey v. Stocker, L. R. 1 Ch. 396; Pearce v. McClenghan, 5 Rich. 178; 55 Am. Dec. 710.

<sup>5</sup> Atlanta Mills v. Mason, 120 Mass. 244; Dority v. Dunning, 78 Me. 381.

<sup>6</sup> Zell v. Univ. Soc., 119 Pa. St. 390; 4 Am. St. Rep. 654.

<sup>7</sup> Ferguson v. Witzell, 5 Rich. 280; 57 Am. Dec. 744.

estates before foreclosure.<sup>1</sup> And where a person holds land by a defective title, and an easement in the same land by a valid title, the easement is not extinguished by unity of possession.<sup>2</sup> An owner of an easement does not by asserting a right to the fee of the servient estate, and by taking possession thereof, destroy his right to the easement.<sup>3</sup> The division of the dominant estate does not destroy the easement; and the owner or assignee of any portion of that estate may claim the right so far as it is applicable to his part, provided the right can be enjoyed as to the separate parcels without any additional charge or burden to the proprietor of the servient tenement.<sup>4</sup> Where the particular purpose for which the easement was granted has been served, the easement becomes extinguished.<sup>5</sup> A right of way to certain buildings is lost by the laying out and construction of a highway over the site of such buildings.<sup>6</sup> An easement of an open dock and common passage-way for water-craft is lost by the laying out of a street and filling up the dock by the city under statutory authority.<sup>7</sup> Easements which are apparent and continuous, and which are technically extinguished by unity of title, and are allowed to remain undisturbed, revive upon severance.<sup>8</sup>

**§ 2781. By Act of Party.**—An easement may be lost or determined by the positive act of the party himself.<sup>9</sup> An easement cannot be extinguished or renounced by a parol agreement between the owner of the dominant and the

<sup>1</sup> *Ritger v. Parker*, 8 Cush. 145; 54 Am. Dec. 744.

<sup>2</sup> *Tyler v. Hammond*, 11 Pick. 193.

<sup>3</sup> *White's Bank v. Nichols*, 64 N. Y. 65.

<sup>4</sup> *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 219; *Farnum v. Platt*, 8 Pick. 339; 19 Am. Dec. 330.

<sup>5</sup> *Nat. etc. Co. v. Donald*, 4 Hurl. & N. 8; *Chase v. Sutton Mfg. Co.*, 4 Cush. 152. But see *Atlanta Mills v. Mason*, 120 Mass. 244.

<sup>6</sup> *Hancock v. Wentworth*, 5 Met.

446. But the entry of a town site and the conveyance of the probate judge do not cut off a pre-existing right to the use of an alley: *Ashby v. Hall*, 119 U. S. 526.

<sup>7</sup> *Central Wharf etc. Co. v. India Wharf*, 123 Mass. 567.

<sup>8</sup> *Hurlburt v. Firth*, 10 Phila. 135; *Riefer v. Imkoff*, 26 Pa. St. 438; *In re Bull*, 15 R. I. 534.

<sup>9</sup> *Lawrence v. Obee*, 3 Camp. 514; *Vogler v. Geiss*, 51 Md. 407; *Crain v. Fox*, 16 Barb. 184.

servient tenement,<sup>1</sup> except where a parol license, granted by the owner of the dominant tenement, is executed by the owner of the servient tenement.<sup>2</sup> An agreement made by a lessee for years to abandon an easement belonging to the estate does not bind the reversioner, unless he is a party to it, or it is made with his knowledge and acquiescence.<sup>3</sup> So an easement may be extinguished by a release.<sup>4</sup> It may be lost by encroachment.<sup>5</sup> Actual obstruction of a private right of way, as by inclosing and cultivating it for ten years, extinguishes the right thereto.<sup>6</sup> And it may be lost by abandonment.<sup>7</sup> But to amount to an abandonment of an easement without a release by the owner of the dominant tenement, the proof must show,—

1. That the acts relied upon were voluntarily done by the owner of the dominant tenement, or by his express authority;
2. That such party was the owner of the inheritance, and had authority to bind the estate by his grant or release;
3. That the acts are of so decisive and conclusive a character as to indicate and prove his intention to abandon the easement.<sup>8</sup> Whether an easement has been abandoned depends on intention, which is a question of fact.<sup>9</sup> Abandonment of a right of way is more readily presumed where the easement is granted for the public benefit than where it is held for private use. Thus non-user of a street railroad more than ten years is sufficient evidence of abandonment, so that the state could grant it to another corporation.<sup>10</sup> Where a party accepts a conveyance con-

<sup>1</sup> *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399.

<sup>2</sup> *Morse v. Copeland*, 2 Gray, 302.

<sup>3</sup> *Glenn v. Davis*, 35 Md. 208; 6 Am. Rep. 389.

<sup>4</sup> *Coleman's Appeal*, 62 Pa. St. 274; *Pope v. Devereux*, 5 Gray, 409; *Hamilton v. Farrar*, 128 Mass. 492; *Rector v. Mack*, 93 N. Y. 488; 45 Am. Rep. 260; *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399.

<sup>5</sup> *Elliott v. Rhett*, 5 Rich. 405; 57 Am. Dec. 750.

<sup>6</sup> *Bowen v. Team*, 6 Rich. 298; 60 Am. Dec. 127.

<sup>7</sup> *Dana v. Valentine*, 5 Met. 14; *Parkins v. Dunham*, 3 Strob. 224; *Louisville etc. R. R. Co. v. Covington*, 2 Bush, 532; *Cawry v. Andrews*, 123 Mass. 155; *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399; *Pope v. Devereux*, 5 Gray, 409; *Queen v. Chorley*, 12 Ad. & E. N. S., 515; *Moore v. Rawson*, 3 Barn. & C. 332; *Vogler v. Geiss*, 51 Md. 407.

<sup>8</sup> *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399.

<sup>9</sup> *Pulson v. Ingram*, 22 S. C. 541.

<sup>10</sup> *Henderson v. R. R. Co.*, 21 Fed. Rep. 358.

taining an express reservation of an easement for the benefit of an adjoining house, he and those claiming in privity of estate with him are precluded from setting up a prior abandonment of such easement to their predecessor in interest.<sup>1</sup> The easement may be lost by non-user.<sup>2</sup> In the case of private ways, non-user for twenty years affords conclusive presumption that the right to them never existed or has been extinguished in favor of some adverse right.<sup>3</sup> But where the right is claimed by deed, mere non-user for any length of time will not impair or defeat it.<sup>4</sup> The non-user, to have that effect, must be in consequence of something which is adverse to the user on the part of the owner of the servient estate, and continued for the period of prescription.<sup>5</sup> So long as the conduct and situation of the parties are consistent with the written title under which they claim, they will be presumed to hold under it and according to its terms.<sup>6</sup> So it may be determined by any act of the party incompatible therewith.<sup>7</sup> The owner of the dominant estate may make such changes in the use and condition thereof as to renounce the easement;<sup>8</sup> and this may be relied on by the owner of the servient estate as an abandonment.<sup>9</sup> A mere abuse of the right, such as using a way for a purpose not included in the right, is only a trespass, and the right remains. But where a way had been laid out for the

<sup>1</sup> *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399.

<sup>2</sup> *Jennison v. Walker*, 11 Gray, 425; *Farrar v. Cooper*, 34 Me. 400; *White v. Crawford*, 10 Mass. 183; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *Wilder v. St. Paul*, 12 Minn. 208; *Chandler v. Jamacia Pond etc. Co.*, 125 Mass. 544; *Thompson v. Myers*, 34 La. Ann. 615. But non-user is only *prima facie* evidence of an intention to abandon: *Pratt v. Sweetzer*, 68 Me. 344.

<sup>3</sup> *Webber v. Chapman*, 42 N. H. 326; 80 Am. Dec. 111.

<sup>4</sup> *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305; *Londendyck v. Anderson*, 59 How. Pr. 1; *Riehle v. Haw-*

*lings*, 38 N. J. L. 20; *Eddy v. Chace*, 140 Mass. 471; *Tyler v. Cooper*, 47 Hun, 94.

<sup>5</sup> *Jewett v. Jewett*, 16 Barb. 150; *Farrar v. Cooper*, 34 Me. 400; *Chandler v. Jamacia Pond*, 125 Mass. 544; *Bannon v. Angier*, 2 Allen, 128; *Hall v. McCaughey*, 51 Pa. St. 43; *Nitzell v. Paschall*, 3 Rawle, 76; *Pope v. O'Hara*, 48 N. Y. 446; *Snell v. Levitt*, 39 Hun, 227.

<sup>6</sup> *Doe v. Butler*, 3 Wend. 149.

<sup>7</sup> *Boone on Real Property*, 147.

<sup>8</sup> *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399.

<sup>9</sup> *Jones v. Tapling*, 11 Com. B., N. S., 283; *Garritt v. Sharp*, 3 Ad. & E. 325.

common use of lots bounded on it, and A, the owner of one of these lots, had appropriated to his own use the part of the way opposite his lot, it was held that A had abandoned his easement, and could not maintain an action against the owner of another of the lots for obstructing the way.<sup>1</sup> A right of way is not extinguished by its owner's habitual use of another, equally convenient, unless there is an intentional abandonment of the former.<sup>2</sup>

§ 2782. **Obstructions to Easements—Remedies.**—Any obstruction to an easement, any encroachment upon it, or any disturbance of the soil, or of that by means of which the easement is enjoyed, is an actionable wrong, provided damage is caused by it.<sup>3</sup> But a previous request to remove the disturbance is essential.<sup>4</sup> And the plaintiff must remove an obstruction to the enjoyment of an easement existing on his own land, or show his readiness to do so before he can maintain an action against another for disturbing such easement.<sup>5</sup> Where the injury is not susceptible of being adequately compensated by damages at law, equity will interfere by injunction, either to restrain the continuance of the wrong,<sup>6</sup> or to prevent the commission of a threatened injury.<sup>7</sup> The owner of the easement has a right, also, to enter the land and abate the obstruction himself.<sup>8</sup> In so doing, he does not lose his right to recover by action the damages he may have

<sup>1</sup> *Steere v. Tiffany*, 13 R. I. 568.

<sup>2</sup> *Jamacia Pond etc. Corp. v. Chandler*, 121 Mass. 3.

<sup>3</sup> *Cooley on Torts*, 371; *Parker v. Griswold*, 17 Conn. 288; 42 Am. Dec. 739; *Munroe v. Stickney*, 48 Me. 462; *Clifford v. Hoare*, L. R. 9 Com. P. 362; 9 Eng. R. 449; *Aynsley v. Glover*, L. R. 18 Eq. 544; 11 Eng. R. 521; *Jackson v. New Castle*, 33 Law J., N. S., 698; *Bliss v. Kennedy*, 43 Ill. 74; *Burnham v. Kempton*, 44 N. H. 79; *Chatfield v. Wilson*, 27 Vt. 670; *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312; *Sampson v. Hoddinott*, 1 Com. B., N. S., 590; *Baer v. Martin*, 8 Blackf. 317.

<sup>4</sup> *Elliott v. Rhett*, 5 Rich. 405; 57 Am. Dec. 750.

<sup>5</sup> *Elliott v. Rhett*, 5 Rich. 405; 57 Am. Dec. 750.

<sup>6</sup> *Burwell v. Hobson*, 12 Gratt. 322; 65 Am. Dec. 247; *Ackerman v. Hori-con Co.*, 16 Wis. 154; *Corning v. Troy Factory*, 40 N. Y. 192; *Merrifield v. Lombard*, 13 Allen, 16; 90 Am. Dec. 172; *Wood v. Saunders*, L. R. 10 Ch. 582; 14 Eng. R. 805.

<sup>7</sup> *Ingraham v. Dunnell*, 5 Met. 118; *Mott v. Schoolbred*, L. R. 20 Eq. 22; 13 Eng. R. 582.

<sup>8</sup> *Amick v. Tharp*, 13 Gratt. 564; 67 Am. Dec. 787; *Great Falls Co. v. Worster*, 15 N. H. 412; *Hutchinson*

sustained up to the time of such abatement.<sup>1</sup> But in abating an obstruction the owner must act in a careful manner, doing no unnecessary injury;<sup>2</sup> if he does not, he forfeits his right, and becomes a trespasser.<sup>3</sup>

§ 2783. **Who may Sue and be Sued.**—Whoever is owner of the dominant tenement at the time an easement is disturbed, or has any interest therein which entitles him to the enjoyment of the easement, may maintain an action for the injury;<sup>4</sup> and where the dominant tenement is under lease, the reversioner may also sue, if the injury is one that affects his rights as reversioner.<sup>5</sup> Suit may be brought against the owner of the servient tenement if the injury was done by him or with his permission; and if it consists in an obstruction or encroachment which is continued by his successor in the title, the latter may be held responsible if he fails to remove it within a reasonable time after notice.<sup>6</sup> If the party from whom an assignee purchases cannot complain of an alleged misuser of an easement, the assignee cannot, as he stands in the shoes of him from whom he purchased.<sup>7</sup>

§ 2784. **Easement of Light and Air—Ancient Lights.**—The English doctrine of ancient lights, i. e., a right by prescription to the light which enters one's windows over

<sup>1</sup> *Granger*, 13 Vt. 386; *Adams v. Barney*, 25 Vt. 225; *Ballard v. Butler*, 30 Me. 94; *Jewell v. Gardiner*, 12 Mass. 312; *Rhea v. Forsyth*, 37 Pa. St. 503; 78 Am. Dec. 441; *McCord v. High*, 24 Iowa, 348; *Perry v. Fitzhowe*, 8 Q. B. 757.

<sup>2</sup> *White v. Chapin*, 102 Mass. 138; *Tate v. Parish*, 7 B. Mon. 328.

<sup>3</sup> *Morrison v. Howe*, 120 Mass. 571; *Amick v. Tharp*, 13 Gratt. 564; 67 Am. Dec. 787; *Burling v. Read*, 11 Q. B. 904; *Roberts v. Rose*, L. R. 1 Ex. 82; *Tuthill v. Scott*, 43 Vt. 525; 5 Am. Rep. 301.

<sup>4</sup> *Ganley v. Looney*, 14 Allen, 40; *Dyer v. Dupui*, 5 Whart. 584; *Wright v. Moore*, 28 Ala. 599; 82 Am. Dec. 731; *Heath v. Williams*, 25 Me. 209;

43 Am. Dec. 265; *Davies v. Williams*, 16 Q. B. 546.

<sup>5</sup> *Hastings v. Livermore*, 7 Gray, 194; *Stanford v. Lyon*, 37 N. J. L. 426; 18 Am. Rep. 736.

<sup>6</sup> *Kidgill v. Moor*, 9 Com. B. 364; *Queen's College v. Hallett*, 14 East, 489; *Battishill v. Reed*, 18 Com. B. 696; *Brown v. Bowen*, 30 N. Y. 519; 86 Am. Dec. 406; *Tinsman v. R. R. Co.*, 25 N. J. L. 255; 64 Am. Dec. 415.

<sup>7</sup> *Woodman v. Tufts*, 9 N. H. 88; *Thornton v. Smith*, 11 Minn. 15; *Grigsby v. Clear Lake*, 40 Cal. 396; *Dodge v. Stacy*, 39 Vt. 558; *Caldwell v. Gale*, 11 Mich. 77.

<sup>8</sup> *Nordfleet v. Cromwell*, 70 N. C. 634; 16 Am. Rep. 787.

the lands of another is not (except in one or two states<sup>1</sup>) recognized in this country, and therefore, in the United States, no prescriptive right to have the light and air enter the windows of a building laterally over the land of another can be acquired, and in the absence of an express or implied grant, an adjoining owner may build upon his own land so as to completely shut out the light of his neighbor's windows opening upon his land, and no action can be maintained therefor.<sup>2</sup> But the right to light and air may be acquired by express grant or covenant.<sup>3</sup> An

<sup>1</sup> *Louisiana*. — *Durant v. Riddel*, 12 La. Ann. 746; *Cleris v. Tiernan*, 15 La. Ann. 316. The rule in this state seems to be as follows: The right to place windows in a party-wall, or in a division wall, may be acquired by ten years' uninterrupted possession; but that right, so acquired, is subject to the right of the owner of the adjoining estate to build on his own ground a wall or house, and thereby completely obstruct light and air. The right to prevent the owner of an adjoining estate from erecting any such obstructions can only be acquired by title.

*Illinois*. — In the early case of *Gerber v. Grabel*, 16 Ill. 217. But the doctrine of this case was repudiated in *Guest v. Reynolds*, 68 Ill. 478; 18 Am. Rep. 570.

*New Jersey*. — The English doctrine is adopted in several early cases in this state: *Robeson v. Pittenger*, 2 N. J. Eq. 57; 32 Am. Dec. 412; *Plum v. Canal Co.*, 10 N. J. Eq. 256; *King v. Miller*, 8 N. J. Eq. 559; 55 Am. Dec. 246; *Barnett v. Johnson*, 15 N. J. Eq. 481; *Bechtel v. Carslake*, 11 N. J. Eq. 500. See *Sutphen v. Therkelson*, 38 N. J. Eq. 318. But it is repudiated in *Hayden v. Dutcher*, 31 N. J. Eq. 217. An action does not lie in New Jersey for obstructing a view: *Harwood v. Tompkins*, 24 N. J. L. 425.

*New York*. — The English doctrine was recognized in an early case in this state: *Mahan v. Brown*, 13 Wend. 261; 28 Am. Dec. 461 (1835). But this case is not now law: See next note.

*Delaware*. — *Clawson v. Primrose*, 4 Del. Ch. 643.

<sup>2</sup> *Ward v. Neal*, 37 Ala. 500; *Parker v. Foote*, 19 Wend. 309; *Doyle v. Lord*, 64 N. Y. 439; 21 Am. Rep. 629; *Doyle v. Lord*, 39 N. Y. Sup. Ct. 421; *Mahan v. Brown*, 13 Wend. 261; 28 Am. Dec. 461; *Radcliff v. Mayor*, 4 N. Y. 200; 53 Am. Dec. 357; *Myers v. Gemmel*, 10 Barb. 537; *Rogers v. Sawin*, 10 Gray, 376; *Carrig v. Dea*, 14 Gray, 583; *Randall v. Sanderson*, 111 Mass. 114; *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Jenks v. Williams*, 115 Mass. 217; *Cherry v. Stern*, 11 Md. 1; *Powell v. Sims*, 5 W. Va. 1; 13 Am. Rep. 629; *Keiper v. Klein*, 51 Ind. 316; *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Napier v. Bulwinkle*, 5 Rich. 312; *Klein v. Gehring*, 25 Tex. Supp. 232; 78 Am. Dec. 565; *Story v. Odin*, 12 Mass. 157; 7 Am. Dec. 46; *Pierre v. Fernald*, 26 Me. 436; 46 Am. Dec. 573; *Oregon Iron Co. v. Trullinger*, 3 Or. 1; *Morrison v. Marquardt*, 24 Iowa, 63; 92 Am. Dec. 444; *Hoy v. Sterrett*, 2 Watts, 331; 27 Am. Dec. 313; *Stein v. Hanck*, 56 Ind. 65; 26 Am. Rep. 10; *Ray v. Sweeney*, 14 Bush, 1; 29 Am. Rep. 388; *Lapere v. Luckey*, 23 Kan. 534; 33 Am. Rep. 196; *Housel v. Conant*, 12 Ill. App. 259; *Greene v. R. R. Co.*, 65 How. Pr. 154.

<sup>3</sup> *Mahan v. Brown*, 13 Wend. 263; 28 Am. Dec. 461; *Parker v. Foote*, 19 Wend. 309; *Keats v. Hugo*, 115 Mass. 216; 15 Am. Rep. 80; *Brooks v. Reynolds*, 106 Mass. 31; *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 218; *James v. Jenkins*, 34 Md. 1; 6 Am. Rep. 300;

easement to light and air may also be acquired by implied grant,<sup>1</sup> though this is denied in some states.<sup>2</sup>

The right rests, nevertheless, in all the cases upon the ground of necessity, and not of mere convenience.<sup>3</sup> No grant of light and air will be implied beyond what is absolutely necessary to the enjoyment of the premises conveyed.<sup>4</sup> The doctrine may be stated thus: That where one, being the owner of land, erects a house thereon with windows opening upon his vacant land adjoining, and sells the house, reserving the adjoining lot, this does not create an easement in the purchaser of the house to have the light and air come through those windows, unless the easement is necessary to supply the building with light, and to its comfortable enjoyment.<sup>5</sup> A person selling a house which opens out upon a vacant lot, also belonging to him, will be estopped from making an erection upon the lot that would obstruct the passage of light and air to the dwelling.<sup>6</sup> But it is essential that the windows which it is sought to protect should be necessary to the admission of sufficient light and air for the reasonable enjoyment of the building conveyed, and that a sufficient amount of

*Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *United States v. Appleton*, 1 Sum. 492; *Thurston v. Minke*, 32 Md. 437; *Lampman v. Milks*, 21 N. Y. 505; *Morrison v. Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444; *Powell v. Sims*, 5 W. Va. 1; 13 Am. Rep. 629; *Turner v. Thompson*, 58 Ga. 268; 24 Am. Dec. 297; *Pope v. Bell*, 37 N. J. Eq. 495.

<sup>1</sup> *Janes v. Jenkins*, 34 Md. 1; 6 Am. Rep. 300; *Maynard v. Esher*, 17 Pa. St. 222; *United States v. Appleton*, 1 Sum. 492; *Story v. Odin*, 12 Mass. 157; 7 Am. Dec. 46; *Oregon Iron Co. v. Trullinger*, 3 Or. 1.

<sup>2</sup> *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Shipman v. Beers*, 2 Abb. N. C. 435; *Haverstick v. Sipe*, 33 Pa. St. 368; *Doyle v. Lord*, 64 N. Y. 432; 21 Am. Rep. 629; *Johnson v. Oppenheim*, 55 N. Y. 293; *Mullen v.*

*Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Keifer v. Klein*, 51 Ind. 216; *Randall v. Sanderson*, 111 Mass. 114.

<sup>3</sup> *Powell v. Sims*, 5 W. Va. 1; 13 Am. Rep. 629; *White v. Bradley*, 66 Me. 254; *Rennyson's Appeal*, 94 Pa. St. 147; 39 Am. Rep. 777; *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379.

<sup>4</sup> *Rennyson's Appeal*, 94 Pa. St. 147; 39 Am. Rep. 777; *Powell v. Sims*, 5 W. Va. 1; 13 Am. Rep. 629.

<sup>5</sup> *White v. Bradley*, 66 Me. 254; *Rennyson's Appeal*, 94 Pa. St. 147; 39 Am. Rep. 777; *Paine v. Boston*, 4 Allen, 169; *Biddle v. Ash*, 2 Ashm. 211; *Napier v. Bulwinkle*, 2 Rich. 312; *Brooks v. Reynolds*, 106 Mass. 31; *Canig v. Dee*, 14 Gray, 583; *Cherry v. Stein*, 11 Md. 1; *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80.

<sup>6</sup> *Maynard v. Esher*, 17 Pa. St. 222.

light and air could not be derived from other windows then existing, or which could elsewhere be opened in the building at a reasonable expense, to render the rooms reasonably useful and enjoyable.<sup>1</sup> Enjoyment of light and air from a private alley does not give the right to have the owner compelled to keep it open.<sup>2</sup> Where two estates are conveyed at the same time to different purchasers, no easement is acquired in favor of either estate for the passage of light and air.<sup>3</sup> As between landlord and tenant, the rule is different from the case of premises conveyed. If the landlord lets premises with windows opening upon an adjoining lot owned by him, which are necessary to furnish light and air for such premises, there is an implied covenant on his part that he will make no erection upon the adjoining premises, during the term, that shall so darken such windows that the beneficial enjoyment of the premises shall be prevented.<sup>4</sup> But if the windows obstructed were not necessary for the beneficial enjoyment of the premises for the purpose for which they were rented, the erection is not a nuisance nor an interference with the tenant's rights.<sup>5</sup>

The access of air to the chimneys of a building can-

<sup>1</sup> *Turner v. Thompson*, 58 Ga. 268; 24 Am. Rep. 497; *Powell v. Sims*, 5 W. Va. 1; 13 Am. Rep. 629; *Clarke v. Clarke*, L. R. 1 Ch. App. 16.

<sup>2</sup> *Dexter v. Tree*, 117 Ill. 532.

<sup>3</sup> *Maynard v. Eshler*, 17 Pa. St. 222; *Collier v. Pierce*, 7 Gray, 18; 6 Am. Dec. 453.

<sup>4</sup> *Doyle v. Lord*, 64 N. Y. 432; 21 Am. Rep. 629. And such an act will amount to an eviction: *Royce v. Gugenheim*, 106 Mass. 201; 8 Am. Rep. 322.

<sup>5</sup> *Palmer v. Wetmore*, 2 Sand. 316. In another case in New York, the defendant leased to the plaintiff a dwelling-house opening out upon a vacant lot, also belonging to him, over which the light and air had been accustomed to come to the house. While the tenant was in possession of the premises, the defendant erected a

building upon this vacant lot, occupying the whole space between the lot and the dwelling, and darkening all the windows on that side of the house. The court held that this was not an actionable injury, and was not in derogation of the defendant's grant, because the law does not attach a right of enjoyment of light as an incident to the occupation of a house, unless it exists in the form of dedication to groups or collections of houses so as to partake of the nature of a public easement. But the court considered that if houses were erected around a court, with an open space for light and air, with a common entrance, and open for all the tenants, that this would be held as a dedication for the benefit of all the tenants: *Myers v. Gemmel*, 10 Barb. 537.

not, even in England, be claimed by prescription, or as a natural right.<sup>1</sup> One will not be restrained by injunction from putting a window in his wall. The remedy is to build up opposite the window.<sup>2</sup> A private dwelling-house may not be declared a nuisance by authority of the legislature, simply because it may injure adjoining property by cutting off the breeze from and the view of the sea.<sup>3</sup>

§ 2785. **Removing Lateral Support of Land.**—An owner of land has a right to lateral support from the soil of his neighbor so far as may be necessary to preserve the soil on his own land in its natural state, and whoever makes excavations on his own lands must do so without endangering that right of his neighbor.<sup>4</sup> There is no absolute right to the support of the adjoining lands; the adjoining owner may withdraw the support, and no action lies if no damage ensues. If the party's soil remains intact, the adjoining owner may excavate to the very extremity of the boundary line, and no action will lie therefor.<sup>5</sup> So one may recover damages for an injury to his soil by removing the lateral support of it, although its subsidence was caused by the weight of adjacent buildings belonging to another proprietor.<sup>6</sup> But this obligation is limited to the support of the land in its natural condition; and if the neighbor's land is weighted with buildings, or other burdens, the owner of the servient tenement, in removing lateral support,

<sup>1</sup> *Bryant v. Lefever*, L. R. 4 Com. P. Div. 172; 27 Week. Rep. 592.

<sup>2</sup> *Shell v. Kemmerer*, 13 Phila. 502.

<sup>3</sup> *Quintini v. Board of Aldermen*, 64 Miss. 483; 60 Am. Rep. 62.

<sup>4</sup> *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57; *Charles v. Rankin*, 22 Mo. 560; 66 Am. Dec. 642; *Boothby v. R. R. Co.*, 51 Me. 318; *Humphries v. Brogdon*, 12 Q. B. 739; *McGuire v. Grant*, 25 N. J. L. 357; 67 Am. Dec. 49; *Richardson v. R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *Stevenson v. Wallace*, 27 Gratt. 77; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; *Farrand v.*

*Marshall*, 19 Barb. 380; 21 Barb. 417; *Lasala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524; *Shafer v. Wilson*, 44 Md. 268; *Busby v. Holthaus*, 46 Mo. 161; *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771; *Maurer v. Lussum*, 65 Ill. 484; *Guest v. Reynolds*, 68 Ill. 478; 18 Am. Rep. 570; *Baltimore etc. R. R. Co. v. Reaney*, 42 Md. 117; *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693; *Acton v. Nolan*, 63 Cal. 269.

<sup>5</sup> Cases in last note; *Lasala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524.

<sup>6</sup> *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771.

can be held responsible only for such consequences as would have followed if the land had not been thus weighted.' A person, on building a house contiguous and adjoining to the house of another, may lawfully sink the foundation of his house below the foundation of his neighbor's, and is not liable for any consequential damage, provided he has used due care and diligence to prevent any injury to the house of the other.<sup>3</sup> The rule is, that if A digs so near the land of B that it falls into his pit, together with the buildings and other improvements thereon, B may recover damages of A for the actual loss of and injury to his soil, but not for any injury to the superimposed improvements, although the soil would have fallen without the additional weight of such improvements.<sup>3</sup>

But the right to lateral support weighted by buildings may be acquired by prescription,<sup>4</sup> or by an implied covenant, as where the adjoining lands were formerly the property of a common owner,<sup>5</sup> or where several buildings, built by a common owner, so as to support each other, have been afterwards sold to different vendees.<sup>6</sup> The fact

<sup>1</sup> *Tunstall v. Christian*, 80 Va. 1; 56 Am. Rep. 581; *Moody v. McClelland*, 39 Ala. 45; 84 Am. Dec. 770; *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57; *Panton v. Holland*, 17 Johns. 92; 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524; *O'Connor v. Pittsburg*, 18 Pa. St. 187; *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Partridge v. Scott*, 3 Mees. & W. 220; *Backhouse v. Bonomi*, 9 H. L. Cas. 502; *Humphries v. Brogden*, 12 Q. B. 739; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; *Cincinnati v. Penny*, 21 Ohio St. 499; 8 Am. Rep. 73; *McGuire v. Grant*, 25 N. J. L. 386; 67 Am. Dec. 49; *Charles v. Rankin*, 22 Mo. 566; 66 Am. Dec. 642; *Bushby v. Holthaus*, 46 Mo. 161; *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771; *Richardson v. R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *Gilmore v. Driscoll*, 122 Mass. 119; 23 Am. Rep. 312; *Winn v. Abeles*, 35 Kan. 85; 57 Am. Rep. 138; *Richart v.*

*Scott*, 7 Watts, 460; 32 Am. Dec. 779.

<sup>2</sup> *Panton v. Holland*, 17 Johns. 92; 8 Am. Dec. 369.

<sup>3</sup> *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312.

<sup>4</sup> *Washburn on Easements*, 547; *Story v. Odin*, 12 Mass. 157; 7 Am. Dec. 46; *Lasala v. Holbrook*, 4 Paige, 161; 25 Am. Dec. 524; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; *Stevenson v. Wallace*, 27 Gratt. 77; *Richart v. Scott*, 7 Watts, 460; 32 Am. Dec. 779; *Charles v. Rankin*, 22 Mo. 566; 66 Am. Dec. 642. *Contra*, *Mitchell v. Mayor*, 49 Ga. 19; 15 Am. Rep. 669.

<sup>5</sup> *Harris v. Ryding*, 5 Mees. & W. 60; *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49; *Stevenson v. Wallace*, 27 Gratt. 77; *Richards v. Rose*, 9 Ex. 218; *Gayford v. Nicholls*, 9 Ex. 702.

<sup>6</sup> *Richards v. Rose*, 9 Ex. 218; 23 L. J. Ex. 3.

that houses have been built on the land does not take away from the owner his right to so much lateral support as would have sustained the soil in its natural condition. If his soil would have sunk in consequence of the excavation without the superincumbent weight of the house, he is entitled to damages for the injury to his soil or to the foundations of his house.<sup>1</sup> But the right to lateral support not being an absolute right, its infringement is not a cause of action without appreciable damage. Therefore, where A dug a well near B's land, which sank in consequence, and a building erected on it within twenty years fell, and it was proved that if the building had not been on B's land, the land would have sunk, but the damage would have been inappreciable, it was held that B had no right of action against A.<sup>2</sup> Where one conveyed land to a railroad company "for material . . . to the uses and purposes of said railroad, and for no other or different purpose," and the removal of the material deprived other land of its lateral support, so that it fell down some years afterwards, it was held that he was estopped by his deed from recovering damages.<sup>3</sup> But in removing lateral support, even where he has a right to do so, the party so removing it must use due care, and if by his negligence he inflicts unnecessary damage, he is responsible therefor.<sup>4</sup>

<sup>1</sup> *Brown v. Robins*, 4 Hurl. & N. 186; 28 L. J. Ex. 250; *Strayan v. Knowles*, 6 Hurl. & N. 454; 30 L. J. Ex. 102; *Stevenson v. Wallace*, 27 Gratt. 77; *Hunt v. Peake*, John. 703; *Hamer v. Knowles*, 6 Hurl. & N. 459; *Wyatt v. Harrison*, Barn. & Adol. 871.

<sup>2</sup> *Smith v. Thackrah*, L. R. 1 Com. P. 544; 1 Har. & R. 615; *Bonomi v. Backhouse*, 9 H. L. Cas. 503; 34 L. J. Q. B. 181. In *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771, the court say: "Whether, if the pressure of the weight of artificial structures which the owner has placed upon his own land for a lawful purpose and in its reasonable use contributes to cause a slide or crumbling away of his soil into a pit excavated in an adjoining

close by another proprietor, this will deprive him of the right to remuneration for the injury sustained, may be considered to be at least open to denial."

<sup>3</sup> *Ludlow v. R. R. Co.*, 4 Hun, 239.

<sup>4</sup> *Washburn on Easements*, 437; *Panton v. Holland*, 17 Johns. 92; 8 Am. Dec. 369; *Stevenson v. Wallace*, 27 Gratt. 77, 89; *Dixon v. Wilkinson*, 2 McAr. 423; *Dodd v. Holmes*, 1 Ad. & E. 493; *Davis v. R. R. Co.*, 2 Scott N. R. 74; 1 Man. & G. 799; 2 Eng. Ry. & C. Cas. 308; 1 Drink. 1; *Lukin v. Goddall*, Peake Ad. Cas. 15; *Trower v. Chadwick*, 3 Bing. N. C. 334; *Austin v. R. R. Co.*, 25 N. Y. 334; *Boothby v. R. R. Co.*, 51 Me. 318; *Shafer v. Wilson*, 44 Md. 268, 280; *Baltimore etc.*

He must give notice of his intention, so that the owner may have an opportunity to provide against any threatened danger.<sup>1</sup> The care which he must exercise, it is held, is not the care which he would exercise were both buildings his own, but ordinary care only.<sup>2</sup> He is not obliged to shore up his neighbor's house.<sup>3</sup> Where the owner is not entitled as of right to support for his house, it is a good defense that the excavation was made by an independent contractor.<sup>4</sup> The mere fact that the walls of plaintiff's house cracked on account of the excavation is not evidence of negligence in making it.<sup>5</sup> An injunction to prevent the threatened injury as well as an action for damages will lie,<sup>6</sup> although the pecuniary damage threatened is slight, and may be easily compensated in damages.<sup>7</sup> One quarrying on a hill-slope will be enjoined from removing the lateral support to his neighbor's land, unless he shall protect such land by a substantial stone wall.<sup>8</sup> But equity will not enjoin a land-owner from making excavations on his land, when no serious injury to the adjoining realty is imminent, and when there is nothing peculiar in the situation and circumstances of such realty.<sup>9</sup>

**ILLUSTRATIONS.**—The plaintiff erected a valuable residence upon Beacon Street, Boston, on a lot adjoining the defendant's. He took the precaution to lay his foundation wall sixteen feet

R. R. Co. v. Reaney, 42 Md. 117; Foley v. Wyeth, 2 Allen, 131; 79 Am. Dec. 771; Quincy v. Jones, 76 Ill. 231, 241; 20 Am. Rep. 243; Charles v. Rankin, 22 Mo. 566; 66 Am. Dec. 642; Walters v. Pfeil, 1 Moody & M. 364; Shrieve v. Stokes, 8 B. Mon. 453; 48 Am. Dec. 401; McGuire v. Grant, 25 N. J. L. 356; 67 Am. Dec. 49; Meyer v. Hobbs, 57 Ala. 175; 29 Am. Rep. 719.

<sup>1</sup> Wyley Canal Co. v. Bradley, 7 East, 368; Massey v. Goyder, 4 Car. & P. 161; Shriever v. Stokes, 8 B. Mon. 453; 48 Am. Dec. 401; Brown v. Werner, 40 Md. 15; Rickart v. Scott, 7 Watts, 460; Shafer v. Wilson, 44 Md. 268; Lasala v. Holbrook, 4 Paige, 169; 25 Am. Dec. 524.

<sup>2</sup> 3 Kent's Com. 437; Charles v. Rankin, 22 Mo. 566; 66 Am. Dec. 642.

<sup>3</sup> Peyton v. Governor, 4 Man. & R. 625; 9 Barn. & C. 725.

<sup>4</sup> Gayford v. Nicholls, 9 Ex. 702. *Aliter* where the owner was entitled to support: Stevenson v. Wallace, 27 Gratt. 77. See *ante*, Division I., Title Master and Servant—Independent Contractor.

<sup>5</sup> Ward v. Andrews, 3 Mo. App. 275.

<sup>6</sup> Farrand v. Marshall, 19 Barb. 380; 21 Barb. 409; Hunt v. Peake, John. 705.

<sup>7</sup> Trowbridge v. True, 52 Conn. 190; 52 Am. Rep. 579.

<sup>8</sup> Wier's Appeal, 81\* Pa. St. 203.

<sup>9</sup> McMaugh v. Burke, 12 R. I. 499.

below the surface. After his building was completed, the defendant entered upon his lot and made an excavation thirty-two feet deep, cracking the foundation walls of the plaintiff's house, and rendering them so insecure that he was compelled to take his house down. *Held*, that there could be no recovery: *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57. The plaintiffs had erected a large and costly church upon a lot in New York City adjoining the defendant's, and the defendant, to lay the foundation walls of a new building that he was about to erect, began to excavate to the depth of several feet below the walls of the church, which endangered the safety of the church. On hearing, the court dissolved the injunction, on the ground that the defendant had a right to make the excavation, and the plaintiffs had no redress: *Lasala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524.

§ 2786. **Contributory Negligence.** — Where the owner of the injured buildings, after notice by the adjacent owner that he intends to make an excavation or alteration in his land or buildings, takes no means to prevent the injury or protect his property, he will be guilty of contributory negligence, which will bar his recovery of damages;<sup>1</sup> unless it should appear that the injury was inflicted recklessly, or could, nevertheless, by using due care, have been avoided by the defendant.<sup>2</sup> The doctrine of contributory negligence does not apply where the owner of the building injured is entitled, on the ground of prescription or of implied grant, to support both for his land and his building. In such a case, it has been held erroneous to instruct the jury that it devolved upon the plaintiff to protect her building by providing herself other supports, and that the defendant was not liable if the plaintiff had knowledge of the danger, and could have averted it by prompt action. In such a case, the fact that the building of the dominant tenement is negligently constructed does not constitute a bar, but is admissible in mitigation of damages.<sup>3</sup>

<sup>1</sup> *Thompson on Negligence*, 279; *Am. Dec.* 642; *Dodd v. Holme*, 3 Nev. Rickart v. Scott, 7 Watts, 460. & M. 739; 1 Ad. & E. 493.

<sup>2</sup> *Walters v. Pfel*, Moody & M. 364; <sup>3</sup> *Stevenson v. Wallace*, 27 Gratt. Charles v. Rankin, 22 Mo. 566; 66 77.

### § 2787. Subjacent Support—Mines and Mining. —

Where one man owns the surface of land, and another the subsurface for the purpose of mining, the owner of the surface is entitled to support not only for his land, but for the buildings on it. If the subsurface owner removes the support, he is liable in damages, quite irrespective of the question of negligence in doing so, or of the fact that he worked his mine in a careful and customary manner.<sup>1</sup> One who conveys land to another, reserving the right to remove the underlying coal, is bound to exercise ordinary care in the removal, and if necessary, to leave pillars or ribs of coal to support the surface of the soil, although the reservation exempted him from any liability for injury to the surface of the land by reason of the mining operations.<sup>2</sup> Where the owner of land conveys it in fee, reserving the coal, and afterwards conveys the coal to another, the latter is liable to the grantee for subsidence of the soil

<sup>1</sup> *Humphries v. Brogden*, 12 Q. B. 737; *Brown v. Robins*, 4 Hurl. & N. 185; 28 L. J. Ex. 250; *Rogers v. Taylor*, 2 Hurl. & N. 828; 27 L. J. Ex. 173; *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385; *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55; *Zinc Co. v. Franklinite Co.*, 13 N. J. L. 342; *Hilton v. Lord Granville*, 5 Q. B. 701. In *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242, the court says: "Where the surface of land belongs to one, and the mineral to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state: *Humphries v. Brogden*, 12 Q. B. 743; *Harris v. Ryding*, 5 Mees. & W. 60; *Smart v. Morton*, 5 El. & B. 30. . . . The rule is well settled, when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil: *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55; *Jones v. Wagner*, 66 Pa. St.

429; 5 Am. Rep. 385; *Harris v. Ryding*, 5 Mees. & W. 60; *Zinc Co. v. Franklinite Co.*, 13 N. J. Eq. 342; *Smart v. Morton*, 5 El. & B. 30. . . . But it is contended this obligation to protect the superincumbent soil only extends to the soil in its natural state, and that no obligation rests on the owner of the subjacent strata to support additional buildings, in the absence of express stipulation to that effect. This is doubtless true; but 'the mere presence of a building or other structure upon the surface does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the building. Where the injury would have resulted from the act if no building existed upon the surface, the act creating the subsidence is wrongful, and renders the owners of the mines liable for all damages that result therefrom, as well to the building as to the land itself'; *Wood on Nuisances*, sec. 601; *Brown v. Robins*, 4 Hurl. & N. 185; *Hamer v. Knowles*, 6 Hurl. & N. 459."

<sup>2</sup> *Livingston v. Moingona Coal Co.*, 49 Iowa, 359; 31 Am. Rep. 150.

by the mining of the coal, although the mining was carefully done.<sup>1</sup> The reservation in a deed of land of the minerals which may be found therein implies the right to penetrate the surface for the minerals, and to use such means in mining and removing them as are necessary; but the means used must be necessary, as distinguished from convenient or reasonable, and the surface owner is entitled to subjacent support for the soil in its natural state.<sup>2</sup> The grantee of minerals beneath the surface is not liable to the owner of the surface for the loss of springs occasioned by the ordinary working of the mine.<sup>3</sup> The doctrine of lateral support does not apply as between owners of adjoining gold-mining claims, where the process of working is to tear down the soil and wash it.<sup>4</sup> The original digging away the soil does not create the right of action, but the actual injury; therefore, even though the injury was not the result until several years after the removal of support, an action lies for the injury, as the cause of action only accrues when the injury begins.<sup>5</sup> The owner of the surface must, in like manner, do no act which will interfere with the use of his estate by the owner of the mine. In draining his land, the owner of the surface will be liable if he floods the mine.<sup>6</sup> So if he

<sup>1</sup> *Carlin v. Chappel*, 101 Pa. St. 349; 47 Am. Rep. 722.

<sup>2</sup> *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; 14 Am. Rep. 322. In *Brown v. Torrence*, 88 Pa. St. 186, a grantor having sold the surface of land to one, and the underlying coal to another, the former grantee sued the latter for damage caused by the subsidence of his land, and the following instruction was sustained: "That if the jury believe, from the evidence, that defendants' intestate mined the coal under plaintiff's land, and removed the same without leaving proper and sufficient ribs or pillars to support the surface, or, in lieu of ribs and pillars, set up posts or other supports of insufficient number and strength to support said surface, in consequence of which said surface

fell in, cracked, and sunk, to the damage thereof and of the other property of plaintiff, then the plaintiff is entitled to a verdict for such damages as the jury believe from the evidence he has sustained, not only in the injury to land actually fallen, sunken, or cracked, but the effect thereof upon the whole of plaintiff's land."

<sup>3</sup> *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93.

<sup>4</sup> *Hendricks v. Spring Valley Mining and Irrigation Co.*, 58 Cal. 190; 41 Am. Rep. 257.

<sup>5</sup> *Ludlow v. R. R. Co.*, 5 Lans. 128; *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; 14 Am. Rep. 322.

<sup>6</sup> *Bagnall v. R. R. Co.*, 7 Hurl. & N. 423; *Elliot v. R. R. Co.*, 10 H. L. Cas. 333.

builds a reservoir, and collects and keeps large quantities of water therein, he is bound to keep it in at his peril, and if it escapes and flows down into the mine, he would be answerable for all the consequences.<sup>1</sup>

§ 2788. **Damages.**—Where there are no buildings, the measure of damages for an injury to support is the diminution in value of the land, and not the expense of restoring it to its former condition by means of a wall, or in any other manner.<sup>2</sup> Where the injury is to buildings as well as to soil, the “rule of damages should be the amount of money required to rebuild the plaintiff’s house as it was before the fall, and the value of the house thrown down and the time necessarily taken to rebuild it, with the interest on those amounts from the time when the house fell until the present time.”<sup>3</sup> Where the buildings were used for business purposes, loss of profits should be added.<sup>4</sup> When a person has conveyed the minerals lying under his land, reserving the surface, and, in the working of the mines, the surface is injured, the surface owner is entitled to recover for the injury to the land, without any reference to the diminished value thereof by reason of the sale of the minerals.<sup>5</sup> Where another injury may occur, as where the excavation may do additional damage in the future, damages are only allowed up to the date of the action;<sup>6</sup> and for a new injury another action may be brought,<sup>7</sup> in which latter suit exemplary damages may be given, to compel a cessation of the injury.<sup>8</sup> Where, how-

<sup>1</sup> *Fletcher v. Rylands*, L. R. 1 Ex. 265; *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184.

<sup>2</sup> *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49.

<sup>3</sup> *Charles v. Rankin*, 22 Mo. 566; 66 Am. Dec. 642; *Hide v. Thornborough*, 6 Car. & K. 250; *Shrieves v. Stokes*, 8 B. Mon. 453; 48 Am. Dec. 401.

<sup>4</sup> *Hamer v. Knowles*, 6 Hurl. & N. 459.

<sup>5</sup> *Mordue v. Durham*, L. R. 8 Com. P. 336.

<sup>6</sup> *Holmes v. Wilson*, 10 Ad. & E. 503; *Battishill v. Reed*, 18 Com. B. 696.

<sup>7</sup> *Shadwell v. Hutchinson*, 4 Car. & P. 333; *Thompson v. Gibson*, 7 Mees. & W. 457.

<sup>8</sup> *Shadwell v. Hutchinson*, 4 Car. & P. 333.

ever, the surface is entirely destroyed, the entire damage may be assessed in one action.<sup>1</sup>

ILLUSTRATIONS.—A, the owner of lands in fee, granted to B “the sole right to dig, mine, use, or sell clay situated on” such land, and also the right to dig and mine coal on the same land. Afterwards he granted to C the right to have, hold, and possess all the coal, iron, lead, and all other productions, vegetable and mineral, “under the surface, except the clay and stone heretofore let” to B. The assignee of B, in mining under a mine dug by the assignee of C, neglected to leave sufficient supports for the mine overhead, which sank and destroyed the upper mine. *Held*, that the owner of the lower mine was liable in damages to the owner of the upper: *Yandes v. Wright*, 66 Ind. 319; 32 Am. Rep. 109. By a decree in partition, the surface of an estate containing a coal deposit was severed from the underlying mineral, and the parts were allotted to different heirs without limitation. *Held*, that the mineral owner was liable to the surface owner for injury to buildings, etc., upon the surface, caused by not leaving proper supports in mining the coal. In such a case, all the coal belongs to the mineral owner; but the maxim, *Sic utere tuo ut alienum non lædas*, applies: *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385. Defendant conveyed by warranty deed to plaintiff’s grantor certain lands, reserving the right to enter upon a portion thereof, and to dig and take therefrom the clay and sand that might be found thereon fit for brick-making. In an action to restrain defendant from removing so much of the clay and sand within the boundaries of the portion described as were necessary to support the adjoining land, *held*, that defendant’s right, arising from a reservation, covered the entire portion described, and that plaintiff was not entitled to relief: *Ryckman v. Gillis*, 57 N. Y. 68; 15 Am. Rep. 464, 470. The owner of a coal mine, in working it, removed the ribs of coal, which supported the roof, by reason whereof the surface sank, and surface-water flowed into the mine, and thence into the mine of an adjoining owner. *Held*, that the former was liable to the latter for the damage, though he had worked according to the usages of miners, and without negligence: *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55. The owner of land conveyed the coal beneath the surface, “and all the privileges necessary for the convenient working of said coal, . . . and all rights and privileges incident or usually appurtenant to the working and using of coal mines.” *Held*,

<sup>1</sup> *Troy v. R. R. Co.*, 23 N. H. 101; 55 49 Am. Dec. 474; *Blunt v. McCormick*, Am. Dec. 177; *Anonymous*, 4 Dall. 3 Denio, 283. 147; *Thayer v. Brooks*, 17 Ohio, 489;

that the grantee could not remove the surface support, and that evidence of a custom to the contrary was not admissible: *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93.

§ 2789. **Party-walls — In General.** — Party-walls are walls between two estates which are used for their common benefit in supporting the timbers used in the construction of contiguous houses.<sup>1</sup> Party-walls exist by statute, by grant, or by prescription.<sup>2</sup> If one lot-owner erects a building upon the extremity of his land, the walls of which are entirely within his own domain, an adjoining owner cannot use the wall to support his timbers without rendering himself liable as a trespasser. But if he fastens his timbers in the wall by the consent of the owner, and maintains them there uninterruptedly for twenty years, or the usual statutory period, the wall becomes charged with the servitude of support as a party-wall, and to that extent the owner loses his absolute and entire control over the wall.<sup>3</sup> So where the owners of adjoining lots by mutual consent construct a wall partly on the land of each for the common support of both buildings, and it is so used for the prescriptive or statutory period, it becomes a party-wall.<sup>4</sup> Where the owner of adjoining lots erects two or more buildings on them with walls partly on each lot for their common support, a conveyance by him of each lot conveys with the building an easement for its support by

<sup>1</sup> Washburn on Real Property, 334, 579; List v. Hornbrook, 2 W. Va. 340; Fetterch v. Leamy, 9 Bosw. 510. A party-wall is a solid wall; one built with openings for windows is not: Vansyckel v. Tryon, 6 Phila. 401; St. John v. Sweeney, 59 How. Pr. 175.

<sup>2</sup> For the statutes of several of the states as to party-walls, see Stimson's American Statute Law, 2170. An old wall may be deemed a party-wall; this may be presumed, either from some agreement to that effect, or from its being built upon the line of the two lots for that purpose by the respective owners: Schile v. Brokhahus, 80 N. Y.

614. See Roberts v. Bye, 30 Pa. St. 375; 72 Am. Dec. 710.

<sup>3</sup> McConnell v. Kibbe, 33 Ill. 175; 85 Am. Dec. 265; Wood on Nuisances, 229; Eno v. Del Vecchio, 4 Duer, 53; Webster v. Stevens, 5 Duer, 553; Volmer's Appeal, 61 Pa. St. 118; Burton v. Moffitt, 3 Or. 29.

<sup>4</sup> Richards v. Rose, 9 Ex. 218; Partidge v. Gilbert, 15 N. Y. 601; 69 Am. Dec. 632; Schile v. Brokhahus, 80 N. Y. 614; Eno v. De Vecchio, 4 Duer, 53; Phillips v. Boardman, 14 Allen, 147; Dauenhauer v. Devine, 51 Tex. 480; 32 Am. Rep. 627.

the wall, and the wall is a party-wall.<sup>1</sup> Where a wall of a house stands wholly upon the land of another, and is essential to the support of the house, the latter cannot remove or impair it, both owners having bought from the common owner, and with knowledge of the situation of the wall.<sup>2</sup> Whether a structure is a party-wall is a question of fact, and not of law.<sup>3</sup> It may be a party-wall to the common height of both buildings, and cease to be such for the rest of its height.<sup>4</sup> A wall which is on the dividing line at the bottom, but not perpendicular, and is wholly upon the estate of one owner at the top, may still be a party-wall.<sup>5</sup> The land covered by a party-wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled;<sup>6</sup> and in all cases where such an easement exists, neither owner nor occupant can interfere with the wall to the detriment of the other without his assent.<sup>7</sup>

**§ 2790. Rights and Liabilities of Parties.**—Either party may make any use of a party-wall which he may require, either by deepening the foundation or increasing the thickness or height,<sup>8</sup> so far as it can be done without injury to the other.<sup>9</sup> But the party making the change, when not required for purposes of repair, is ab-

<sup>1</sup> *Webster v. Stevens*, 5 Duer, 553; *Giles v. Dugro*, 1 Duer, 331; *Eno v. Del Vecchio*, 4 Duer, 53; *Partridge v. Gilbert*, 15 N. Y. 601; 69 Am. Dec. 632.

<sup>2</sup> *Henry v. Koch*, 80 Ky. 391; 44 Am. Rep. 484.

<sup>3</sup> *Campbell v. Mesier*, 4 Johns. Ch. 334; 8 Am. Dec. 570; *Schile v. Brokhahus*, 80 N. Y. 614; 2 Hill, 148.

<sup>4</sup> *Cubitt v. Porter*, 8 Barn. & C. 257; *Motts v. Hawkins*, 5 Taunt. 20.

<sup>5</sup> *Gordon v. Milne*, 10 Phila. 15.

<sup>6</sup> *Webster v. Stevens*, 5 Duer, 553; *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545; *Sherred v. Cisco*, 4 Sand. 480.

<sup>7</sup> *Partridge v. Gilbert*, 15 N. Y. 601; 69 Am. Dec. 632; *Webster v. Stevens*, 5 Duer, 553.

<sup>8</sup> *Matts v. Hawkins*, 5 Taunt. 20; *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545; *Phillips v. Boardman*, 4 Allen, 147; *Hicatt v. Morris*, 10 Ohio St. 523; *Dauenhauer v. Devine*, 51 Tex. 490; 32 Am. Rep. 627; *Andrae v. Haseltine*, 58 Wis. 395; 46 Am. Rep. 635.

<sup>9</sup> *Bradbee v. Christ's Hospital*, 4 Man. & G. 761; *Dowling v. Hennings*, 20 Md. 179; 83 Am. Dec. 545; *Gorham v. Gross*, 125 Mass. 232; 28 Am. Rep. 224; *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545.

solutely responsible for any damage it occasions.<sup>1</sup> The right of adjoining owners to support of a party-wall is that of tenants in common.<sup>2</sup> While it is the duty of one erecting a party-wall to make it of sufficient strength to support another building similar to one of which it forms a part, yet he is not bound to make it strong enough to support any kind of building which may be erected by the adjoining proprietor.<sup>3</sup> So there is no implied obligation between owners of distinct parts of a building, which will enable either to maintain an action against the other for mere refusal and neglect to repair his tenement, whereby the plaintiff's part is injured.<sup>4</sup> Where, after erecting a party-wall between two lots, the owner conveys one of them, such conveyance, unless there are express words of reservation, conveys the right to use the party-wall.<sup>5</sup> Where an agreement concerning a party-wall does not expressly bind subsequent grantees, they are not bound.<sup>6</sup> But a person purchasing a lot of land with full notice of the rights of the adjoining owners cannot avail himself of the use of the party-wall without compliance with the terms upon which it was built under their covenants with his grantor.<sup>7</sup>

§ 2791. **Contribution between Parties.**—At common law the owner of land cannot compel the owner of the adjoining premises to build a party-wall, nor can either demand contribution from the other for a wall erected in

<sup>1</sup> *Maxwell v. East River Bank*, 3 Bosw. 144, the court saying: "When the owners of adjoining lots agree, although verbally, that each will erect a building or store on his own lot, and that the dividing wall shall be a party-wall, and be used to support the beams and roof of each building, and they build according to such agreement, and with a view to execute it, neither can remove or do anything to impair the stability or efficiency of such wall, so long at least as the buildings continue to subserve, in every substantial re-

spect, the uses for which they were erected."

<sup>2</sup> *Montgomery v. Masonic Hall*, 70 Ga. 38; *Bennett v. Seligman*, 32 Mich. 500.

<sup>3</sup> *Gilbert v. Woodruff*, 40 Iowa, 320.

<sup>4</sup> *Pierce v. Dyer*, 109 Mass. 374; 12 Am. Rep. 716.

<sup>5</sup> *Goldschmid v. Starring*, 5 Mackey, 582.

<sup>6</sup> *Weeks v. McMillan*, 13 Daly, 139; *Hart v. Lyon*, 90 N. Y. 663.

<sup>7</sup> *Standish v. Lawrence*, 111 Mass. 111; *Sharp v. Cheatham*, 88 Mo. 498; 57 Am. Rep. 433.

whole or in part on the land of such other person, nor for any incidental benefit the latter may derive from a wall erected upon the land of the builder.<sup>1</sup> The easement ends with the destruction of that in which it existed, and in the absence of a binding covenant between the parties, or running with the land, neither party can be compelled to rebuild it, or to contribute toward the expense thereof if it is rebuilt by the other.<sup>2</sup> When the wall becomes ruinous, and in such a state of decay as to be virtually a nuisance, the easement is ended; and while either party may rebuild at his own expense, he cannot compel the other party to contribute thereto.<sup>3</sup> In case a party-wall is destroyed by fire, there is no implied obligation to contribute toward rebuilding it.<sup>4</sup> Where houses having a party-wall are accidentally destroyed by fire, leaving the wall standing, the easement in the wall ceases, and either owner may dispose as he pleases of the part on his ground.<sup>5</sup> A parol agreement by the owner of the adjoining land to pay for the part of the wall set upon his land does not run with the land nor bind his grantee.<sup>6</sup>

§ 2792. **Rights of Way—Private Ways.**—A right of way over the land of another is an incorporeal hereditament, and may arise from a grant, from necessity, or from prescription.<sup>7</sup> A way is either gross or appendant. A

<sup>1</sup> *Urman v. Day*, 5 Fla. 385; *List v. Hornbrook*, 2 W. Va. 340; *Bisquay v. Jennelot*, 10 Ala. 245; 44 Am. Dec. 483; *Sherred v. Cisco*, 4 Sand. 480; *McCord v. Harris*, 18 Ill. App. 439; *Preiss v. Parker*, 67 Ala. 500; *Abrahams v. Krautler*, 24 Mo. 69; 66 Am. Dec. 698.

<sup>2</sup> *Glen v. Davis*, 35 Md. 208; 6 Am. Rep. 389; *Pentz v. Brown*, 5 N. Y. Leg. Obs. 19; *Webster v. Stevens*, 5 Duer, 563; *Daniel v. North*, 11 East, 372; *Partridge v. Gilbert*, 15 N. Y. 601; 69 Am. Dec. 632; *Hoffman v. Kuhn*, 57 Miss. 750; 34 Am. Rep. 491; *Antomarchi v. Russell*, 63 Ala. 386; 35 Am. Rep. 40.

<sup>3</sup> *Wood on Nuisances*, 234.

<sup>4</sup> *Antomarchi's Ex'r v. Russell*, 63 Ala. 356; 35 Am. Rep. 40.

<sup>5</sup> *Hoffman v. Kuhn*, 57 Miss. 746; 34 Am. Rep. 491.

<sup>6</sup> *List v. Hornbrook*, 2 W. Va. 346.

<sup>7</sup> 2 Black, 36; *Lawton v. Rivers*, 2 McCord, 445; 13 Am. Dec. 741; *Derrickson v. Springer*, 5 Harr. (Del.) 21. One may have a private easement in a public highway: *Ross v. Thompson*, 78 Ind. 90. In Pennsylvania, a private road must have for its principal terminus the plantation or dwelling of the petitioner: *Kilbuck v. Private Road*, 77 Pa. St. 39.

way in gross is one that is attached to the person or appurtenant to land,<sup>1</sup> and a way appendant is one that is incident to the estate of the person claiming it, and has a terminus thereon. A way in gross, being personal, cannot be transferred,<sup>2</sup> but a way appendant is an incident of the estate, and passes as an appurtenance by grant;<sup>3</sup> and the latter is appurtenant to every parcel into which the estate may be divided,<sup>4</sup> no matter how small.<sup>5</sup> A right of way appendant to an estate can only be used for purposes connected with that estate, and a right of way in gross can only be enjoyed by the person in whom it exists.<sup>6</sup> Of what kind the grant is, must be determined from the grant itself, and not by matters *aliunde*.<sup>7</sup>

§ 2793. **Ways by Grant or Prescription.**—A way by grant is made by deed, and is no stronger by length of time.<sup>8</sup> If the deed be lost or destroyed, the right may be established by secondary evidence.<sup>9</sup> A grant of a right of way, not of necessity, over other land of the grantor is not to be inferred from language not clearly showing such intention.<sup>10</sup> The right must be used according to the terms of the grant,<sup>11</sup> and is subject to its restrictions.<sup>12</sup> A right of way granted without limit of use may be used for any purpose to which the land thereby accommodated may be

<sup>1</sup> *Garrison v. Rudd*, 19 Ill. 558; *Boatman v. Laaley*, 23 Ohio St. 614; *White v. Crawford*, 10 Mass. 183.

<sup>2</sup> *Washburn on Easements*, 232; *Alley v. Carleton*, 29 Tex. 77; 94 Am. Dec. 260; *Sauzey v. Hunger*, 42 Ind. 44; *Leonard v. White*, 7 Mass. 6; 5 Am. Dec. 19.

<sup>3</sup> *Thorpe v. Brumfitt*, L. R. 8 Ch. App. 650; *Lide v. Hadley*, 36 Ala. 627; 76 Am. Dec. 338.

<sup>4</sup> *Whitney v. Lee*, 1 Allen, 198; 79 Am. Dec. 727; *Fox v. Union Sugar Refinery*, 109 Mass. 298.

<sup>5</sup> *Watson v. Bioren*, 1 Serg. & R. 227; 7 Am. Dec. 617.

<sup>6</sup> *Ackroyd v. Smith*, 10 Com. B. 164.

<sup>7</sup> *Wagner v. Hanna*, 38 Cal. 111; 99 Am. Dec. 354. A grant will not be

presumed to be in gross where it can be construed to be appurtenant: *Louisville etc. R. R. Co. v. Koelle*, 104 Ill. 455. The use of the words "heirs or assigns" is not essential to make a right of way appurtenant: *Karmuller v. Krotz*, 18 Iowa, 352.

<sup>8</sup> *Sauzey v. Hunger*, 42 Ind. 44; *Lawton v. Rivers*, 2 McCord, 445; 13 Am. Dec. 741.

<sup>9</sup> *Lawton v. Rivers*, 2 McCord, 445; 13 Am. Dec. 741.

<sup>10</sup> *Regan v. Boston Gas Light Co.*, 137 Mass. 37.

<sup>11</sup> *Atwater v. Bodfish*, 11 Gray, 150; *French v. Marston*, 24 N. H. 440; 57 Am. Dec. 294; 32 N. H. 316; *Kirkham v. Sharp*, 1 Whart. 323; 29 Am. Dec. 57.

<sup>12</sup> *Garraty v. Duffy*, 7 R. I. 476.

naturally and reasonably devoted.<sup>1</sup> But a right of way for all purposes is not restricted to one purpose because the owner thereof has had occasion for a long series of years to use it for that purpose only.<sup>2</sup> The way may be inclosed by the owner of the land with gates or bars, unless it is expressed to be an open way, or unless such inclosure is inconsistent with the purposes for which it was granted.<sup>3</sup> But if the way had been laid out before the grant, it will pass in the condition it was when conveyed, and if it was then open, the grantor would have no right to set up gates or bars at its entrance.<sup>4</sup> Unless restricted by the terms of the grant, the owner of the land may do any act that does not impair the right of passage over the way granted, or interfere with its free use by the person to whom the right is granted.<sup>5</sup> A private right of way may be acquired by prescription, even across a railroad track.<sup>6</sup> The use must have been under circumstances indicating that it is claimed as a right, and not merely as a privilege.<sup>7</sup> Neither acts of courtesy nor convenience can give one a right of way over another's land.<sup>8</sup> An unexplained use for twenty years is presumed to have been under a claim of right, and adverse. The burden of proving a permissive use is on the owner of the land.<sup>9</sup> To entitle a person to a right of way by prescription, he must show an uninterrupted adverse user for the requisite length of time,<sup>10</sup> and that he has always used the

<sup>1</sup> *Abbott v. Butler*, 59 N. H. 317; *McConnell v. Rathbun*, 46 Mich. 303; *Brown v. Meady*, 10 Me. 391; 25 Am. Dec. 248.

<sup>2</sup> *Holt v. Sargent*, 15 Gray, 97.

<sup>3</sup> *Garland v. Furber*, 47 N. H. 304; *Houpes v. Alderson*, 22 Iowa, 162; *Maxwell v. McAtee*, 9 B. Mon. 20; 48 Am. Dec. 409.

<sup>4</sup> *Welch v. Wilcox*, 101 Mass. 163; 100 Am. Dec. 113.

<sup>5</sup> *Schwoerer v. Boylston Market*, 99 Mass. 285; *Bakeman v. Talbot*, 31 N. Y. 366; 88 Am. Dec. 275; *Bean v. Coleman*, 44 N. H. 539.

<sup>6</sup> *Gay v. R. R. Co.*, 141 Mass. 407.

<sup>7</sup> *Hall v. McLeod*, 2 Met. (Ky.) 98; 74 Am. Dec. 400; *Deerfield v. R. R. Co.*, 144 Mass. 325; *Warren v. Jacksonville*, 15 Ill. 236; 58 Am. Dec. 611.

<sup>8</sup> *Turnbull v. Rivers*, 3 McCord, 131; 15 Am. Dec. 622; *Witter v. Harvey*, 1 McCord, 67; 10 Am. Dec. 650.

<sup>9</sup> *Cox v. Forrest*, 60 Md. 74.

<sup>10</sup> *Derriger v. Springer*, 5 Harr. (Del.) 21; *Hill v. Crosby*, 2 Pick. 466; 13 Am. Dec. 448; *Rowland v. Wolfe*, 1 Bail. 56; 19 Am. Dec. 651; *Worrall v. Rhoads*, 2 Whart. 427; 30 Am. Dec. 274; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; 47 Am. Dec. 156; *Blake v. Everett*, 1 Allen, 248; *Campbell v.*

same without change or variation.<sup>1</sup> If the user relied upon has been interrupted, he must show that such interruptions were consistent with the title claimed by him.<sup>2</sup> So the user must be of a way certain; no right of way can be gained by passing over the land in any place and in all directions.<sup>3</sup> The public may acquire a prescriptive right to use a way as well as a single individual.<sup>4</sup> The right is commensurate with and is measured by the use.<sup>5</sup>

§ 2794. **Ways by Necessity.**—A right of way by necessity arises where the owner of several parcels of land conveys one which is so surrounded by the others that the only way to reach it is through them.<sup>6</sup> A way of necessity must grow out of a grant or change of ownership. It cannot exist where neither the party claiming it, nor the owner of the land over which it is claimed, nor the predecessor of either, was ever seised at the same time of both tracts.<sup>7</sup> If a grantor reserves the parcel surrounded by others for himself, he is entitled to a way to it of necessity.<sup>8</sup> But the necessity must have existed when the land

Wilson, 3 East, 294; Tracey v. Atherton, 36 Vt. 503; Krier's Private Road, 73 Pa. St. 109; Barker v. Clark, 4 N. H. 380; 17 Am. Dec. 428.

<sup>1</sup> Lawton v. Rivers, 2 McCord, 445; 13 Am. Dec. 741; Barnes v. Haynes, 13 Gray, 188; 74 Am. Dec. 629.

<sup>2</sup> Puryear v. Clements, 53 Ga. 233; Plimpton v. Converse, 42 Vt. 712.

<sup>3</sup> Jones v. Percival, 5 Pick. 485; 16 Am. Dec. 415; Aaron v. Gurnee, 68 Ga. 528; Turnbull v. Rivers, 3 McCord, 131; 15 Am. Dec. 622. See Cheney v. O'Brien, 69 Cal. 199.

<sup>4</sup> Richardson v. Pond, 15 Gray, 387; Smith v. State, 23 N. J. L. 712; Wood v. Hurd, 34 N. J. L. 87; Danforth v. Durell, 8 Allen, 242.

<sup>5</sup> Smith v. Wiggin, 52 N. H. 112; Richardson v. Pond, 15 Gray, 387.

<sup>6</sup> Nichols v. Luce, 24 Pick. 102; 35 Am. Dec. 302; Hall v. McLeod, 2 Met. (Ky.) 98; 74 Am. Dec. 400; Worrall v. Rhoads, 2 Whart. 427; 30 Am. Dec. 274; Bass v. Edwards, 126 Mass. 445; Collins v. Prentice, 15

Conn. 39; 38 Am. Dec. 61; White v. Leeson, 5 Hurl. & N. 53; Marshall v. Trumbull, 28 Conn. 183; 73 Am. Dec. 667; Trask v. Patterson, 29 Me. 499; Tracy v. Atherton, 36 Vt. 52; 82 Am. Dec. 621; Taylor v. Waimaky, 55 Cal. 350; McTavish v. Carroll, 7 Md. 352; 61 Am. Dec. 353; Brown v. Burkenmeyer, 9 Dana, 159; 33 Am. Dec. 541; Snyder v. Warford, 11 Mo. 513; 49 Am. Dec. 94; Hetfold v. Baum, 13 Ired. 394; 57 Am. Dec. 563; Kimball v. R. R. Co., 27 N. H. 448; 59 Am. Dec. 387; Pingree v. McDuffie, 56 N. H. 306; Wiswell v. Minogue, 57 Vt. 616; Wilson v. Jarrard, 59 Cal. 55.

<sup>7</sup> Woodworth v. Raymond, 61 Conn. 70.

<sup>8</sup> Houton v. Fearson, 8 Term Rep. 50; Pingree v. McDuffie, 56 N. H. 306; Lawton v. Rivers, 2 McCord, 445; 13 Am. Dec. 741; City of London v. Riggs, L. R. 13 Ch. Div. 798; Burden v. Stein, 29 Ala. 104; 62 Am. Dec. 759; Brigham v. Smith, 4 Gray, 297; 64 Am. Dec. 76. "If I have four fields,

was conveyed. If the owner, by his own act, has deprived himself of a way existing over his own land when the conveyance was made, he cannot thereafter claim a way by necessity over the land of his grantor.<sup>1</sup> On a grant of land wholly surrounding a close, the implied grant of a right of way by the grantee to the grantor to enable him to get to the reserved or expected or inclosed close is not a grant of a general right of way for all purposes, but only a grant of a right of way for the purpose of the enjoyment of the reserved or excepted close in its then state.<sup>2</sup> If a part of a person's land is levied on or set off on execution so as to leave him no way to and from the other portion of his premises, the law gives him a way over the land levied upon;<sup>3</sup> and if the creditor in whose favor the land is set off has no other mode of access to and from the land so set off to him, he takes a way by necessity over the debtor's land.<sup>4</sup> Where the real estate of a deceased person is divided among his heirs by proceedings in the probate court, a right of way of necessity may be implied from one part to another, and where appurtenant to a part set off for dower, it does not cease with the widow's death, but passes to a grantee or purchaser.<sup>5</sup>

and grant away two of them over which I have been accustomed to pass, the law will presume I reserve a right of way to those which I retain; but what right? The same as existed before? No; the old right is extinguished, and the new way arises out of the necessity of the thing": *Holmes v. Goring*, 2 Bing. 76.

<sup>1</sup> *Leonard v. Leonard*, 2 Allen, 543.

<sup>2</sup> *Mayor v. Riggs*, L. R. 13 Ch. Div. 798, the master of the rolls saying: "If you imply more, you reserve to him not only that which enables him to enjoy the thing he has reserved as it is, but that which enables him to enjoy it in the same way, and to the same extent as if he reserved a general right of way for all purposes; that is, as in the case I have before me, a man who reserves two acres of arable land in the middle of a large piece of land is to be entitled to cover

the reserved land with houses, and call on his grantee to allow him to make a wide metalled road up to it. I do not think that is a fair meaning of a way of necessity. I think it must be limited by the necessity at the time of the grant, and that the man who does not take the pains to secure the actual grant of a right of way for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made."

<sup>3</sup> *Pernam v. Wead*, 2 Mass. 203; 3 Am. Dec. 43; *Russell v. Jackson*, 2 Pick. 578; *Schmidt v. Quinn*, 136 Mass. 575.

<sup>4</sup> *Taylor v. Townsend*, 8 Mass. 411; 5 Am. Dec. 107; *Wheeler v. Gilsey*, 35 How. Pr. 139.

<sup>5</sup> *Goodal v. Godfrey*, 53 Vt. 219; 38 Am. Rep. 671; *Cheswell v. Chapman*, 38 N. H. 14; 75 Am. Dec. 158.

A mortgagee of a lot with house and appurtenances resting partly on another strip of land owned by the mortgagor, and fenced in with the mortgaged lot, but not described in the mortgage, takes on foreclosure an easement to the use of so much of said strip as is reasonably necessary.<sup>1</sup>

In order to establish a right of way by necessity, nothing is required but to show the necessity.<sup>2</sup> Neither time nor occupation are necessary, and although the right may never have been enjoyed, yet its existence will be co-extensive with the necessity.<sup>3</sup> The right of locating a way of necessity belongs to the owner of the land in the first instance, but the owner of the easement may select the place, if the other party refuses so to do.<sup>4</sup> A person may, in some cases, have two ways by necessity, as where one way cannot be used to get to and from different portions of the land because of a natural and impassable barrier.<sup>5</sup> Mere convenience or inconvenience does not give a right of way by necessity; there must be an actual necessity.<sup>6</sup> But a reasonable necessity is sufficient; there need not be an absolute necessity.<sup>7</sup> The fact that it is more convenient for the grantee to use a certain way will not give him an easement therein by necessity, if he

<sup>1</sup> *John Hancock Mutual Life Ins. Co. v. Patterson*, 103 Ind. 582; 53 Am. Rep. 550.

<sup>2</sup> *Lawton v. Rivers*, 2 McCord, 445; 13 Am. Dec. 741.

<sup>3</sup> *Sanxay v. Hunger*, 42 Ind. 44; *Derrickson v. Springer*, 5 Harr. (Del.) 21.

<sup>4</sup> *Smiles v. Hastings*, 24 Barb. 44; *Russell v. Jackson*, 2 Pick. 578.

<sup>5</sup> *Nichols v. Luce*, 24 Pick. 105; 35 Am. Dec. 302.

<sup>6</sup> *McDonald v. Lindall*, 3 Rawle, 492; *Grant v. Chase*, 17 Mass. 443; 9 Am. Dec. 161; *Nichols v. Luce*, 24 Pick. 105; 35 Am. Dec. 303; *Abbott v. Stewartstown*, 47 N. H. 230; *Staple v. Heydon*, 6 Mod. 1; *Holmes v. Seely*, 19 Wend. 507; *Scriven v. Gregorie*, 8 Rich. 158; 64 Am. Dec. 747; *Gayetty*

*v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188; *Alley v. Carleton*, 29 Tex. 78; 94 Am. Dec. 260; *Lawton v. Rivers*, 2 McCord, 445; 13 Am. Dec. 741; *New York Life Insurance and Trust Co. v. Milnor*, 1 Barb. Ch. 353; *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61; *City of Hamilton v. Morrison*, 18 U. C. C. P. 224; *Holmes v. Goring*, 2 Bing. 76; *Stuyvesant v. Woodruff*, 24 N. J. L. 133; 47 Am. Dec. 157.

<sup>7</sup> *Lawton v. Rivers*, 2 McCord, 445; 13 Am. Dec. 741; *Dillman v. Hoffman*, 38 Wis. 575; *O'Rourke v. Smith*, 11 R. I. 264; 23 Am. Rep. 440; *Brown v. Berry*, 6 Cold. 98; *Pettingill v. Porter*, 8 Allen, 6; 85 Am. Dec. 671; *Oliver v. Pitman*, 98 Mass. 50; *Hollenbeck v. McDonald*, 112 Mass. 250.

can get to and from his premises over his own land.<sup>1</sup> And if the grantor has provided a way of access for ordinary purposes, a way by necessity does not exist because it is not sufficient for all purposes.<sup>2</sup> It only exists when the person claiming it has no other means of passing from his premises,<sup>3</sup> and it ceases when the owner acquires another right of way over his own land to the highway, or the necessity for it in any other way ceases.<sup>4</sup> A right of way can only be raised out of the land granted or reserved by the grantor, and never out of the land of a stranger.<sup>5</sup> One can have no right of way by necessity over the land of another to connect different parts of a tract of land belonging to himself.<sup>6</sup>

**ILLUSTRATIONS.**—A building contained two stores below and a hall above, which was used independently, and to which the only mode of access was by a stairway in the south store. The owner of the building conveyed the stores to different persons, no mention being made of the hall and stairway. The grantees became tenants in common in the hall. *Held*, that the owner of the north store had the right to use the stairway in the south store: *Galloway v. Bonesteel*, 65 Wis. 79; 56 Am. Rep. 616. The plaintiff leased to defendant a portion of a building, reserving a part to which there was access without going through the part leased. *Held*, that plaintiff had no implied right of way to the part reserved through defendant's premises: *Ramirez v. McCormick*, 4 Cal. 245.

**§ 2795. Rights and Liabilities of Parties.**—A right of way is so far appurtenant to the land that it passes with the land to a grantee.<sup>7</sup> But the title to the soil is in the owner of the land, and he may maintain trespass

<sup>1</sup> *Ogden v. Grove*, 38 Pa. St. 487; *Outerbridge v. Phelps*, 58 How. Pr. 77; 45 N. Y. Sup. Ct. 555; *Motes v. Bates*, 74 Ala. 374; *Burns v. Gallagher*, 62 Md. 462.

<sup>2</sup> *Haskell v. Wright*, 22 N. J. Eq. 389.

<sup>3</sup> *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 183; *Plitt v. Cox*, 43 Pa. St. 486; *Wissler v. Hershey*, 23 Pa. St. 333; *Pernam v. Wead*, 2 Mass. 203; 3 Am. Dec. 43; *Holmes v. Seely*, 19 Wend. 507; *Simmons v. Sines*, 4 Keyes, 153.

<sup>4</sup> *Baker v. Crosby*, 9 Gray, 421; *Viall v. Carpenter*, 14 Gray, 126; *Ogden v. Grove*, 38 Pa. St. 487; *New York Ins. Co. v. Milnor*, 1 Barb. Ch. 353; *Carey v. Rae*, 58 Cal. 159.

<sup>5</sup> *Oliver v. Hook*, 47 Md. 301.

<sup>6</sup> *Cooper v. Maupin*, 6 Mo. 624; 35 Am. Dec. 456.

<sup>7</sup> *Wissler v. Hershey*, 23 Pa. St. 333; *Taylor v. Wamaky*, 55 Cal. 350; *Simmons v. Sines*, 4 Keyes, 153.

against persons using it without right,<sup>1</sup> or ejectment against those making erections upon or over it.<sup>2</sup> A right of way appurtenant to land is appurtenant to the whole and to every part of it, and if such land be divided and conveyed in separate parcels, a right of way thereby passes to each of the grantees.<sup>3</sup> The owner of the land must do no act upon the land adjoining the way that impairs its usefulness or interferes with the passage over it.<sup>4</sup> He may make any reasonable or ordinary use of the adjacent land, provided he does not thereby obstruct the passage over it.<sup>5</sup> He may erect gates across the way, if they do not interfere with the reasonable and proper enjoyment of it;<sup>6</sup> or he may pave or repair the way,<sup>7</sup> or erect a building over it, or cover it in by a roof.<sup>8</sup> Where the easement is, that a passage-way shall be kept open and maintained of a certain width, bay-windows over the passage-way from houses on the side are an obstruction.<sup>9</sup>

The same legal rights apply to subterranean ways as to surface-ways, and the owner of coal-lands through which another has a right of way may cross that way by an entry if he does not substantially interfere with the use thereof.<sup>10</sup> Any act of the land-owner obstructing or hindering the right of the person is a nuisance, and actionable; as where he digs a drain in it, or makes insecure erections on it or openings,<sup>11</sup> or if he closes up the way en-

<sup>1</sup> *Hollenbeck v. Rowley*, 8 Allen, 476.

<sup>2</sup> *Codman v. Evans*, 5 Allen, 308; 81 Am. Dec. 748.

<sup>3</sup> *Underwood v. Caney*, 1 Cush. 285; *Watson v. Brown*, 1 Serg. & R. 227.

<sup>4</sup> *Van O'Linda v. Lothrop*, 21 Pick. 292; 32 Am. Dec. 261; *Richardson v. Pond*, 15 Gray, 387.

<sup>5</sup> *Underwood v. Caney*, 1 Cush. 292; *Van O'Linda v. Lothrop*, 21 Pick. 292; 32 Am. Dec. 261; *Schworer v. Boylston Market*, 99 Mass. 285; *Tilmes v. Marsh*, 67 Pa. St. 557; *Bakeman v. Talbot*, 31 N. Y. 366; 88 Am. Dec. 275; *Huson v. Young*, 4 Lans. 63; *McTavish v. Carroll*, 7 Md. 352; 61 Am. Dec. 353.

<sup>6</sup> *Baker v. Frick*, 45 Md. 337; 24 Am. Rep. 506; *Barnwell v. Magrath*, 1 McMull. 174; 36 Am. Dec. 254. But see *Dickinson v. Whiting*, 141 Mass. 414.

<sup>7</sup> *Brown v. Stone*, 10 Gray, 61; 69 Am. Dec. 303; *McMillan v. Cronin*, 57 How. Pr. 69.

<sup>8</sup> *Adkins v. Bordman*, 2 Met. 457; 37 Am. Dec. 101; *Sutton v. Groll*, 42 N. J. Eq. 213.

<sup>9</sup> *Attorney-General v. Williams*, 140 Mass. 329; 54 Am. Rep. 468.

<sup>10</sup> *Pomeroy v. Buckeye Salt Co.*, 37 Ohio St. 520.

<sup>11</sup> *Perley v. Chandler*, 6 Mass. 454; 4 Am. Dec. 159; *Corby v. Hill*, 4 Com. B., N. S., 556.

tirely.<sup>1</sup> And in general, any interference with a private way, by the land-owner or any other person, that materially interferes with its convenient use, or by the owner of the right of way, is a nuisance, and actionable.<sup>2</sup> Proof of special damage is not required.<sup>3</sup> The party who has the right of way is bound to keep it in repair; the land-owner is not;<sup>4</sup> and the former, because the old track is impassable, has no right to go over other lands.<sup>5</sup> But if the land-owner obstructs the way, the owner of the right may remove them,<sup>6</sup> or he may pass over adjoining land of the same owner.<sup>7</sup> An impassable obstruction of a private way by prescription by the land-owner may justify the owner of the way in deviating from it, and going over another part of the land.<sup>8</sup>

Where a right of way is vested in several persons, for the benefit of several tenements, neither of the persons in whom the right exists has a right to more than a reasonable use of the way, and any obstruction thereof by one to the detriment of the others is a nuisance, and actionable.<sup>9</sup> If the acts of several persons together, though not done jointly or in concert, operate as a nuisance to a way, when the acts of either alone would not operate as an appreciable injury, an action may be maintained in equity against all of them in favor of one who is injured by the aggregation of their acts.<sup>10</sup> The measure of damages for obstruct-

<sup>1</sup> *Kent v. Judkins*, 53 Me. 162; 87 Am. Dec. 544.

<sup>2</sup> *Wood on Nuisances*, 180.

<sup>3</sup> *Williams v. Ealing*, 4 Pa. St. 486; 45 Am. Dec. 710.

<sup>4</sup> *Wynkoop v. Binger*, 12 Johns. 222; *Walker v. Pierce*, 38 Vt. 95.

<sup>5</sup> *Williams v. Safford*, 7 Barb. 309; *Boyce v. Brown*, 7 Barb. 80.

<sup>6</sup> *Boyce v. Brown*, 7 Barb. 80. One passing over a road obstructed by movable bars does not become a trespasser *ab initio* by his neglect to replace the bars, but is liable in case for the injury arising from such neglect: *Hinks v. Hinks*, 46 Me. 423.

<sup>7</sup> *Bass v. Edwards*, 126 Mass. 445;

*Leonard v. Leonard*, 2 Allen, 543; *Farnum v. Platt*, 8 Pick. 339; 19 Am. Dec. 330.

<sup>8</sup> *Haley v. Colcord*, 59 N. H. 7; 47 Am. Rep. 176.

<sup>9</sup> *Thorpe v. Brumfitt*, L. R. 8 Ch. 650.

<sup>10</sup> *Thorpe v. Brumfitt*, L. R. 8 Ch. 650, the court saying: "The plaintiff only claims a right of way. He does not claim to be entitled to the soil or to prevent the owner of the soil from exercising over it any rights which do not derogate from his grant. The plaintiff cannot complain unless he can prove an obstruction which injures him. The case is not like one of tres-

ing a way is the plaintiff's injury sustained by loss of the use of the entire way; the mere value of the way up to some further obstruction is not the proper rule.<sup>1</sup>

ILLUSTRATIONS.—The plaintiff had a right of way over the lands of the defendant for hauling merchandise to his store, and had hoisting apparatus arranged for taking the goods into the store. *Held*, that the defendant was liable for all damages that resulted from the erection of a building over the way that cut off these facilities: *Richardson v. Pond*, 15 Gray, 387. A granted to B a right of way to be held so long as B should occupy the building for the grocery business then carried on by him. B failed, and a corporation purchased B's stock and employed him as chief manager in the grocery business. *Held*, that the right of way ceased to exist on B's failure: *Hall v. Armstrong*, 53 Conn. 554.

pass in which a recovery can be had if no damage is proved. Nothing can be much more injurious to the owner of an inn than that the way to his yard should be constantly obstructed by the loading and unloading of heavy wagons. It is said that the plaintiff alleges an obstruction caused by several persons, acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, give

ground for any complaint, though the amount caused by all of them may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may not cause any appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience which a person entitled to the use of the way has a right to prevent; and it is no defense to any one among the hundred to say that what he does of itself causes no damage to the complainant."

<sup>1</sup> *Rogers v. Stewart*, 5 Vt. 215; 26 Am. Dec. 298.

**TITLE XXVIII.**  
**LANDLORD AND TENANT.**



## TITLE XXVIII.

# LANDLORD AND TENANT.

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### CHAPTER CXXXII.

#### LANDLORD AND TENANT.

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§ 2796. **Estates for Years—Term of.**—An estate for years is an interest in lands and tenements for a determinate time.<sup>1</sup> It may be for less than a year,<sup>2</sup> or for any definite number of years, no matter how great.<sup>3</sup> A perpetual lease may be created by a grant in fee, reserving an annual rent, or by a lease to continue so long as the tenant shall continue to pay the rent and perform the covenants.<sup>4</sup> In some states, leases for more than twelve, fifteen, or twenty years are prohibited.<sup>5</sup> An estate for years is a chattel real, or personal estate.<sup>6</sup> It does not pass to the heir on the death of the owner, but vests in the executor, or goes to the administrator as personal estate.<sup>7</sup> But a very long lease, as one for 999 years, has been said to be to all intents and purposes “a fee clogged

<sup>1</sup> 2 Bla. Com. 141; 4 Kent's Com. 85.

<sup>2</sup> 2 Bla. Com. 139; Co. Lit. 54 b.

<sup>3</sup> Co. Lit. 46 a.

<sup>4</sup> Tyler v. Herdom, 46 Barb. 437; Van Rensselaer v. Hays, 19 N. Y. 68; 75 Am. Dec. 278.

<sup>5</sup> Alabama, 20; Maryland, 15; California, 20; Dakota, 20; Clark v. Barnes, 76 N. Y. 301; 32 Am. Rep. 306; Odell v. Durant, 62 N. Y. 524. See 1 Stimson's American Statute Law, 1341.

<sup>6</sup> Brewster v. Hill, 1 N. H. 350; Os-

borne v. Humphrey, 7 Conn. 335; Bisbee v. Hall, 3 Ohio, 405; Ex parte Gay, 5 Mass. 419; Montague v. Smith, 13 Mass. 396; Chapman v. Gray, 15 Mass. 437.

<sup>7</sup> Fugaley v. Aikin, 11 N. Y. 498; Chapman v. Gray, 15 Mass. 439. A lease for ninety-nine years is of no higher dignity than a lease or term for one year; both are mere chattels, and go to the administrator: Dillingham v. Jenkins, 7 Smedes & M. 479.

with a ground rent."<sup>1</sup> An estate for years is created by act of the parties by contract, express or implied; generally by a deed called a lease.<sup>2</sup>

**ILLUSTRATIONS.**—In 1750, A made a lease to B, his heirs and assigns, agreeing that he and they might hold the premises as long as he and they should think proper, after the specified term of one hundred years had expired, at a yearly rent of three pounds. *Held*, that this was a perpetual lease at the will of the lessee: *Effinger v. Lewis*, 32 Pa. St. 367.

**§ 2797. Relation of Landlord and Tenant — How Created.**—The relation of landlord and tenant is created by a contract, express or implied, between the parties, for the possession of the property by the latter, and the reservation to the former of some reversionary interest therein.<sup>3</sup> The relation can only exist by virtue of some express or implied contract.<sup>4</sup> The reservation of rent will constitute a lease, yet rent is not absolutely essential to a lease or a tenancy,<sup>5</sup> for the recompense may consist of a gross

<sup>1</sup> *Montague v. Smith*, 13 Mass. 396; *Murdock v. Reed*, 1 Disn. 274. And see *Arms v. Burt*, 1 Vt. 303; *Stevens v. Dewing*, 2 Vt. 411; *Adams v. Bucklin*, 7 Pick. 121; *Alexander v. Warrance*, 17 Mo. 228; *Farley v. Craig*, 11 N. J. L. 262; *Wartenby v. Moran*, 3 Call, 491; *Scott v. Lunt*, 7 Pet. 596; *Van Rensselaer v. Hays*, 19 N. Y. 68; 75 Am. Dec. 278; *Wallace v. Harmstad*, 44 Pa. St. 492; *Worthington v. Hewes*, 19 Ohio St. 66; *Loring v. Melendy*, 11 Ohio, 355, the court saying: "To withdraw permanent leasehold estates from their anomalous position between chattels and realty, and by calling them what in truth they are, lands, we relieve them from all doubt as to the principles and laws which shall control them, and assign to them a certain and fixed place in the law. A permanent leasehold estate is not a chattel, but is, in truth, land carrying the fee. Such is the nature of the estate, and so it has been considered and treated in the legislation of our state. We therefore declare that permanent leasehold estates are lands, subject to all the rules and laws which attach to land for all purposes."

<sup>2</sup> *Libby v. Libby*, 2 Me. 242; 11 Am. Dec. 68.

<sup>3</sup> *Gear on Landlord and Tenant*, sec. 1.

<sup>4</sup> *Little v. Libby*, 2 Me. 242; 11 Am. Dec. 68; *Crim v. Nelms*, 78 Ala. 604; *Strauss v. Harrison*, 79 Ala. 324; *Bell v. Ellis*, 1 Stew. & P. 294; *Shumake v. Nelms*, 25 Ala. 126; *Weaver v. Jones*, 24 Ala. 240. *Fielder v. Childs*, 73 Ala. 567; *Stringfellow v. Curry & Co.*, 76 Ala. 394; *Fitzgerald v. Beebe*, 7 Ark. 305; 46 Am. Dec. 285; *Byrd v. Chase*, 10 Ark. 602; *Thurston v. Hinds*, 8 Ark. 118; *Sampson v. Schaeffer*, 3 Cal. 196; *O'Connor v. Corbitt*, 3 Cal. 370; *Ramirez v. Murray*, 5 Cal. 222; *Hathaway v. Ryan*, 35 Cal. 188; *Emerson v. Weeks*, 58 Cal. 439; *Redden v. Barker*, 4 Harr. (Del.) 179; *Jackson v. Mowry*, 30 Ga. 143; *Littleton v. Wynn*, 31 Ga. 583.

<sup>5</sup> *Osborne v. Humphrey*, 7 Conn. 340; *Hooten v. Holt*, 139 Mass. 54; *Folden v. State*, 13 Neb. 328; *Johnson v. Hoffman*, 53 Mo. 504; *Hunt v. Comstock*, 15 Wend. 667; *Mitchell v. Com.*, 37 Pa. St. 187; *Morgan v. U. S.*, 14 Ct. of Cl. 319; *State v. Page*, 1 Spear, 408, 429; 40 Am. Dec. 606;

sum,<sup>1</sup> or of any consideration or advantage moving to the lessor.<sup>2</sup> It is essential that the contract be legal, otherwise the relation of landlord and tenant is not constituted.<sup>3</sup> The relation of landlord and tenant has been held to exist in the following cases, viz.: Where a purchaser, under a contract of title, enters into possession;<sup>4</sup> where one enters under a lease from the tenant.<sup>5</sup> So where a grantor remains in possession of the premises after the conveyance, the presumption is, that he is in rightfully, and as tenant of the grantee.<sup>6</sup> The relation of landlord and tenant does not exist between the vendor and vendee of land;<sup>7</sup> nor between the tenant of a mortgagor and the assignee of a mortgagee;<sup>8</sup> nor by permission by the owner, to one entering and holding afterwards adversely, to continue in possession;<sup>9</sup> nor by the use of an unimproved bank of a river in mooring rafts;<sup>10</sup> nor upon vacant lands;<sup>11</sup> nor between one tenant in common and the other co-tenants, where the one occupies the common estate in his own right, and without contract, express or implied, with his co-tenants;<sup>12</sup> nor where one merely makes an arrangement to and does occupy jointly with another who has been

*Steele v. Steele*, 2 Tex. App. 345; *Jones v. Shay*, 50 Cal. 508; *Godfrey v. Walker*, 42 Ga. 562; *Floyd v. Floyd*, 4 Rich. 28; *McKissack v. Bullington*, 37 Miss. 535; *Strickland v. Hudson*, 55 Miss. 235; *Herrell v. Sizeland*, 82 Ill. 457.

<sup>1</sup> *Gearon Landlord and Tenant*, sec. 2.

<sup>2</sup> *Mitchell v. Com.*, 37 Pa. St. 187.

<sup>3</sup> *Crim v. Nelms*, 78 Ala. 604; *Strauss v. Harrison*, 79 Ala. 324; *Milton v. Haden*, 32 Ala. 30; 70 Am. Dec. 523; *Folsom v. Perrin*, 2 Cal. 603; *El Dorado Co. v. Davison*, 80 Cal. 521; *Uhlig v. Garrison*, 2 Dak. 71; *Tribble v. Anderson*, 63 Ga. 31; *McIntosh v. Lee*, 57 Iowa, 356; *Capper v. Sibley*, 65 Iowa, 754; *Rawlston v. Brady*, 20 Ga. 449; *Kathman v. Walters*, 22 La. Ann. 54; *Dyer v. Curtis*, 72 Me. 181; *Simpson v. Wood*, 105 Mass. 263; *Sherman v. Wilder*, 106 Mass. 537.

<sup>4</sup> *Stansbury v. Taggart*, 3 McLean, 457; *Kirk v. Taylor*, 8 B. Mon. 264; *Powell v. Hadden*, 21 Ala. 745. *Aliter* as to a verbal contract: *James v. Patterson*, 1 Swan, 309; 55 Am. Dec. 737. And see *Stone v. Sprague*, 20 Barb. 509; *Dolittle v. Eddy*, 7 Barb. 74.

<sup>5</sup> *Schilling v. Holmes*, 23 Cal. 227. See *Lucas v. Brooks*, 18 Wall. 436.

<sup>6</sup> *Sherburne v. Jones*, 20 Me. 70.

<sup>7</sup> *Watkins v. Holman*, 16 Pet. 25. See *Nobles v. McCarty*, 61 Miss. 456. Where a tenant, during the term of a lease, exercises his option of purchasing, he is no longer a tenant, but a vendee: *Kner v. Bradley*, 105 Pa. St. 190.

<sup>8</sup> *Jackson v. Rowland*, 6 Wend. 666.

<sup>9</sup> *Jackson v. Tyler*, 2 Johns. 444.

<sup>10</sup> *Hall v. Jacobs*, 7 Bush, 595.

<sup>11</sup> *Turner v. Ferguson*, 39 Tex. 505.

<sup>12</sup> *Bird v. Earle*, 15 Fla. 447.

left in possession of premises originally taken by virtue of a lease to him and another;<sup>1</sup> nor on a deed of land in fee, with a clause that the grantor should retain the possession until a certain time;<sup>2</sup> nor on a contract for the sale of land on installments, with the condition that if the first installment was not paid, the purchaser should pay a stipulated amount as rent.<sup>3</sup> Whether the relation of landlord and tenant exists is a question of fact;<sup>4</sup> whether the evidence proves a tenancy is one of law.<sup>5</sup>

§ 2798. **Implied Tenancy.**—A tenancy is, in general, implied where one person occupies the land of another by his permission.<sup>6</sup> It may be implied, also, from the acts and conduct of the parties.<sup>7</sup> A tenancy proved to have once existed is presumed, in the absence of evidence to the contrary, to continue as long as the tenant remains in possession.<sup>8</sup> But a tenancy will not be implied from

<sup>1</sup> Carver v. Palmer, 33 Mich. 342.

<sup>2</sup> Sims v. Humphrey, 4 Denio, 185.

<sup>3</sup> Oxford v. Ford, 67 Ga. 362.

<sup>4</sup> Caldwell v. Center, 30 Cal. 539; 89 Am. Dec. 131; Franklin Tel. Co. v. Pewtress, 43 Conn. 167; Linahan v. Barr, 41 Conn. 471; Doe v. Gray, 2 Houst. 135; Rawley v. Brown, 71 N. Y. 85; Bank v. Getchell, 59 N. H. 281; State v. Hayes, 59 N. H. 450; Welcome v. Labrute, 63 N. H. 124; Nat. Oil Refining Co. v. Bush, 88 Pa. St. 336; Chamberlain v. Donohue, 41 Vt. 57; Cunningham v. Holton, 65 Me. 33.

<sup>5</sup> Howard's Lessee v. Carpenter, 22 Md. 10; Reed v. Todd, 1 Harr. (Del.) 138.

<sup>6</sup> Rainey v. Capps, 22 Ala. 288; Oakes v. Oakes, 16 Ill. 106; Chambers v. Ross, 25 N. J. L. 293; Sutton v. Mandeville, 1 Munf. 407; 4 Am. Dec. 549; Sargent v. Ashe, 23 Me. 201; Perine v. Hankinson, 11 N. J. L. 183; Sterrett v. Wright, 27 Pa. St. 259; Vetter's Appeal, 99 Pa. St. 52; Henwood v. Cheeseman, 3 Serg. & R. 500; Herrell v. Sizeland, 81 Ill. 457; Cressler v. Williams, 80 Ind. 366; Howard v. Ransom, 2 Aiken, 252; Health Dept. v. Police Dept., 41 N. Y. Sup. Ct. 323; Hunt v. Comstock, 15

Wend. 665; Anderson v. Prindle, 23 Wend. 616; Marquart v. Lafarge, 5 Duer, 559; Farrow v. Edmundson, 4 B. Mon. 605; 41 Am. Dec. 250; Harlan v. Emery, 46 Iowa, 538; Snedeker v. Powell, 32 Kan. 396; Hulett v. Nugent, 71 Mo. 132; McKissick v. Bullington, 37 Miss. 535; Boudette v. Pierce, 50 Vt. 212; Towery v. Henderson, 60 Tex. 291; Ellsworth v. Hale, 33 Ark. 633; Cobb v. Kidd, 19 Blatchf. 560; Wilcox v. Wilburn, 15 R. I. 434; Mills v. U. S., 17 Ct. of Cl. 79.

<sup>7</sup> Ladd v. Riggle, 6 Heisk. 620; Hardin v. Pulley, 79 Ala. 381; Bates v. Ridgway, 48 Ala. 611; Rainey v. Capps, 22 Ala. 288; Waugh v. Ridgway, 42 Ala. 368; Doe v. Gray, 2 Houst. 135; Cunningham v. Holton, 55 Me. 33; Ballentine v. McDowell, 2 Scam. 28; McNair v. Schwartz, 16 Ill. 24; Greenup v. Vernor, 16 Ill. 26; Dunn v. Trustees, 39 Ill. 578; Jackson v. Mowry, 30 Ga. 143; Littleton v. Wynn, 31 Ga. 583; Larned v. Hudson, 60 N. Y. 102; Gustin v. Burnham, 34 Mich. 511; Watson v. Brainerd, 33 Vt. 83.

<sup>8</sup> Wheelock v. Warschaner, 21 Cal. 316.

occupancy alone;<sup>1</sup> *a fortiori*, where it may be referred to another cause;<sup>2</sup> nor will it be implied where the occupier does not recognize the owner's title,<sup>3</sup> or where the owner has repudiated the relation.<sup>4</sup> The relation of landlord and tenant does not exist by implication between a landlord and a sheriff who suffers goods to remain in the tenant's possession after levy;<sup>5</sup> nor between the purchaser of a house as a chattel and the vendor who claims the land;<sup>6</sup> nor where an execution defendant remains in possession after a sheriff's sale.<sup>7</sup>

### § 2799. Holding over after Expiration of Term. —

If a tenant for one or more years holds over after the expiration of his term, the owner of the premises may treat him either as a trespasser or as a tenant for another year, upon the terms of the prior lease, so far as applicable,<sup>8</sup> and he is liable for the damage thereby sustained by the landlord.<sup>9</sup> An overholding tenant is presumed to hold for the term and subject to all the covenants of the

<sup>1</sup> Executors of Smith v. Houston, 16 Ala. 111; Weaver v. Jones, 24 Ala. 420; Cook v. Norton, 48 Ill. 20; Nance v. Alexander, 49 Ind. 516; Blanchard v. Davidson, 7 La. Ann. 654; Fisk v. Morse, 7 Rob. (La.) 279; Jordan v. Mead, 19 La. Ann. 101; Rich v. Bolton, 46 Vt. 84; 14 Am. Rep. 615; Wilcher v. Robertson, 78 Va. 602; Williams v. Deriar, 31 Mo. 13; Edmonson v. Kite, 43 Mo. 176; Richmond etc. Road Co. v. Rogers, 7 Bush, 532; Hall v. Jacobs, 7 Bush, 595; Stewart v. Fitch, 31 N. J. L. 17; Knight v. Quigley, 2 Camp. 504; Hyde v. Moakes, 5 Car. & P. 42; Levy v. Lewis, 6 Com. B., N. S., 766; Sullivan v. Jones, 3 Car. & P. 579; Doe v. Pullen, 2 Bing. N. C. 749; Doe v. Cartwright, 3 Barn. & Ald. 326.

<sup>2</sup> Russell v. Erwin's Adm'r, 38 Ala. 44; Bell v. Ellis's Heirs, 1 Stew. & P. 294; Straus v. Harrison, 79 Ala. 324; Brookhaven v. Baggett, 61 Miss. 383; Barnes v. Shinholdster, 14 Ga. 131; Powell v. De Hart, 55 Ind. 94; Scott v. Hudson, 86 Ind. 286; Goldsberry v. Bishop, 2 Duvall, 144; Snowden v.

McKinney, 7 B. Mon. 259; Leonard v. Kingman, 136 Mass. 123; Wales v. Chase, 130 Mass. 538; Mayo v. Shattuck, 14 Pick. 525; State v. Page, 1 Spear, 498; Victory v. Stroud, 15 Tex. 373.

<sup>3</sup> Butler v. Cowles, 4 Ohio, 213; 19 Am. Dec. 612; Douglass v. Geiler, 32 Kan. 500; Carlisle v. McCall, 1 Hilt. 399; Krug v. Davis, 101 Ind. 75; Ackerman v. Lyman, 20 Wis. 454.

<sup>4</sup> Greton v. Smith, 33 N. Y. 245; Pendergast v. Young, 21 N. H. 234.

<sup>5</sup> Hamilton v. Hamilton, 25 N. J. L. 544.

<sup>6</sup> Furlong v. Garrett, 44 Wis. 111.

<sup>7</sup> Griffin v. Rochester, 96 Ind. 545.

<sup>8</sup> Schuyler v. Smith, 51 N. Y. 309; 10 Am. Rep. 609; Bennock v. Whipple, 12 Me. 346; 28 Am. Dec. 187; De Young v. Buchanan, 10 Gill & J. 149; 32 Am. Dec. 156; Hemphill v. Flynn, 2 Pa. St. 144; Kerr v. Simmons, 8 Mo. App. 431; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Daniels v. Logan, 47 Iowa, 395. But see Smith v. Alt, 7 Daly, 492.

<sup>9</sup> Stoddard v. Waters, 30 Ark. 156.

expired lease;<sup>1</sup> but no such agreement can be implied where the lease contains collateral stipulations which could not be performed in the second year.<sup>2</sup> To warrant a landlord in claiming that, by continuing in occupation of the premises beyond expiration of the year, the tenant has made himself liable for another year's rent at the same rate, either the circumstances must warrant an inference that the tenant acquiesced in the rent, or he must have been in fault in holding over.<sup>3</sup> Thus where the tenant determined and endeavored to remove, and was prevented by neglect of duty by the landlord, it was held that the rule did not apply.<sup>4</sup> So where a tenant's holding over was in order to take certain new premises of the landlord;<sup>5</sup> so where he held over by merely allowing certain chattels to remain on the premises after the expiration of the term for the convenience of the incoming tenant.<sup>6</sup> Where a tenant is told that if he holds over it must be as a tenant from month to month, and not for a year, no contract to the contrary can be implied.<sup>7</sup> Where a lease does not provide for re-entry on breach of condition, and there is no agreement that a failure to perform shall

<sup>1</sup> *Vrooman v. McKaig*, 4 Md. 450; 59 Am. Dec. 85; *Hurd v. Whitsitt*, 4 Col. 77; *Miller v. Ridgely*, 19 Ill. App. 306; *Crommelin v. Thiess*, 31 Ala. 412; 70 Am. Dec. 499; *Quinette v. Carpenter*, 35 Mo. 502; *De Young v. Buchanan*, 10 Gill & J. 149; 32 Am. Dec. 156; *Brewer v. Knapp*, 1 Pick. 332; *Ellis v. Paige*, 1 Pick. 43; *Moore v. Beasley*, 3 Ohio, 294; *Phillips v. Monges*, 4 Whart. 226; *Diller v. Roberts*, 13 Serg. & R. 60; 15 Am. Dec. 578; *Laguere v. Dougherty*, 35 Pa. St. 45; *Dorrill v. Stevens*, 4 McCord, 59; *Fronty v. Wood*, 2 Hill, 367; *Baker v. Root*, 4 McLean, 572; *Ames v. Schuesler*, 14 Ala. 600; *Schilling v. Holmes*, 23 Cal. 227; *Rothschild v. Williamson*, 83 Ind. 387; *Brinley v. Walcott*, 10 Heisk. 82. If a tenant who has occupied and paid rent annually holds over into a new year, it is evidence of a new demise for a year: *Hoof v. Ladd*, 1 Cranoh C. C. 167; *Har-*

*kins v. Pope*, 10 Ala. 493; *Bacon v. Brown*, 9 Conn. 334; 4 Am. Dec. 640. A tenant under a lease for three years with a privilege of five more, holding over, is bound for the full further term of five years: *Montgomery v. Commissioners of Hamilton County*, 76 Ind. 362; 40 Am. Rep. 250; *Tersette v. Benevolent Society*, 92 Ind. 82; 47 Am. Rep. 135.

<sup>2</sup> *Diller v. Roberts*, 13 Serg. & R. 60; 15 Am. Dec. 578. And see *Dubouque v. Miller*, 11 Iowa, 583.

<sup>3</sup> *Cairo etc. R. R. Co. v. Wiggins*, 82 Ill. 230; *Neumister v. Palmer*, 8 Mo. App. 491; *Hollis v. Burns*, 100 Pa. St. 206; 45 Am. Rep. 379; *Withnell v. Palmer*, 17 Mo. App. 667.

<sup>4</sup> *Smith v. Allt*, 4 Abb. N. C. 205.

<sup>5</sup> *Wilcox v. Raddin*, 7 Ill. App. 594.

<sup>6</sup> *Lore v. Pierson*, 10 Daly, 272.

<sup>7</sup> *Shipman v. Mitchell*, 64 Tex. 174.

operate as a forfeiture or termination of the lease, the tenant does not "hold over" contrary to the terms of the lease.<sup>1</sup> The right (when the tenant holds over) of the lessor to elect to continue the tenancy is not affected by the fact that the tenant has refused to renew the lease, and has given the lessor notice that he has hired other premises.<sup>2</sup> A demand of rent of a tenant holding over does not convert his tenancy into one from year to year.<sup>3</sup>

**ILLUSTRATIONS.** — A tenant under a lease for five years, rent payable monthly, held over three days, and on the third day notified the landlord in writing that he would surrender at the expiration of that month, and paid the month's rent, leaving the keys on a table in the landlord's office, the landlord accepting the rent, but refusing to receive the keys. *Held*, that the landlord might treat him as tenant for the rest of that year, on the former terms: *Tolle v. Orth*, 75 Ind. 298; 39 Am. Rep. 147.

**§ 2800. Letting on Shares.** — It is held in a large number of cases that a letting of land on shares is not a lease, and that, as to the crops raised, the owner of the land and the cropper are merely tenants in common.<sup>4</sup> This is so, even where the letting is for more than a single year,<sup>5</sup> and although the owner of the land agrees to pay the

<sup>1</sup> *Pickard v. Kleis*, 56 Mich. 604.

<sup>2</sup> *Schuyler v. Smith*, 51 N. Y. 309; 10 Am. Rep. 609; *Wolfe v. Wolfe*, 69 Ala. 549; 44 Am. Rep. 526.

<sup>3</sup> *Condon v. Barr*, 47 N. J. L. 113; 54 Am. Rep. 121.

<sup>4</sup> *Brown v. Coats*, 56 Ala. 439; *Haywood v. Rogers*, 73 N. C. 320; *Neal v. Bellamy*, 73 N. C. 384; *Chase v. McDonnell*, 24 Ill. 236; *Caswell v. Districh*, 15 Wend. 379; *Bradish v. Schenck*, 8 Johns. 152; *Lowe v. Miller*, 8 Gratt. 205; 46 Am. Dec. 188; *Williams v. Cleaver*, 4 Houst. 453; *Guest v. Opdyke*, 31 N. J. L. 554; *Aiken v. Smith*, 21 Vt. 181; *Williams v. Nolan*, 34 Ala. 167; *Bernal v. Hovious*, 17 Cal. 546; 79 Am. Dec. 147; *Henderson v. Allen*, 23 Cal. 521; *De Mott v. Hagerman*, 8 Cow. 220; 18 Am. Dec. 443; *Fiquet v. Allison*, 12 Mich. 330; 86 Am. Dec. 54; *Harris v. Frink*, 49 N. Y. 24; 10 Am. Rep. 318; *Decker v. Decker*, 17 Hun, 18; *Daniels v. Brown*, 34 N. H. 454;

69 Am. Dec. 505; *Smyth v. Tankersley*, 20 Ala. 212; 56 Am. Dec. 193; *Smith v. Rice*, 56 Ala. 417; *Putnam v. Wise*, 1 Hill, 234; and see note to this case in 37 Am. Dec. 317-323; *Brown v. Lincoln*, 47 N. H. 468; *Baughman v. Reed*, 75 Cal. 319; 7 Am. St. Rep. 170; *Connell v. Richmond*, 55 Conn. 401. Even though the technical terms of a lease are used: *Chandler v. Thurston*, 10 Pick. 205; *Taylor v. Bradley*, 39 N. Y. 129; 100 Am. Dec. 415; *Griswold v. Cook*, 46 Conn. 198. A lease of land to be worked on shares with the lessor's implements is not assignable: *Randall v. Chubb*, 46 Mich. 311; 41 Am. Rep. 165; *Jeter v. Penn*, 28 La. Ann. 230; 26 Am. Rep. 98. He cannot transfer his share to a third person before a division of the crop is made: *McNesley v. Hart*, 10 Ired. 63; 51 Am. Dec. 377.

<sup>5</sup> *Taylor v. Bradley*, 39 N. Y. 129, 135; 100 Am. Dec. 415.

cropper for one half the grain produced.<sup>1</sup> But in other cases it has been held that a letting of the land for a year will constitute the relation of landlord and tenant, although the former is to receive a share of the crops for the use of the land.<sup>2</sup> The difference between a tenant and a cropper is, that a tenant has an estate in the land for the term, and consequently he has a right of property in the crops; until a division, the right of property and of possession in the whole is the tenant's.<sup>3</sup> And he may sue even the landlord for a trespass on the land,<sup>4</sup> or maintain replevin for the crop.<sup>5</sup> A cropper has no estate in the land; and although he has the possession of the crop, it is the possession of a servant only, and is in law that of the landlord.<sup>6</sup> A landlord leasing land on shares has a lien upon or a property in the growing crop until the rent reserved is satisfied,<sup>7</sup> and it is not subject to a judgment against the

<sup>1</sup> *Wilber v. Sisson*, 53 Barb. 258; 54 N. Y. 121; *Tanner v. Hills*, 44 Barb. 428.

<sup>2</sup> *Jeter v. Penn*, 28 La. Ann. 230; 26 Am. Rep. 98; *Brown v. Jaquette*, 94 Pa. St. 113; 39 Am. Rep. 770; *Alwood v. Ruckman*, 21 Ill. 200; *Birmingham v. Rogers*, 46 Ark. 254; *Woodruff v. Adams*, 5 Blackf. 317; 35 Am. Dec. 122; *Hoskins v. Rhodes*, 1 Gill & J. 266; *Strain v. Gardner*, 61 Wis. 174. See *Esdon v. Colburn*, 28 Vt. 631; 67 Am. Dec. 730. "In general, the question of possession will determine the matter. Take the case where the tenant moves onto the farm, and occupies and controls it exclusively as if it were his for the time being, and is by the agreement so to occupy it for the year, it would be deemed to be in his exclusive possession, and it would be held to be a lease of the farm for the year, although the rent was to be paid in a part of the crops, the amount of which was to be determined by the amount of the crops raised, when the tenant would be held to be the exclusive owner of the crop until the stipulated rent was set off to the landlord. On the other hand, in a case where the owner of the farm resided upon it, and continued to exercise control over it as the owner, and allows another to

cultivate a crop upon a part, or even the whole of it, and is to receive a portion of the crop as his compensation for the use of the land, we should not presume a tenancy, nor hold the person who cultivates it to be in the exclusive possession of the portion which he cultivates, and the parties would be tenants in common of the crops"; *Alwood v. Ruckman*, 21 Ill. 200.

<sup>3</sup> *Cornell v. Dean*, 105 Mass. 435; *Harrison v. Ricks*, 71 N. C. 7; *Lathrop v. Rogers*, 1 Ind. 554. If the lessor of a farm agrees with A to cultivate crops on shares, A has no estate in the land as against the lessor: *McLaughlin v. Kennedy*, 49 N. J. L. 519. Where one cultivates another's farm, using the teams, implements, etc., of the farm-owner, no presumption arises as to the character of the occupation, or as to the right of either to the crops: *Rawley v. Brown*, 71 N. Y. 85.

<sup>4</sup> *Front v. Hardin*, 56 Ind. 165; 26 Am. Rep. 18. But see *Hershell v. Bushnell*, 37 Conn. 36, where both the parties resided on the premises.

<sup>5</sup> *Cunningham v. Baker*, 84 Ind. 597.

<sup>6</sup> *Harrison v. Ricks*, 71 N. C. 7.

<sup>7</sup> *Case v. Hart*, 11 Ohio, 364; 38 Am. Dec. 735; *Gray v. Stevens*, 28 Vt. 1; 65 Am. Dec. 216.

tenant.<sup>1</sup> The landlord is entitled to demand for rent such portion of the crop raised as his share would amount to if proper industry had been bestowed in cultivating the land.<sup>2</sup> But the promisee is not an insurer against bad weather.<sup>3</sup> The agreement of the lessee to pay "half of all profits from the farm" means one half of the products, and not one half of the net profits.<sup>4</sup> The tenant under a cropping lease deprives himself of all claim to a crop which he has planted, where, without fault on the part of the landlord, he repudiates the agreement, and voluntarily abandons the premises. In such case, the crop becomes a part of the land, and goes with it.<sup>5</sup>

ILLUSTRATIONS.—A contract for working a farm on shares provided that one party should have one third of all "crops grown upon the above-named farm for one year." *Held*, that the limitation was applicable to the growth of the crop; and should be construed to mean crops of one year's growth, and not over, and not crops maturing within one year from the date of the agreement: *Armstrong v. Bicknell*, 2 Lans. 216.

§ 2801. **Lease Defined—Agreement for Lease—Action for Breach of Agreement for Lease.**—A lease is a contract for the possession and profits of lands and tenements with a recompense of rent or other income.<sup>6</sup> It is a demise or letting of land unto another for a less time than the lessor has in it.<sup>7</sup> The person letting the land is called the lessor, or landlord; the person to whom the lease is made is called the lessee, or tenant.<sup>8</sup> A writing giving the privilege of flowing lands for a certain term is a lease.<sup>9</sup> "It is sometimes a question whether the instrument amounts to a lease, or is merely a contract for a lease. It is always a

<sup>1</sup> *Durbin v. Hill*, 75 Ga. 228; 58 Am. Rep. 467; *Brazier v. Analely*, 11 Ired. 12; 51 Am. Dec. 408.

<sup>2</sup> *Wheat v. Watson*, 57 Ala. 581.

<sup>3</sup> *Brown v. Owen*, 94 Ind. 31. See *Smally v. Cortes*, 37 Vt. 486.

<sup>4</sup> *Richmond v. Connell*, 55 Conn. 403.

<sup>5</sup> *Kiplinger v. Green*, 61 Mich. 340;

<sup>6</sup> 1 Am. St. Rep. 584.

<sup>7</sup> *Jackson v. Harsen*, 7 Cow. 323; 17

Am. Dec. 517. Reservation of rent is not necessary to the creation of a lease for years: *State v. Page*, 1 Spear, 408; 40 Am. Dec. 608.

<sup>8</sup> *Hall v. Benner*, 1 Penr. & W. 402; 21 Am. Dec. 394.

<sup>9</sup> *Jackson v. Harsen*, 7 Cow. 323; 17 Am. Dec. 517.

<sup>9</sup> *Smith v. Simons*, 1 Root, 318; 1 Am. Dec. 48.

question of intention, and though an agreement may on one part of it purport to be a lease, yet if, from the whole instrument taken and compared together, it clearly appears to have been intended to be a mere executory agreement for a future lease, the intention shall prevail. So a contrary conclusion is drawn when the intention, from the instrument, appears to create a subsisting term, though it contemplated a mere formal lease to be made."<sup>1</sup> The form of words used is of no consequence; and it is not necessary that the term "lease" should be used. Whatever is equivalent will be equally available, if the words assume the form of a license, covenant, or agreement, and the other requisites of a lease are present.<sup>2</sup> Words of present demise will not control if the intention appears to make a future lease;<sup>3</sup> and on the other hand, a mere provision for a future lease will not control words clearly intended to create a present demise;<sup>4</sup> nor will executory words of agreement preclude a present leasing.<sup>5</sup> A written authority to a person to give a lease to another on the

<sup>1</sup> 4 Kent's Com. 105; *Jackson v. Kisselbrack*, 10 Johns. 336; 6 Am. Dec. 341; *Jackson v. Delacroix*, 2 Wend. 437; *Stanley v. Brunswick Hotel Co.*, 13 Me. 51; 29 Am. Dec. 485; *Potter v. Mercer*, 53 Cal. 667; *Griffin v. Kinsely*, 75 Ill. 411; *Bacon v. Bowdoin*, 22 Pick. 401; *Jackson v. Clarke*, 3 Johns. 424; *Thornton v. Payne*, 5 Johns. 77; *Poole v. Bentley*, 2 Camp. 286; *State v. Page*, 1 Spear, 408; 40 Am. Dec. 608; *Baxter v. Brown*, 2 W. Black. 973; *Doe v. Powell*, 8 Scott N. R. 700; *Perring v. Brooke*, 1 Moody & R. 510; *Hallett v. Wylie*, 3 Johns. 44; 3 Am. Dec. 457; *Hurlbut v. Post*, 1 Bosw. 28; *People v. Kelsey*, 38 Barb. 269; *Kelby v. Gas Light Co.*, 102 Mass. 392; *Gartaide v. Outley*, 58 Ill. 211; 11 Am. Rep. 59; *Christie's Appeal*, 85 Pa. St. 463; *Holley v. Young*, 66 Me. 520; *Andrino v. Marin*, 92 Ill. 40. Where the contract was held to be a lease: *Buell v. Cook*, 4 Conn. 238; *McGrath v. Boeton*, 103 Mass. 369; *Withaus v. Star-*

*ris*, 12 Daly, 226; *Brookhaven v. Baggett*, 61 Miss. 883; *Harrison v. Palmer*, 76 Ala. 157, where it was held simply an agreement for a lease.

<sup>2</sup> *Moore v. Miller*, 8 Pa. St. 272.

<sup>3</sup> *Jackson v. Delacroix*, 2 Wend. 433; *Jackson v. Moncrief*, 5 Wend. 26; *Tempest v. Rawling*, 13 East, 18; *Taylor v. Caldwell*, 3 Best & S. 826; *Morgan v. Powell*, 8 Jur. 1123; *Goodtitle v. Way*, 1 Term Rep. 75; *Morgan v. Bissell*, 3 Taunt. 72; *Perring v. Brook*, 7 Car. & P. 360.

<sup>4</sup> *Jenkins v. Eldridge*, 3 Story, 525; *Jackson v. Kisselbrack*, 10 Johns. 336; 6 Am. Dec. 341; *Jackson v. Van Hoesen*, 4 Cow. 325; *Warman v. Faithful*, 5 Barn. & Adol. 1042; *Barry v. Nugent*, 5 Term Rep. 165; *Baxter v. Brown*, 2 W. Black. 973; *Wilson v. Chisholm*, 4 Car. & P. 474; *Pearce v. Cheslyn*, 5 Nev. & M. 652.

<sup>5</sup> *Jenkins v. Eldridge*, 3 Story, 525; *Emmons v. Kiger*, 23 Ind. 483; *Munson v. Wray*, 7 Blackf. 403; *Doe v. Richards*, 4 Ind. 374.

terms before offered in writing by him is not a lease.<sup>1</sup> A complete lease merges all previous negotiations, whether oral or written.<sup>2</sup> A mere agreement for a future lease does not give a right of possession,<sup>3</sup> or create a tenancy,<sup>4</sup> and is not a consideration for an actual renting.<sup>5</sup>

Although equity will in most cases decree specific performance of an agreement to give a lease,<sup>6</sup> either party has also a right of action for damages for breach of the agreement.<sup>7</sup> The action will not lie upon a mere proposal for a lease,<sup>8</sup> nor upon a parol agreement therefor,<sup>9</sup> unless it is partly performed,<sup>10</sup> or the property lies untenanted, or expenditure is incurred as the result of its breach;<sup>11</sup> nor upon a refusal to execute a lease which imposes terms and conditions not agreed to, and not imposed by law.<sup>12</sup> It is a good defense that the plaintiff has no title, and no power to make the lease.<sup>13</sup> It is no defense that the rent agreed upon was not paid or tendered, if greater rent was demanded;<sup>14</sup> nor that the lessor tried to relet the premises after the refusal of the tenant to take them.<sup>15</sup>

In a suit by the lessor, the measure of damage is the rent for the term, less what he may have received from others.<sup>16</sup> Where the suit is by the lessee, the measure of

<sup>1</sup> Davis v. Thompson, 13 Me. 209.

<sup>2</sup> Phillbrook v. Emswiler, 92 Ind. 599.

<sup>3</sup> Harrison v. Palmer, 76 Ala. 157; Billings v. Canney, 57 Mich. 425; Becker v. De Forest, 1 Sweeny, 528; Neppach v. Jordan, 15 Or. 308.

<sup>4</sup> Weld v. Traip, 80 Mass. 330; Potter v. Mercer, 53 Cal. 667; Billings v. Canney, 57 Mich. 425.

<sup>5</sup> Tillman v. Fuller, 13 Mich. 113.

<sup>6</sup> See ante, Title Contracts—Specific Performance.

<sup>7</sup> Milkman v. Ordway, 106 Mass. 232; Cocking v. Ward, 1 Com. B. 858.

<sup>8</sup> Foster v. Rowland, 7 Hurl. & N. 103.

<sup>9</sup> Townsend v. Townsend, 6 Met. 319; Union Banking Co. v. Gittings, 45 Md. 181.

<sup>10</sup> Steel v. Payne, 42 Ga. 207; Deisher v. Stein, 34 Kan. 39.

<sup>11</sup> Sausser v. Steinmetz, 88 Pa. St. 324; McCafferty v. Griswold, 99 Pa. St. 270.

<sup>12</sup> Hayden v. Lucas, 18 Mo. App. 325.

<sup>13</sup> Gear on Landlord and Tenant, sec. 12.

<sup>14</sup> Murphy v. Service, 2 Tex. App. sec. 749.

<sup>15</sup> Kerland v. Wolf, 3 Cinn. Law Bull. 114.

<sup>16</sup> Cleveland v. Bryant, 16 S. C. 634.

damages is his actual loss from the breach.<sup>1</sup> But speculative or contingent profits are not recoverable.<sup>2</sup>

§ 2802. **Who may be Lessor—And Lessee.**—Any person having capacity to make a contract may be a lessor.<sup>3</sup> An executor or administrator may be lessor of lands in which the deceased owned a term for years;<sup>4</sup> so trustees who have the legal fee in lands may grant leases;<sup>5</sup> and corporations have power to grant leases, unless specially restricted by law.<sup>6</sup> A tenant for life can make a lease, but not to continue beyond his own estate;<sup>7</sup> and a mortgagor can lease the mortgaged premises.<sup>8</sup> Joint tenants, coparceners, and tenants in common may lease their undivided interests, either jointly or severally.<sup>9</sup> Any person may be a lessee; for a lease is presumed to be beneficial to the person who takes it.<sup>10</sup>

§ 2803. **Form of.**—As a general rule, leases for years must be in writing, and they are usually sealed as well as signed.<sup>11</sup> But it is well settled that a valid lease of lands for years may be made by a writing not under seal.<sup>12</sup> Al-

<sup>1</sup> *Stanly v. Hotel Corporation*, 13 Me. 51; 29 Am. Dec. 485; *Adair v. Bogle*, 20 Iowa, 238; *Chic. & R. I. R. Co. v. Ward*, 16 Ill. 522; *Giles v. O'Toole*, 4 Barb. 261; *Menard v. Stevens*, 44 Jones & S. 515; *Hoy v. Gronable*, 34 Pa. St. 9; 75 Am. Dec. 628; *Garsed v. Turner*, 71 Pa. St. 54; *Sausser v. Steinmetz*, 88 Pa. St. 324; *McCafferty v. Griswold*, 99 Pa. St. 270; *Williams v. Oliphant*, 3 Ind. 271; *Wright v. Calls*, 8 Com. B. 150.

<sup>2</sup> *Chambers v. Brown*, 69 Iowa, 213; *Giles v. O'Toole*, 4 Barb. 261; *Rhodes v. Baird*, 16 Ohio St. 573.

<sup>3</sup> See *ante*, Division I., as to infants, insane persons, married women, etc., and *Title Contracts*, Division III.

<sup>4</sup> 2 Greenl. Cruise, 392; compare *Simpson v. Gutteridge*, 1 Madd. 616; *Bank of Hamilton v. Dudley*, 2 Pet. 492; *George v. Baker*, 3 Allen, 326; *Doe v. Sturges*, 7 Taunt. 217.

<sup>5</sup> *Sinclair v. Jackson*, 8 Cow. 548; *Cox v. Walker*, 28 Me. 504; *Greason*

*v. Keteltas*, 17 N. Y. 491. And see *Malpas v. Auckland*, 3 Russ. 273.

<sup>6</sup> See *ante*, Division I., *Corporations*.

<sup>7</sup> *Story v. Johnson*, 2 Younge & C. 586. See *Horsey v. Horsey*, 4 Harr. (Del.) 517; *Doe v. Morse*, 1 Barn. & Adol. 365.

<sup>8</sup> *Gibson v. Farley*, 16 Mass. 280; *Hutchinson v. Dearing*, 20 Ala. 798; *Rawson v. Eicke*, 7 Ad. & E. 451.

<sup>9</sup> *Mussey v. Holt*, 24 N. H. 248; 55 Am. Dec. 234.

<sup>10</sup> 2 Greenl. Cruise, 398.

<sup>11</sup> *Crommelin v. Thiess*, 31 Ala. 412; 70 Am. Dec. 499; *Brewer v. Knapp*, 1 Pick. 335; *Den v. Johnson*, 15 N. J. L. 116; *Allen v. Jaquish*, 21 Wend. 635; *Sharp v. Mayor etc.*, 40 Barb. 256; *Stillman v. Harvey*, 47 Conn. 26; *Hunt v. Hazleton*, 5 N. H. 216; 20 Am. Dec. 575; *Kiersted v. R. R. Co.*, 69 N. Y. 343; 25 Am. Rep. 199.

<sup>12</sup> *University etc. v. Joslyn*, 21 Vt. 52; *Den v. Johnson*, 15 N. J. L. 116;

though a lease of real estate need not be under seal, yet where it is so made, an indorsement on the back of such lease, made afterwards, and signed by the lessor for the reduction of the rent provided for in the lease, cannot vary the terms of the lease.<sup>1</sup> The words "demise, lease, and to farm let" are the proper ones to constitute a lease;<sup>2</sup> but any other words which show the intention of the parties that one shall divest himself of the possession, and the other come into it for a certain time, whatever be the form, will, in construction of law, be sufficient.<sup>3</sup> In construing a lease, the intention of the parties is to be gathered from the whole instrument, and from their concurrent or subsequent acts.<sup>4</sup>

§ 2804. **Acceptance Necessary.**—An acceptance of the lease by the lessee is necessary to bind him.<sup>5</sup> But a lease beneficial to the lessee may be presumed to be accepted.<sup>6</sup> It is not necessary to the validity of a lease that the lessee should affix his seal thereto. His acceptance is shown by claiming and occupying under it and paying rent.<sup>7</sup>

§ 2805. **When Lease Begins.**—An estate for years may be created to commence *in futuro*.<sup>8</sup> But a lease must have a certain beginning, or be capable of being made certain by reference to some event or contingency that must.

Nicoll v. Burke, 8 Abb. N. C. 213; 78 N. Y. 580. See *supra*, Title Contracts, Statute of Frauds.

<sup>1</sup> Loach v. Farnum, 90 Ill. 368.

<sup>2</sup> Jackson v. Delacroix, 2 Wend. 438.

<sup>3</sup> Upper App. Co. v. Hamilton, 83 Va. 319; Michie v. Lawrence, 5 Rand. 571; Jackson v. Delacroix, 2 Wend. 438; People v. Kelsey, 35 Barb. 269; Putnam v. Wise, 1 Hill, 234; 37 Am. Dec. 309; Krider v. Lafferty, 1 Whart. 303; Waller v. Morgan, 18 B. Mon. 136; Doe v. Benjamin, 9 Ad. & E. 650; Bond v. Roshing, 1 El. B. & E. 371; Moore v. Miller, 8 Pa. St. 272; Weed v. Crocker, 13 Gray, 219.

<sup>4</sup> People v. Gillis, 24 Wend. 201; Jenkins v. Eldredge, 3 Story, 325; Idings v. Nagle, 3 Watts & S. 24; Doe

v. Powell, 8 Scott N. R. 687; 7 Man. & G. 980; Banker v. Braker, 9 Abb. N. C. 411; Osborn v. Farwell, 87 Ill. 89; 29 Am. Rep. 47.

<sup>5</sup> Camp v. Camp, 5 Conn. 299; 13 Am. Dec. 60; Jackson v. Dunlap, 1 Johns. Cas. 114; 1 Am. Dec. 100; Hedge v. Drew, 12 Pick. 141; 22 Am. Dec. 416; Stephens v. R. R. Co., 20 Barb. 338.

<sup>6</sup> Jackson v. Bodle, 20 Johns. 184; Spencer v. Carr, 45 N. Y. 410; 6 Am. Rep. 112; Merrills v. Swift, 18 Conn. 257; 46 Am. Dec. 315; Thorne v. San Francisco, 4 Cal. 127; Camp v. Camp, 5 Conn. 299; 13 Am. Dec. 60.

<sup>7</sup> Wharf and Lighter Co. v. Simpson, 77 Cal. 286.

<sup>8</sup> 1 Greenl. Cruise, 226.

happen.<sup>1</sup> If made to begin from an impossible date, it will take effect from delivery;<sup>2</sup> if from an uncertain date, as where the month but not the year is mentioned, it is void.<sup>3</sup> A lease ordinarily takes effect from the time of its delivery.<sup>4</sup> A tenancy under a verbal lease commences from the day when the tenant takes possession under it.<sup>5</sup> A tenancy created by acceptance of rent from a tenant holding over will be held to commence on the same day of the year as the original lease.<sup>6</sup> A lease of a building in course of construction begins on its completion.<sup>7</sup> A lease from a certain day does not include that day.<sup>8</sup> A lease for a term of years, "from the first day of July," begins on the 2d of July.<sup>9</sup> A lease, "from — day of —, A. D. 1856, for and during and until the full end and term of eighteen months," runs from the last day of the year 1856.<sup>10</sup> A tenant for years is not said to be seised of the lands, and a mere delivery of a lease for years does not vest any estate in the lessee, but only gives him a right of entry on the land.<sup>11</sup> The interest which he acquires by the delivery of the lease, and before an actual entry, is called an *interesse termini*,<sup>12</sup> or a right to the possession of a term at a future time.<sup>13</sup> But when the lessee has actually entered, the estate becomes vested in him, and he is then said to be possessed, not properly of the land, but of the term for years, the seisin of the freehold still remaining in the lessor.<sup>14</sup> In case of the lessee's death before entry, the right to enter passes to his executors or administrators.<sup>15</sup>

<sup>1</sup> Child v. Boylie, Cro. Jac. 459; Goodright v. Richardson, 3 Term Rep. 462.

<sup>2</sup> 2 Greenl. Cruise, 378; Styles v. Wardle, 4 Barn. & C. 908; Trustees etc. v. Robinson, Wright, 436.

<sup>3</sup> 2 Greenl. Cruise, 378; Moore v. Hussey, Hob. 18.

<sup>4</sup> De Ponde v. Olmstead, 5 Daly, 398; Chung You v. Hop Chong, 11 Or. 220.

<sup>5</sup> Kemp v. Derrett, 3 Camp. 511.

<sup>6</sup> Doe v. Samuel, 5 Esp. 174.

<sup>7</sup> Billings v. Canney, 57 Mich. 425; Clarke v. Spaulding, 20 N. H. 313.

<sup>8</sup> Doe v. Smyth, Anth. 179.

<sup>9</sup> Atkins v. Sleeper, 7 Allen, 487.

<sup>10</sup> Huffman v. McDaniel, 1 Or. 259.

<sup>11</sup> 1 Greenl. Cruise, 224. And see Doe v. Walker, 5 Barn. & C. 111.

<sup>12</sup> See Williams on Real Property, 329; 1 Greenl. Cruise, 225.

<sup>13</sup> Co. Lit. 46 b; 4 Kent's Com. 97.

<sup>14</sup> 1 Greenl. Cruise, 224.

<sup>15</sup> Co. Lit. 46 b.

It is the lessor's duty to have the lease expressed in clear terms. If it is left doubtful whether the lease is to terminate on the 1st or 31st of a certain month, the lessee may elect which of the two dates it shall end on.<sup>1</sup> A lease from the first day of April, for one year, expires March 31st, succeeding.<sup>2</sup>

§ 2806. **What Passes by Lease—Appurtenances.**—By the lease of a building everything which belongs to it, or is used with it, and which is reasonably essential to its enjoyment, passes as incident to the principal thing and as a part of it, unless especially reserved.<sup>3</sup> A lease of a "building" conveys the land under the eaves.<sup>4</sup> A lease of a "store" includes the land under it and to the middle of a private way in the rear, the fee of which is in the lessor,<sup>5</sup> and likewise the iron grating in front of a city building which protects the windows of and admits light and air to the basement.<sup>6</sup> The tenant may use sign-boards customarily used by former tenants,<sup>7</sup> and his right to put up signs is limited by what is customary and reasonable.<sup>8</sup> The reasonable use by the tenant of outside walls for posting bills and notices cannot be interfered with by the lessor;<sup>9</sup> but if the lease does not provide therefor, the lessee of part of a building has no exclusive right to a

<sup>1</sup> *Murrell v. Lyon*, 30 La. Ann., pt. 1, 255.

<sup>2</sup> *Marys v. Anderson*, 2 Grant Cas. 446; 24 Pa. St. 272.

<sup>3</sup> *Riddle v. Littlefield*, 53 N. H. 503; 16 Am. Rep. 388.

<sup>4</sup> *Sherman v. Williams*, 113 Mass. 481; 18 Am. Rep. 522.

<sup>5</sup> *Hooper v. Farnsworth*, 128 Mass. 487.

<sup>6</sup> *Spies v. Damm*, 54 How. Pr. 293. See *Stockwell v. Hunter*, 11 Met. 448; 45 Am. Dec. 220. Where a platform covering the outlet to cellar steps was not mentioned in a lease of a part of the cellar, and its use was not necessary to the reasonable use of the leased premises, it was held that the tenant could not claim it: *Hill v.*

*Shultz*, 40 N. J. Eq. 164. So where a building was described in a lease thereof by its number on E. Street, it was held that upper rooms in an adjoining building belonging to the lessor, reached from M. Street, were not embraced in the lease, although, on the lower floor, the rooms in both buildings had been thrown together by a removal of the partition wall between them: *Houghton v. Moore*, 141 Mass. 437.

<sup>7</sup> *Francis v. Hayward*, L. R. 20 Ch. Div. 773.

<sup>8</sup> *Bennett v. Seligman*, 32 Mich. 500.

<sup>9</sup> *Riddle v. Littlefield*, 52 N. H. 503; 16 Am. Rep. 388; *Baldwin v. Morgan*, 43 Hun, 365.

particular place for his sign.<sup>1</sup> A lease of the "first floor in a building" includes the outside of the front wall of that part of the building, with the right to use and enjoy the same.<sup>2</sup>

A tenant is entitled to the crops growing on the premises at the beginning of his tenancy.<sup>3</sup> A lessee of land bounded by the "present bank of a stream" is entitled to the accretions formed during his term in the same manner as a grantee.<sup>4</sup> A landlord has no right to remove a fence on land leased to his tenant.<sup>5</sup> A lease conveys no right to a private way, though it may adjoin the premises.<sup>6</sup> The general principle that a lease of land carries with it the mines upon the land applies only where the contract relates to the land generally, without exception or reservation.<sup>7</sup> A lease of a lot with "appurtenances" gives the lessee no right to use other lands of the lessor, except when indispensable to the enjoyment of the former;<sup>8</sup> nor can it be otherwise shown by parol evidence.<sup>9</sup> Thus it has been held that in a lease of a hotel the word "appurtenances" did not include an iron kettle for heating water situated on the lessor's adjacent lot not included in the lease, and not indispensable to the enjoyment of the hotel, though used by the lessor in connection therewith.<sup>10</sup>

The word "furniture," in a lease of "a hotel, with the furniture therein," includes that which furnishes or with which anything is furnished or supplied; whatever must be supplied to a house, a room, or the like, to make it habitable, convenient, or agreeable; goods, vessels, utensils, and other appendages necessary or convenient for

<sup>1</sup> Pevey v. Skinner, 116 Mass. 129; Knoefel v. Ins. Co., 48 How. Pr. 208. See Snyder v. Heisberg, 11 Phila. 200.

<sup>2</sup> Lowell v. Strahan, 145 Mass. 1; 1 Am. St. Rep. 422.

<sup>3</sup> Martin v. Knapp, 57 Iowa, 336.

<sup>4</sup> Cobb v. Lavalle, 89 Ill. 331; 31 Am. Rep. 91.

<sup>5</sup> State v. Piper, 89 N. C. 551.

<sup>6</sup> Taylor v. Bailey, Wright, 646.

<sup>7</sup> Shaw v. Wallace, 25 N. J. L. 453.

<sup>8</sup> Barrett v. Bell, 82 Mo. 110; 52 Am. Rep. 361.

<sup>9</sup> Hall v. Bonner, 1 Penn. & W. 402; 21 Am. Dec. 395.

<sup>10</sup> Barrett v. Bell, 82 Mo. 110; 52 Am. Rep. 361.

housekeeping; whatever is added to the interior of a house or apartment for use or convenience.<sup>1</sup> But parol evidence is not admissible to show that the words "said house to be furnished with gas," in a lease, meant that the landlord should furnish fixtures, and not gas.<sup>2</sup>

**§ 2807. Tenant cannot Dispute Landlord's Title.** — A tenant, or one entering directly under him, is not allowed to dispute the title of his landlord, or those succeeding to the interest of his landlord.<sup>3</sup> The tenant must first sur-

<sup>1</sup> Bell v. Golding, 27 Ind. 173.

<sup>2</sup> Thorpe v. Sughi, 33 Ala. 330.

<sup>3</sup> Springs v. Schenck, 99 N. C. 551; 6 Am. St. Rep. 552; Lucas v. Brooks, 18 Wall. 436; Lunsford v. Turner, 5 J. J. Marsh. 104; 20 Am. Dec. 248; Bertram v. Cook, 32 Mich. 518; Arnold v. Woodard, 4 Cold. 249; Rogers v. Boynton, 57 Ala. 501; Savings Bank v. Phalen, 12 R. I. 495; Brahm v. Jersey City Forge Co., 38 N. J. L. 74; Mattis v. Robinson, 1 Neb. 3; Brenner v. Bigelow, 8 Kan. 497; Frazer v. Robinson, 42 Miss. 121; Clarke v. Clarke, 51 Ala. 498; Cook v. Creswell, 44 Md. 531; Delaney v. Fox, 2 Com. B., N. S., 768; Balls v. Westwood, 2 Camp. 11; Stott v. Rutherford, 92 U. S. 107; Lewis v. Adams, 61 Ga. 559; Ronaldson v. Tabor, 43 Ga. 230; Rose v. Davis, 11 Cal. 136; Earle v. Hale, 31 Ark. 470; Hardy v. Akerly, 57 Barb. 148; Jones v. Dove, 7 Or. 467; Bedford v. Kelly, 61 Pa. St. 491; People v. Angel, 61 How. Pr. 157; Rogers v. Waller, 4 Hayw. (Tenn.) 205; 9 Am. Dec. 758; Jackson v. Miller, 6 Wend. 228; 21 Am. Dec. 316; Jackson v. Rowland, 6 Wend. 666; 22 Am. Dec. 557; Winston v. Franklin Academy, 28 Miss. 118; 61 Am. Dec. 540; Young v. Smith, 28 Mo. 65; 75 Am. Dec. 109; Chambers v. Pleak, 6 Dana, 426; 32 Am. Dec. 78; Tillotson v. Kennedy, 5 Ala. 407; 39 Am. Dec. 330; Whaley v. Whaley, 1 Spear, 225; 41 Am. Dec. 594; Farrow v. Edmondson, 4 B. Mon. 605; 41 Am. Dec. 250; Rigg v. Cook, 4 Gilm. 336; 46 Am. Dec. 462; Sims v. Glaziner, 14 Ala. 695; 48 Am. Dec. 120; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; 49 Am. Dec. 189; Hoen v. Simmons, 1 Cal. 119; 52 Am. Dec. 291; Givens v.

Mullinax, 4 Rich. 590; 55 Am. Dec. 706; Emerick v. Taverner, 9 Gratt. 220; 58 Am. Dec. 217; Vrooman v. McKaig, 4 Md. 450; 59 Am. Dec. 85; Arnold v. Woodward, 4 Col. 249; Caldwell v. Smith, 77 Ala. 157; King v. Bolling, 77 Ala. 594; Loring v. Harmon, 84 Mo. 123; Standly v. Stephens, 66 Cal. 541; Mandlin v. Cox, 67 Cal. 387; Blantin v. Whitaker, 11 Humph. 313; Lalailarde v. Santa Barbara Gas Co., 58 Cal. 4. And the rule applies even where the tenant was in possession before the making of the rent contract: Richardson v. Harvey, 37 Ga. 224; Gleaton v. Gleaton, 37 Ga. 650; McConnell v. Bowdry, 4 T. B. Mon. 392; Patterson v. Hansel, 4 Bush, 654; Hockenbury v. Snider, 2 Watts & S. 240; Thayer v. Soc. of United Brethren, 20 Pa. St. 60. A lessee, when sued for rent, cannot deny that his lessor, a *de facto* corporation, was a corporation *de jure*, or that it had not the power to execute the lease: Oregonian R'y Co. v. Oregon R'y & Nav. Co., 27 Fed. Rep. 277. One who has taken a lease of public grounds from a municipal corporation is estopped to deny its right or power to make it: Helena v. Turner, 36 Ark. 577. Or its title: Hatch v. Pendergast, 15 Md. 251. A lessee obtaining a lease from an agent cannot, after enjoyment of the term, deny the title of his lessor or the authority of the agent before he restores possession: Bailey v. Kilburn, 10 Met. 176; 43 Am. Dec. 423. In ejectment by a landlord against his tenant, who holds over after the term has expired, the former may rely on the lease, and need show no other title: Mattox v. Helm, 5 Litt.

render possession to the landlord;<sup>1</sup> and this estoppel extends to all persons succeeding to the premises through or under the first tenant.<sup>2</sup> This rule has been held to apply to a tenant who has entered and is in possession under a written unsealed lease;<sup>3</sup> to one who, at the time under a disability to contract, enters upon land by permission of another claiming and acknowledged to be the owner.<sup>4</sup> So where one abandons his right to occupy under contract of purchase, and continues to occupy.<sup>5</sup> A tenant, however he originally entered into possession, is, by his subsequent recognition of his tenancy, estopped to deny his landlord's title.<sup>6</sup> Where a tenant admits the fact of tenancy, it is immaterial, as between them, from what source the landlord derived his title.<sup>7</sup> Although a landlord's title may be bad, his tenant cannot dispute it so long as the true owner permits the tenant's occupation.<sup>8</sup> One who has paid rent for land claimed by the lessor, and has peaceably enjoyed the full term, cannot recover the rent from the lessor, although the lessor has been ejected, or has voluntarily surrendered to a superior title.<sup>9</sup>

But the rule does not apply where the acceptance of the lease was induced by fraud, mistake, misrepresentation, or duress.<sup>10</sup> And the tenant may show that the relation

185; 15 Am. Dec. 64. A tenant who disclaims his landlord's title and asserts title in himself in an action at law, cannot, when defeated in that action, afterwards obtain, in a court of equity, compensation for his improvements: *McQueen v. Chouteau*, 20 Mo. 222; 64 Am. Dec. 178.

<sup>1</sup> *Mattis v. Robinson*, 1 Neb. 3; *Pate v. Turner*, 94 N. C. 47; *Bryan v. Winborn*, 43 Ark. 28. A leaving of possession by a tenant for a few days, without notice to the landlord, and then resuming it again by collusion with a third person, is a surrender of possession: *Littleton v. Clayton*, 77 Ala. 571.

<sup>2</sup> *Jones v. Dove*, 7 Or. 467; *Stewart v. Roderick*, 4 Watts & S. 188; 39

Am. Dec. 71; *Lewis v. Adams*, 61 Ga. 559. A widow in possession, as such, of lands occupied by her husband in his life is bound by an estoppel which bound him: *Bufferlow v. Newsom*, 1 Dev. 208; 17 Am. Dec. 565; *Gorham v. Brenon*, 2 Dev. 174; *Love v. Dennis*, Harp. 70.

<sup>3</sup> *Morrison v. Bassett*, 26 Minn. 235.

<sup>4</sup> *Wilson v. James*, 79 N. C. 349.

<sup>5</sup> *Henderson v. Miller*, 53 Mich. 590.

<sup>6</sup> *Tyler v. Davis*, 61 Tex. 674.

<sup>7</sup> *James v. Russell*, 92 N. C. 194.

<sup>8</sup> *Providence County Savings Bank v. Phalen*, 12 R. I. 495.

<sup>9</sup> *Dwinnell v. Brown*, 65 Ga. 438; 38 Am. Rep. 792.

<sup>10</sup> *Hall v. Benner*, 1 Penn. & W. 402; 21 Am. Dec. 395; *Alderson v. Miller*,

has been dissolved, and may then controvert the title of the landlord.<sup>1</sup> After the termination of the tenancy, a tenant may purchase and assert an adverse title against the landlord;<sup>2</sup> and his previous tenancy is no bar to his recovery.<sup>3</sup> A lessee is not, by a covenant to pay rent, estopped, in an action for the rent, to show that the lessor's estate ended before the rent accrued.<sup>4</sup> So where the title of the landlord is divested by his own act, or by operation of law, or it is judicially pronounced insufficient for his security, he may dispute it,<sup>5</sup> as where the tenant is evicted.<sup>6</sup>

A tenant sued for rent may set up a title acquired by purchase under an encumbrance prior to his landlord's title.<sup>7</sup> A lessee of a mortgagor is not estopped by the lease from disputing the lessor's title, where, subsequent to the lease, he becomes assignee of the mortgage.<sup>8</sup> Where a tenant has a mortgage on the leased premises conditioned

15 Gratt. 279; Pentz v. Kuester, 41 Mo. 447; Miller v. McBrier, 14 Serg. & R. 382; Evans v. Bidwell, 76 Pa. St. 497; Baskin v. Seeschrist, 6 Pa. St. 163; Gleim v. Rise, 6 Watts, 44; Brown v. Dysinger, 1 Rawle, 408; Gravenor v. Woodhouse, 1 Bing. 38; De Wolf v. Martin, 12 R. I. 533; Jackson v. Cuerden, 2 Johns. Cas. 355; Swift v. Dean, 11 Vt. 323; 34 Am. Dec. 693; Johnson v. Chesley, 43 Cal. 305; Givins v. Mullinax, 4 Rich. 570; 55 Am. Dec. 706; Tison v. Yawn, 15 Ga. 491; 60 Am. Dec. 708; Cain v. Guion, 36 Ala. 168; Pearce v. Nix, 34 Ala. 183; Wiggin v. Wiggin, 58 N. H. 235. The payment of rent by one in possession of real estate does not estop him from showing the true character in which he holds the premises: Shelton v. Carroll, 16 Ala. 148; Wilburn v. Whitfield, 44 Ga. 51. But where one is induced by fraud to take a lease, and retains possession after discovering the fraud, he cannot afterwards contest its validity: Morey v. Pierce, 14 Ill. App. 91.

<sup>1</sup> Camp v. Camp, 5 Conn. 291; 13 Am. Dec. 60; Bigler v. Furman, 58 Barb. 545; Wild v. Serpel, 10 Gratt.

415; Giles v. Elsworth, 10 Md. 338; Carpenter v. Thompson, 3 N. H. 204; 14 Am. Dec. 348; Jackson v. Rowland, 6 Wend. 666; 22 Am. Dec. 557; Heath v. Williams, 25 Me. 209; 43 Am. Dec. 265. A tenant, on surrendering his lease, and taking one from an adverse claimant, may dispute the title of his former landlord: Boyer v. Smith, 3 Watts, 449.

<sup>2</sup> Gable v. Wetherholt, 116 Ill. 313; 56 Am. Rep. 774.

<sup>3</sup> Smith v. Mundy, 18 Ala. 182; 52 Am. Dec. 221.

<sup>4</sup> Lamson v. Clarkson, 113 Mass. 348; 18 Am. Rep. 498.

<sup>5</sup> Lunsford v. Turner, 5 J. J. Marsh. 104; 20 Am. Dec. 248; Bettison v. Budd, 17 Ark. 546; 65 Am. Dec. 442; Chambers v. Pleak, 6 Dana, 426; 32 Am. Dec. 78.

<sup>6</sup> Fowler v. Cravens, 3 J. J. Marsh. 428; 20 Am. Dec. 153; Foster v. Morris, 3 A. K. Marsh. 609; 13 Am. Dec. 205; Gove v. Stevens, 1 Dana, 301; 25 Am. Dec. 141.

<sup>7</sup> Carson v. Crigler, 9 Ill. App. 83.

<sup>8</sup> Niles v. Ransford, 1 Mich. 338; 51 Am. Dec. 95.

for the payment of a sum of money on the day of the expiration of the lease, and the mortgage is not paid when due, the tenant may make title under his mortgage without first yielding and surrendering the possession to the lessor, and a subsequent tender by the mortgagor will not terminate the tenant's estate.<sup>1</sup> A tenant in possession under a lease for years purchasing a judgment which is an encumbrance on the leasehold, not for profit, but to protect his possession, may lawfully offset the amount which he has paid for the same against the rent.<sup>2</sup> A tenant in possession may purchase his landlord's title at a tax sale thereof, which purchase will extinguish the landlord's title, and merge the lease in his fee.<sup>3</sup> So a tenant may acquire his lessor's title by a purchase on execution against the lessor, or by redeeming the premises after an execution sale.<sup>4</sup> A tenant under no obligation to pay taxes on the demised premises may acquire a valid title to the premises on a tax sale during the term, and thereby defeat his landlord's claim for subsequently accruing rent.<sup>5</sup> But a tenant stands in a position of trust and confidence to his landlord; and if he aids in procuring the sheriff's sale of his landlord's property by preventing the landlord having any notice, such sale will not inure to the tenant's advantage.<sup>6</sup> So where the tenant is under an obligation to pay the taxes, he cannot acquire title at a tax sale made in his own name.<sup>7</sup> The doctrine of estoppel between landlord and tenant has no application to a constructive relation, but only to the actual relation created by con-

<sup>1</sup> *Shields v. Lozear*, 34 N. J. L. 496; 3 Am. Rep. 256.

<sup>2</sup> *Thrall v. Hotel Co.*, 5 Neb. 295; 25 Am. Rep. 438.

<sup>3</sup> *Ferguson v. Etter*, 21 Ark. 160; 76 Am. Dec. 361.

<sup>4</sup> *Nellis v. Lathrop*, 22 Wend. 121; 34 Am. Dec. 285; *Murrell v. Roberts*, 11 Ired. 424; 53 Am. Dec. 419; *Camley v. Sanfield*, 10 Tex. 546; 60 Am. Dec. 219; *Pickett v. Ferguson*, 45 Ark.

177; 55 Am. Rep. 545. *Contra*, in the case of an absent lessor: *Lausman v. Drahos*, 10 Neb. 172; 35 Am. Rep. 468.

<sup>5</sup> *Weichselbaum v. Curlett*, 20 Kan. 709; 27 Am. Rep. 204.

<sup>6</sup> *Matthew's Appeal*, 104 Pa. St. 444.

<sup>7</sup> *Blake v. Howe*, 1 Aiken, 306; 15 Am. Dec. 681, and see note 684-690; *Haskell v. Putnam*, 104 Pa. St. 444; *Cauthers v. Weaver*, 7 Kan. 110.

tract;<sup>1</sup> nor where the lessor has never taken or been put in possession.<sup>2</sup> And as against a stranger, a tenant is not estopped from setting up title in himself adverse to his landlord.<sup>3</sup> So a lessor having no interest, title, or possession, or right of possession, cannot make a valid lease to another in possession, and the doctrine of estoppel is inapplicable.<sup>4</sup> Accepting a lease for part of a tract does not estop the tenant from denying the landlord's title to the residue of the tract.<sup>5</sup> The rule is for the benefit of the lessor, and may be waived by him.<sup>6</sup>

ILLUSTRATIONS. — Defendant, who was in possession as tenant in common of certain real estate, agreed by parol to pay rent to C. for an undivided share therein not owned by defendant, and claimed by C. After paying rent for several years, defendant disclaimed tenancy under C., and refused to longer pay rent. *Held*, that defendant was not estopped from denying the title of C.: *Fuller v. Sweet*, 30 Mich. 237; 18 Am. Rep. 122. Under an execution against defendant, lands in which he had a right of homestead were sold. Subsequently, he took a lease of such lands from the purchaser, and after the expiration of the term thereof continued in possession. *Held*, that he was not estopped from claiming homestead in the lands, but could not set up that defense to an action by his landlord to recover possession thereof: *Abbott v. Cromartie*, 72 N. C. 292; 21 Am. Rep. 457. A had a lease for a year, with a right of renewal. He sublet to B, contrary to the covenants in his lease, beginning at the end of the year. A did not obtain a renewal of his lease. *Held*, that B, after occupying, was estopped to deny A's title. *Fordyce v. Young*, 39 Ark. 135. A purchaser of lands, in possession under an agreement for title, leased them. Subsequently, the owner of the legal title died, having devised the land to the tenant. *Held*, that the tenant could not set up the devise in an action against him for rent: *Hatch v. Bullock*, 57 N. H. 15. One in possession by tenant released the latter before his term expired, and leased to another, who entered, but afterwards tendered the keys to the lessor's agent, and abandoned the premises. *Held*, an occupancy under the lease; and the tenant

<sup>1</sup> *James v. Patterson*, 1 Swan, 309; 55 Am. Dec. 737; *Baker v. Hale*, 6 Bart. 46.

<sup>2</sup> *Dist. of Columbia v. Johnson*, 1 Mackey, 51; *Tewksbury v. Magrath*, 33 Cal. 237; *Franklin v. Merida*, 35 Cal. 558; 95 Am. Dec. 129.

<sup>3</sup> *Cole v. Maxfield*, 13 Minn. 235.

<sup>4</sup> *Hall v. Benner*, 1 Penr. & W. 402; 21 Am. Dec. 394.

<sup>5</sup> *Pederick v. Searle*, 5 Serg. & R. 236.

<sup>6</sup> *Wood v. Chambers*, 3 Rich. 150.

could not thereafter impeach his landlord's title: *Howard v. Murphy*, 23 Pa. St. 173. A tenant in possession under a lease purchased the premises at a foreclosure sale, without yielding up possession or notifying his landlord. *Held*, that the presumption was that he purchased to protect his possession, and that the landlord might redeem: *Lausman v. Drahos*, 10 Neb. 172; 35 Am. Rep. 468. A tenant's landlord died, and the tenant, erroneously supposing that plaintiff thus became the owner of the premises, agreed by parol to pay rent thereafter to plaintiff. *Held*, in a suit for the rent, that the tenant was not estopped to show that his promise to plaintiff was based upon a mistake, and that, in fact, another was the owner of the premises, and entitled to the rent: *Petterson v. Sweet*, 13 Ill. App. 255.

**§ 2808. Rights and Liabilities of Tenant for Years.—**

The lessee has a right to the property leased during the lease paramount to any right of the lessor or his creditors, and in the enjoyment of this right they cannot disturb or take the property out of his possession.<sup>1</sup> The landlord has neither actual nor constructive possession during the continuance of the lease, so as to enable him to maintain trespass.<sup>2</sup> He has no such interest in the growing crops of his tenant as to enable him to maintain an action against one who injures the crop,<sup>3</sup> or to make them the subject of a valid mortgage.<sup>4</sup> Where the tenant has expressly covenanted to repair, he has a right to maintain an action against a stranger committing waste for injuries done to the freehold, but such right of action does not accrue in favor of a tenant until he has paid or satisfied his landlord, or repaired the premises.<sup>5</sup> After the expiration of his lease, and his removal from the leased premises, he has a right to reasonable ingress upon the land, in order to remove his property.<sup>6</sup> He has no right to make any altera-

<sup>1</sup> *Smith v. Niles*, 20 Vt. 315; 49 Am. Dec. 783. As to the rights to emblements and other rights, see Title Real Property.

<sup>2</sup> *Gibbons v. Dillingham*, 10 Ark. 9; 50 Am. Dec. 233; *Moody v. King*, 74 Me. 497. But see *Hinton v. McNeil*, 5 Ohio, 509; 24 Am. Dec. 316.

<sup>3</sup> *Drake v. R. R. Co.*, 70 Iowa, 59.

<sup>4</sup> *Broughton v. Powell*, 52 Ala. 123.

<sup>5</sup> *California Dry Dock Co. v. Armstrong*, 8 Saw. 523; 17 Fed. Rep. 216.

<sup>6</sup> *Daniels v. Brown*, 34 N. H. 454; 69 Am. Dec. 505. But a tenant is not entitled to remain in possession after the expiration of his term, for the pur-

tion in the demised premises during the continuance of the lease.<sup>1</sup>

§ 2809. **Tenancy at Will.**—An estate at will is an estate in lands terminable at the will of the parties.<sup>2</sup> All interests in the use and enjoyment of lands for uncertain and indefinite terms are leases at will.<sup>3</sup> The tenancy may arise by implication, as well as by express words;<sup>4</sup> as where one enters upon land by permission of the owner for an indefinite period, even without the reservation of any rent, he is, by implication of law, a tenant at will.<sup>5</sup> The tenancy may be created by an occupation under a lease or deed which is void,<sup>6</sup> or under a contract with the owner for a purchase not yet completed.<sup>7</sup> So one let into possession under an agreement that a lease shall be executed, but in the mean time he shall enjoy the premises on the terms of the lease, becomes immediately a tenant at will;<sup>8</sup> or an occupant of land under a parol

pose of removing his goods: *Witt v. New York*, 5 Rob. (N. Y.) 248. And a tenant who is expelled for the breach of a condition of his lease cannot return and enter upon the land for the purpose of harvesting the crops when ripe, although they were planted by him before he was expelled: *Hunter v. Jones*, 7 Phila. 233.

<sup>1</sup> *Kaiser v. New Orleans*, 17 La. Ann. 178.

<sup>2</sup> *Boone on Real Property*, sec. 121.

<sup>3</sup> *Cheever v. Pearson*, 16 Pick. 271; *Gould v. Thompson*, 4 Met. 224; *Leavitt v. Leavitt*, 47 N. H. 329; *Doe v. Baker*, 4 Dev. 220; 25 Am. Dec. 706; *Rich v. Bolton*, 46 Vt. 84; 14 Am. Rep. 615; *Ashley v. Warner*, 11 Gray, 43; *Webb v. Seekins*, 62 Wis. 26; *Doe v. Richards*, 4 Ind. 374. A letting on a verbal agreement of the occupant to pay rent while he remains in possession constitutes a tenancy at will: *Goodenow v. Allen*, 68 Me. 308. So does a verbal lease of real estate at an annual rent: *Withers v. Larrabee*, 48 Me. 570. An occupant of public lands is a tenant at will of the government: *Duncan v. Potts*, 5 Stew. & P. 82; 24 Am. Dec. 766.

<sup>4</sup> *Jackson v. Bradt*, 2 Caines, 169; *Rex v. Fillongley*, 1 Term Rep. 458; *Doe v. Cox*, 11 Q. B. 122; *Say v. Stoddard*, 27 Ohio St. 478; *Elliott v. Stone*, 1 Gray, 571.

<sup>5</sup> *Johnson v. Johnson*, 13 R. I. 467; *Burns v. Bryant*, 31 N. Y. 453; *Sarsfield v. Healy*, 50 Barb. 245; *Larned v. Hudson*, 60 N. Y. 102; *Jones v. Shay*, 50 Cal. 508; *Wright v. Roberts*, 52 Wis. 161; *Ball v. Cullimore*, 2 Crompt. M. & R. 120; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195.

<sup>6</sup> *Doe v. Stennett*, 2 Esp. 717; *Ezelle v. Parker*, 41 Miss. 520; *Derm v. Fearnside*, 1 Wils. 176; *Huyser v. Chase*, 13 Mich. 98.

<sup>7</sup> *Proprietors etc. v. McFarland*, 12 Mass. 325; *Jackson v. Miller*, 7 Cow. 747; *Jones v. Jones*, 2 Rich. 542; *Glascock v. Robards*, 14 Mo. 350; 55 Am. Dec. 108; *Dean v. Comstock*, 32 Ill. 180; *Risely v. Ryle*, 11 Mees. & W. 16; *Manchester v. Doddridge*, 3 Ind. 360; *Patterson v. Stoddard*, 47 Me. 355; 74 Am. Dec. 490; *Love v. Edmondston*, 1 Ired. 152.

<sup>8</sup> *Anderson v. R. R. Co.*, 3 El. & E. 614; *Manchester v. Doddridge*, 3 Ind. 360; *Dunne v. Trustees*, 39 Ill. 578.

license.<sup>1</sup> A tenant at will has no estate in the land, and cannot transfer the possession to another, or make any lawful contract regarding such possession.<sup>2</sup> Upon the termination of his tenancy, he has the right of ingress, egress, and regress, so far as may be necessary for the purpose of removing his goods and personal property.<sup>3</sup>

ILLUSTRATIONS. — A granted to B the right to enter upon his land, and to mine and remove coal and other minerals therefrom "during the continuance of the agreement," and to erect all needful buildings for that purpose, paying to A a certain price per ton for the minerals taken; and it was agreed that B should have the right to cease mining and to remove his building at any time. *Held*, that B took an estate at will, determinable at the will of either party: *Knight v. Indiana Coal Co.*, 47 Ind. 105; 17 Am. Rep. 692. Pending appeal by execution defendants, where property had been ordered sold under special execution, plaintiff suffered them to remain in possession. *Held*, tenants at will: *Munson v. Plummer*, 59 Iowa, 120. B owned a landing-place. A sent to B a verbal message, asking upon what terms he could pile wood there, and B sent word that he could do so for six cents per cord. A therefore began to pile wood there, B not objecting. *Held*, that A became B's tenant at will: *Duley v. Kelley*, 74 Me. 556.

§ 2810. Tenancy at Will—How Determined. — A tenancy at will is determinable at the pleasure of either party.<sup>4</sup> The tenancy will terminate on the death of either the lessor or lessee;<sup>5</sup> or by the desertion of the premises by the latter;<sup>6</sup> or if the lessee assigns over the land to another,<sup>7</sup> or commits an act of waste.<sup>8</sup> It is determined

<sup>1</sup> *Allen v. Mansfield*, 82 Mo. 688; *Jones v. Shay*, 50 Cal. 508; *Larned v. Hudson*, 60 N. Y. 10.

<sup>2</sup> *Doak v. Donelson's Lessee*, 2 Yerg. 249; 24 Am. Dec. 485; *Cunningham v. Holton*, 55 Me. 33.

<sup>3</sup> *Folsom v. Moore*, 19 Me. 252.

<sup>4</sup> *Price v. Price*, 2 Maule & S. 464; 9 Bing. 356; *Locke v. Matthews*, 13 Com. B. N. S., 753; *Doe v. Richards*, 4 Ind. 374; *Knight v. Indiana Coal etc. Co.*, 47 Ind. 105; 17 Am. Rep. 697. An abandonment by a tenant at will is to be considered an abandonment to the landlord or his grantee:

*Warner v. Page*, 4 Vt. 291; 24 Am. Dec. 607.

<sup>5</sup> *Howard v. Merriam*, 5 Cush. 563; *Robie v. Smith*, 21 Me. 114; *James v. Dean*, 11 Ves. 391; *Cody v. Quartermain*, 12 Ga. 400; *Rising v. Stannard*, 17 Mass. 282; *Ellis v. Paige*, 1 Pick. 43; *Toy v. McKay*, 70 Cal. 445.

<sup>6</sup> *Say v. Stoddard*, 27 Ohio St. 478; *Chandler v. Thurston*, 10 Pick. 205.

<sup>7</sup> *Cunningham v. Holton*, 55 Me. 33; *Cooper v. Adams*, 6 Cush. 87.

<sup>8</sup> *Daniels v. Pond*, 21 Pick. 367; 32 Am. Dec. 269.

by a sale or alienation of the property.<sup>1</sup> So any act of ownership exercised by the lessor which is inconsistent with the existence of the estate will operate as a determination of it.<sup>2</sup> Any act done upon the land by him in assertion of his title to the possession determines the tenancy at will.<sup>3</sup>

§ 2811. **Tenancies from Year to Year Favored.**—The courts favor tenancies from year to year, rather than at will, and a holding over by the tenant after the expiration of his term may become a tenancy from year to year.<sup>4</sup> And at the present time tenancies for an indefinite period are generally regarded as tenancies from year to year.<sup>5</sup>

§ 2812. **Tenancy by Sufferance.**—A tenant at sufferance is one who holds over by wrong, after the determination of his interest, having no estate, but a naked possession only, and standing in no privity to the landlord.<sup>6</sup> An estate at sufferance is an estate created, not by the consent, but by the laches, of the owner. It seems to follow that, without laches, on the part of the owner or landlord, there can be no estate at sufferance.<sup>7</sup> The following are examples of tenancies by sufferance, viz.: A tenant *pur auter vie*, who continues in possession after the death of the *cestui que vie*;<sup>8</sup> a tenant for years hold-

<sup>1</sup> *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; *Esty v. Baker*, 50 Me. 325; 79 Am. Dec. 616.

<sup>2</sup> *Dorrell v. Johnson*, 17 Pick. 263; *Walden v. Bodley*, 14 Pet. 162; *Holly v. Brown*, 14 Conn. 255; *Curtis v. Galvin*, 1 Allen, 215; *Kelly v. Waite*, 12 Met. 300; *Pollen v. Brewer*, 7 Com. B., N. S., 371.

<sup>3</sup> *Ball v. Cullimore*, 2 Crompt. M. & R. 120.

<sup>4</sup> *Boone on Real Property*, 124.

<sup>5</sup> *Jackson v. Hughes*, 1 Blackf. 421; *Ridgely v. Stilwell*, 25 Mo. 570; *Den v. Drake*, 14 N. J. L. 523; *Steffens v. Earl*, 6 Rep. 402; *Bradley v. Coval*, 4

*Cow*. 350; *Garrett v. Clark*, 5 Or. 464; *Lesley v. Randolph*, 4 Rawle, 123; *Logan v. Herron*, 8 Serg. & R. 459; *Thomas v. Wright*, 9 Serg. & R. 89.

<sup>6</sup> *Whaley v. Whaley*, 1 Spear, 225; 40 Am. Dec. 594; *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Jackson v. Parkhurst*, 5 Johns. 128; *Russell v. Fabyan*, 34 N. H. 218; *Doe v. Hull*, 2 Dowl. & R. 38. See *Smith v. Littlefield*, 51 N. Y. 539; *Bacon v. Bacon*, 9 Conn. 334; *Rising v. Stanard*, 17 Mass. 282.

<sup>7</sup> *Rowan v. Lytle*, 11 Wend. 617.

<sup>8</sup> 2 Co. Lit. 57 b. And see *Rowan v. Lytle*, 11 Wend. 617; *Livingston v. Tanner*, 12 Barb. 484.

ing over after the expiration of his term;<sup>1</sup> a tenant at will continuing in possession after the will is determined by the death of the lessor;<sup>2</sup> a person selling lands, agreeing to deliver them up to the grantee on a certain day, but continuing in possession after that day;<sup>3</sup> a mortgagor remaining in possession after a sale of the mortgaged premises on foreclosure;<sup>4</sup> where a lease for years is made by parol, and the lessee agrees to quit within the term if the demised premises shall be sold, and if he holds over after a sale.<sup>5</sup> A tenancy by sufferance is determined at any time by the entry of the landlord,<sup>6</sup> unless the statute requires notice to be given.<sup>7</sup> So the tenancy is determined by a conveyance by the tenant;<sup>8</sup> or by the death of the landlord.<sup>9</sup>

§ 2813. **Lodgings and Apartments — Rights and Liabilities.**— Where a room or rooms in a house or building are leased to a person, the owner retaining no control or dominion over them, the former becomes a tenant of the room or rooms.<sup>10</sup> And this is so, although he may have no exclusive control of the outer entrance,<sup>11</sup> or notwith-

<sup>1</sup> Jackson v. Parkhurst, 5 Johns. 128; Jackson v. McLeod, 12 Johns. 182; Hollis v. Pool, 3 Met. 350.

<sup>2</sup> Co. Lit. 57 b; Benedict v. Morse, 10 Met. 223.

<sup>3</sup> Wood v. Hyatt, 4 Johns. 312; 4 Johns. 150.

<sup>4</sup> Kinsley v. Ames, 2 Met. 29.

<sup>5</sup> Hollis v. Pool, 3 Met. 350.

<sup>6</sup> Hauxhurst v. Lobree, 38 Cal. 563; Uridias v. Morrell, 25 Cal. 35; Moore v. Morrow, 28 Cal. 552; Joy v. McKay, 70 Cal. 445; Reed v. Reed, 48 Me. 388; Esty v. Baker, 50 Me. 325; 79 Am. Dec. 616; Howard v. Carpenter, 22 Md. 10; Kinsley v. Ames, 2 Met. 29; Hollis v. Pool, 3 Met. 350; Jackson v. McLeod, 12 Johns. 182; Mendell v. Hall, 13 Bush, 231; Jackson v. Parkhurst, 5 Johns. 128; Rowan v. Lytle, 11 Wend. 616; Smith v. Littlefield, 51 N. Y. 541; Meier v. Thiemann, 15 Mo. App. 307; Evans v. Reed, 5 Gray, 308; Den v. Adams, 12 N. J. L. 99; Emerick v. Taverner, 9 Gratt.

220, 58 Am. Dec. 217; Mason v. Gray, 36 Vt. 311, 312; Stanbury v. Dean, Brayt. 166; Atkinson v. Burt, 1 Aiken, 329; Babcock v. Kennedy, 1 Vt. 457; 18 Am. Dec. 695; Lyman v. Mower, 6 Vt. 345; Stedman v. Gassett, 18 Vt. 346; Lull v. Matthews, 19 Vt. 322; Pierce v. Brown, 24 Vt. 165; Hemming v. Brett, Har. & W. 3; Wallis v. Delman, 29 L. J. Ex. 276; Doe v. Turner, 7 Mees. & W. 225; Doe v. Maisey, 8 Barn. & C. 767; Doe v. Lawder, 1 Stark. 308.

<sup>7</sup> See post.

<sup>8</sup> Proctor v. Towes, 115 Ill. 138; McCann v. Rathbone, 8 R. I. 403.

<sup>9</sup> Joy v. McKay, 70 Cal. 445.

<sup>10</sup> Porter v. Merrill, 124 Mass. 534; White v. Maynard, 111 Mass. 253; 15 Am. Rep. 28; Swain v. Mixer, 8 Gray, 182; 69 Am. Dec. 244; Wilson v. Martin, 1 Denio, 602; Gould v. School Dist., 8 Minn. 427.

<sup>11</sup> Gear on Landlord and Tenant, sec. 45.

standing there may be restrictions as to the use of the premises.<sup>1</sup> But where one occupies a room or apartment in a house without any exclusive control over it, he is a lodger, and not a tenant.<sup>2</sup> Neither a lodger nor a lessee of apartments has any interest in the land,<sup>3</sup> except such as is necessary for the enjoyment of apartments rented.<sup>4</sup> Yet if there are clear terms of demise, there may be a tenancy of real estate in one or more rooms.<sup>5</sup> The rooms of a lodger are not protected against a forcible entry by an officer;<sup>6</sup> whereas a lessee of apartments cannot be forcibly entered upon, though the outer door is peaceably entered.<sup>7</sup> As to rent, a lodger is liable only upon his contract.<sup>8</sup> A lodger is liable for rent for the period of actual occupation, though compelled to leave by misconduct of his landlord.<sup>9</sup> One who contracts for board and rooms, with deduction for absence, cannot, when leaving the rooms entirely, claim the benefit of the deduction.<sup>10</sup> A contract for rooms and board at a specified price for each is entire, and after the party leaves on account of a neglect to furnish the board, he is not liable for the rooms.<sup>11</sup> An engagement of desk-room at a fixed rent, followed by

<sup>1</sup> Porter v. Merrill, 124 Mass. 534.

<sup>2</sup> Taylor on Landlord and Tenant, sec. 66; Cochrane v. Tuttle, 75 Ill. 361; Lee v. Gansel, Cowp. 1; Fludier v. Lombe, Cas. temp. Hardw. 307; Dobson v. Jones, 5 Man. & G. 112; Davis v. Wadlington, 7 Man. & G. 85; Wansey v. Perkins, 7 Man. & G. 151; Monks v. Dykes, 4 Mees. & W. 567; Smith v. Lancaster, L. R. 5 Com. P. 246; Brown v. McGowan, L. R. 5 Com. P. 230; Hartley v. Banks, 5 Com. B., N. S., 40; Riddle v. Welden, 5 Wheat. 9; Jones v. Webber, 1 D. Chip. 215; Theological Inst. v. Barbour, 4 Gray, 329.

<sup>3</sup> McMillan v. Solomon, 42 Ala. 356; 94 Am. Dec. 654; Alexander v. Dorsey, 12 Ga. 12; 56 Am. Dec. 443; Ainsworth v. Ritt, 38 Cal. 89; Shawmut Nat. Bank v. Boston, 118 Mass. 125; Stockwell v. Hunter, 11 Met. 448; 45 Am. Dec. 220; White v. Maynard, 111 Mass. 250; 15 Am. Rep. 28.

<sup>4</sup> Gear on Landlord and Tenant, sec. 45.

<sup>5</sup> Gear on Landlord and Tenant, sec. 45.

<sup>6</sup> Lee v. Gansel, Cowp. 1.

<sup>7</sup> Swain v. Mizner, 8 Gray, 182; 69 Am. Dec. 244.

<sup>8</sup> Gear on Landlord and Tenant, sec. 46. See Porter v. Merrill, 124 Mass. 534.

<sup>9</sup> Kirkman v. Jervis, 7 Dowl. Pr. 678. A tenant may leave an apartment-house without liability for future rent, where the steam heat which the lessor agreed to furnish is insufficient, the elevator service insufficient, and the flues so defective that the apartment is often filled with dense smoke: Lawrence v. Burrell, 17 Abb. N. C. 312.

<sup>10</sup> Wetmore v. Jaffray, 9 Hun, 140.

<sup>11</sup> Wilson v. Martin, 1 Denio, 602. See Shallies v. Wilcox, 4 Thomp. & C. 591.

some acts of occupation, will create a liability for occupation, though no railing is made nor sign put up;<sup>1</sup> but the mere cleaning of rooms by one who thinks of renting will not constitute a renting, unless done as an act of possession.<sup>2</sup> A tenant of rooms may decorate the outside walls with his business signs.<sup>3</sup> There is no presumption from a general hiring of lodgings or furnished apartments that it is to continue for a year.<sup>4</sup> When the hiring is for a weekly rent, it may be determined without notice at the end of any week,<sup>5</sup> though notice to quit must be given if agreed upon,<sup>6</sup> or if required by usage.<sup>7</sup>

**§ 2814. Rent — In General.** — Rent is the return made by the tenant for the land which he occupies; the price or purchase-money for the ownership of the term.<sup>8</sup> The acceptance of a lease binds the recipient to pay rent, though he has not signed the instrument.<sup>9</sup> So one who enters on property with knowledge of the price asked must pay it, although he said he would not.<sup>10</sup> But where land is occupied by a person not the owner, in such manner and under such circumstances that a contract to pay rent cannot, in law, be implied, rent for such occupancy cannot be recovered in the absence of an express contract to pay it.<sup>11</sup> A written acknowledgment that one occupies land as the tenant of another raises no presumption of law that he promises to pay rent.<sup>12</sup> Where there is a written lease, by the conditions of which no rent is due, none can be recovered for the occupation, though the defendant

<sup>1</sup> *Franklin Tel. Co. v. Pewtress*, 43 Conn. 167.

<sup>2</sup> *Lewis v. Havens*, 40 Conn. 367.

<sup>3</sup> *Baldwin v. Morgan*, 43 Hun, 355; *Lowell v. Strahan*, 145 Mass. 1.

<sup>4</sup> *Wilson v. Abbott*, 4 Dowl. & R. 694.

<sup>5</sup> *Huffell v. Armistead*, 7 Car. & P. 56.

<sup>6</sup> *Peacock v. Ruffan*, 6 Esp. 4.

<sup>7</sup> *Huffell v. Armistead*, 7 Car. & P. 56.

<sup>8</sup> 2 Greenl. Cruise, 72; *McGee v.*

*Gibson*, 1 B. Mon. 105; *Fowler v. Bott*, 6 Mass. 67; *Stone v. Patterson*, 19 Pick. 476; 31 Am. Dec. 156; *Constantine v. Waile*, 1 Sweeny, 239.

<sup>9</sup> *McFarlane v. Williams*, 107 Ill. 33.

<sup>10</sup> *Thompson v. Sanborn*, 52 Mich. 141.

<sup>11</sup> *Mitchell v. Pendleton*, 21 Ohio St. 661; *Middleton v. Middleton*, 35 N. J. Eq. 141.

<sup>12</sup> *Strafford County Savings Bank v. Getchell*, 59 N. H. 281.

may have had some beneficial enjoyment, and did not give up the premises, upon non-performance of the condition by the lessor, at the day.<sup>1</sup> So if an agreement or understanding existed that the tenant was to repair in lieu of paying rent, no claim for rent can be maintained.<sup>2</sup> So rent cannot be claimed for the use of premises occupied under a gratuitous license.<sup>3</sup> Rent must be certain, or capable of being reduced to a certainty.<sup>4</sup> At common law it was necessary that it should issue out of the land or thing itself.<sup>5</sup> But rent may be reserved in a certain portion of the products or in labor.<sup>6</sup> So rent may issue not only from land and tenements corporeal, but also from the personal property necessary for their proper enjoyment.<sup>7</sup> Property in products in which rent is made payable does not pass to the landlord until severed and set apart for him or delivered to him by the tenant.<sup>8</sup> If the landlord sells the land, the vendee becomes entitled to that proportion of the grain growing at the time of the conveyance which the landlord would have been entitled to had he not conveyed.<sup>9</sup> Where a lessee agrees to pay forty dollars a year in specific articles, at an agreed price, as rent for premises, if he tenders the articles at the time agreed upon, the lessor is bound to take them at the stipulated price; but if the lessee fails altogether to deliver the

<sup>1</sup> *Epping v. Devanny*, 28 Ga. 422.

<sup>2</sup> *Sherwin v. Lasher*, 9 Ill. App. 227.

<sup>3</sup> *Loague v. Memphis*, 7 Lea, 67; *Strickland v. Hudson*, 55 Miss. 235.

<sup>4</sup> 2 Greenl. Cruise, 72; *Smith v. Tyler*, 2 Hill, 648; *Cross v. Tome*, 14 Md. 247; *Bowzer v. Scott*, 8 Blackf. 36; *Smith v. Colvon*, 10 Johns. 91; *Dutcher v. Culver*, 24 Minn. 548; *Smith v. Ankrim*, 13 Serg. & R. 39. Rent is certain which can be reduced to a certainty by computation: *Dutcher v. Culver*, 24 Minn. 584; *Brooks v. Cunningham*, 47 Miss. 108. A lease provided that the rent to be paid was \$1,513.84, "subject to any errors in the figuring hereto attached." Held, not void for uncertainty as to the amount: *McFarlane v. Williams*, 107 Ill. 33.

<sup>5</sup> 2 Greenl. Cruise, 72.

<sup>6</sup> *Ream v. Harnish*, 45 Pa. St. 376; *Butterfield v. Baker*, 5 Pick. 522; *Kier v. Peterson*, 41 Pa. St. 357; *Smalley v. Corliss*, 37 Vt. 486; *Buskirk v. Cleveland*, 41 Barb. 610; *Dockham v. Parker*, 9 Me. 137; 23 Am. Dec. 547; *Johnson v. Smith*, 3 Pennr. & W. 496; 24 Am. Dec. 339; *Lilley v. Fifty Associates*, 101 Mass. 432; *McGee v. Gibson*, 1 B. Mon. 105.

<sup>7</sup> *Vetter's Appeal*, 99 Pa. St. 52.

<sup>8</sup> *Dockham v. Parker*, 9 Me. 137; 23 Am. Dec. 547; *Chicago etc. R. R. Co. v. Linard*, 94 Ind. 319; 48 Am. Rep. 155; *Deaver v. Rice*, 4 Dev. & B. 431; 34 Am. Dec. 389; *In re Wait*, 7 Pick. 100; 19 Am. Dec. 262.

<sup>9</sup> *Johnson v. Smith*, 3 Pennr. & W. 496; 24 Am. Dec. 339.

articles, the standard of the damages to the lessor is the forty dollars agreed upon by them in the contract.<sup>1</sup>

**ILLUSTRATIONS.**—A agreed to hire a building, to be finished off and furnished by the lessor, who drew the lease, but who omitted to recite this, and A, not noticing the omission, signed the lease, but refused to take the property on the lessor's refusal to finish and furnish. *Held*, that an action on the lease for rent was not maintainable: *Wyman v. Sperbeck*, 66 Wis. 495. A lessor of land engaged to put thereon sufficient stable-room for three span of horses, to furnish sufficient crib and bin room, to break the prairie sod that was unbroken on said land in season to be planted in corn, to dig a stock-well, and to have the farm fenced. *Held*, that these were conditions precedent, to be performed before rent could be recovered: *Baird v. Evans*, 20 Ill. 29. Rent was to be paid in certain articles, the prices of which were specified in the lease. *Held*, that if the lessee tendered the articles at the day, the rent was paid, notwithstanding the real value was much greater or less than that agreed upon: *Heywood v. Heywood*, 42 Me. 229; 66 Am. Dec. 277.

**§ 2815. When Payable.**—Where the time for the payment of rent is not fixed by agreement or custom, it is not payable until the end of the term.<sup>2</sup> The time of payment must be determined by the laws and customs of the country where the premises are situate, where the contract is to be performed, and the landlord lives.<sup>3</sup> Under a lease for years from a specified day, rent conditioned to be payable quarterly on certain days is not due until after midnight of such days.<sup>4</sup> Where a lease, conditioned to be forfeited for non-payment of rent, provides no place for payment, payment must be demanded by the landlord of the tenant,

<sup>1</sup> *Heywood v. Heywood*, 42 Me. 229; 66 Am. Dec. 277.

<sup>2</sup> *Garvey v. Dobyns*, 8 Mo. 213; *Ridgley v. Stillwell*, 27 Mo. 128; *Perry v. Aldrich*, 13 N. H. 343; 38 Am. Dec. 493; *Gibbons v. Thompson*, 21 Minn. 398; *Boyd v. McCombs*, 4 Pa. St. 146; *Hopkins v. Helmore*, 8 Ad. & E. 463; *Menough's Appeal*, 5 Watts & S. 432; *Duryee v. Turner*, 20 Mo. App. 34; *Dixon v. Nicolls*, 39 Ill. 372; 89 Am. Dec. 312. If rent be pay-

able quarterly, nothing is due until the time stipulated for payment arrives: *Fitchburg Corp. v. Melvin*, 15 Mass. 268; *Wood v. Partridge*, 11 Mass. 488. In case of a holding over, rent is payable at the same intervals as under the original holding: *Vegely v. Robinson*, 20 Mo. App. 199.

<sup>3</sup> *Calhoun v. Atchison*, 4 Bush, 261; 96 Am. Dec. 299.

<sup>4</sup> *Ordway v. Remington*, 12 R. I. 319; 34 Am. Rep. 646.

on the premises, just before sunset on the specified day.<sup>1</sup> Rent payable in advance on a certain day may be paid at any time during that day.<sup>2</sup> No demand of the rent on the day it falls due is necessary to entitle the landlord to maintain an action therefor.<sup>3</sup> A custom to pay rent in advance cannot be applied to an express covenant to pay quarterly.<sup>4</sup> If the lessee has paid the rent of the term in advance, he will not be liable to pay the same again to an assignee of the reversion.<sup>5</sup> A lessor's verbal agreement with his tenant to change, for a new consideration, the time of paying the rent, from the beginning to the end of the month, is valid.<sup>6</sup> A landlord taking the negotiable note of his tenant for rent may not distrain or sue for the rent until the maturity and non-payment of the note.<sup>7</sup> Where rent is payable in produce, it is due a reasonable time after the crops are gathered.<sup>8</sup>

§ 2816. **Double Rent.**—By statute in several states, a tenant holding over without right is liable for double rent.<sup>9</sup> And the lease may stipulate for double rent if the lessee holds over or breaks its covenants.<sup>10</sup> The right to double rent is waived by a subsequent contract extending the tenancy,<sup>11</sup> or by accepting single rent.<sup>12</sup> A written proposition to a tenant, in anticipation of the end of his term, to charge in future an increased rent for the premises, commits the tenant to such increase if he holds over.<sup>13</sup>

<sup>1</sup> *Jenkins v. Jenkins*, 63 Ind. 415; 30 Am. Rep. 229.

<sup>2</sup> *Sherlock v. Thayer*, 4 Mich. 355; 66 Am. Dec. 539; *Giles v. Comstock*, 4 N. Y. 270; 53 Am. Dec. 374. And if the tenant is evicted on that day, he is not bound to pay it: *Smith v. Shepard*, 15 Pick. 147; 25 Am. Dec. 432.

<sup>3</sup> *Clarke v. Charter*, 128 Mass. 483.

<sup>4</sup> *Mitchell v. Weller*, 1 Jur. 622.

<sup>5</sup> *Stone v. Patterson*, 19 Pick. 476; 31 Am. Dec. 156.

<sup>6</sup> *Wilgus v. Whitehead*, 89 Pa. St. 131.

<sup>7</sup> *Hornbrooks v. Lucas*, 24 W. Va. 493; 49 Am. Rep. 277.

<sup>8</sup> *Brown v. Adams*, 35 Tex. 447; *Lamberton v. Stouffer*, 55 Pa. St. 276; *Toler v. Seabrook*, 39 Ga. 14.

<sup>9</sup> *Gear on Landlord and Tenant*, sec. 132.

<sup>10</sup> *Gear on Landlord and Tenant*, sec. 132.

<sup>11</sup> *Lofland v. Emory*, 2 Harr. (Del.) 297.

<sup>12</sup> *Wilgus v. Lewis*, 8 Mo. App. 336.

<sup>13</sup> *Reithman v. Brandenburg*, 7 Col. 480.

§ 2817. **Action for Rent—Debt and Covenant.**—At common law an action of debt lies for rent due.<sup>1</sup> Where the lease contains a covenant by the lessee to pay the rent, an action of covenant may be brought thereon.<sup>2</sup> Rent is recoverable in equity where the remedy has become difficult or doubtful at law, or where there is a perplexity or uncertainty as to the title or the extent of the defendant's responsibility.<sup>3</sup>

§ 2818. **Action for Rent—Use and Occupation.**—An action of *assumpsit* for the use and occupation of the land by permission of the plaintiff lies only on a promise, either express or implied, to pay rent.<sup>4</sup> It will lie against a lessee by deed who holds over after the expiration of his term, or after notice to quit.<sup>5</sup> So an action for use and occupation may be maintained by a landlord against a tenant who leaves the premises without giving due notice of his intention to quit.<sup>6</sup> So *assumpsit* will lie for use and occupation on an express promise to pay a certain rent, or on a general promise to pay the landlord to his satisfaction.<sup>7</sup> To support this action, "something in the nature of a demise must be shown, or some evidence given to establish the relation of landlord and tenant. That relation can only grow out of contract. . . . The contract need not be technically formal, but there must at least be a permissive occupation by the tenant. Occupation by the tenant with the assent of the landlord is indispensable to

<sup>1</sup> *Duppa v. Mayo*, 1 Saund. 281. Demand is necessary: *McMurphy v. Minot*, 4 N. H. 251.

<sup>2</sup> 2 Greenl. Cruise, 94.

<sup>3</sup> *Livingston v. Livingston*, 4 Johns. Ch. 287; 8 Am. Dec. 562.

<sup>4</sup> *Gunn v. Scovil*, 4 Day, 228; 4 Am. Dec. 208; *Crouch v. Briles*, 7 J. J. Marsh. 255; 23 Am. Dec. 404; *Sutton v. Mandeville*, 1 Munf. 407; 4 Am. Dec. 549; *Warner v. Hale*, 65 Ill. 395; *Swasey v. Little*, 7 Pick. 296; *Boston v. Binney*, 11 Pick. 1; 22 Am. Dec.

353; *Fitzgerald v. Beebe*, 7 Ark. 305; and see note to this case in 46 Am. Dec. 289, 290; *Barron v. Marsh*, 63 N. H. 107; *Swift v. Lumber Co.*, 64 N. H. 53.

<sup>5</sup> *Abeel v. Radcliff*, 13 Johns. 297; 7 Am. Dec. 377; *Hogsett v. Ellis*, 17 Mich. 351; *Hidden v. Jordan*, 57 Cal. 184.

<sup>6</sup> *Walker v. Furbush*, 11 Cush. 366; 59 Am. Dec. 143.

<sup>7</sup> *Eppees v. Cole*, 4 Hen. & M. 161; 4 Am. Dec. 512.

the maintenance of the action."<sup>1</sup> "Almost any evidence which shows the relation of landlord and tenant to exist between the parties will support this action. It is not necessary for the plaintiff to prove an express contract with the tenant when he took possession, or any particular reservation of rent, nor that the tenant had once paid rent; for an understanding to that effect will be implied in all cases where a permissive holding is established."<sup>2</sup> Whether a promise to pay rent is to be implied from occupation and other circumstances is a question of fact.<sup>3</sup>

An action for use and occupation will lie only where the relation of landlord and tenant exists between the parties.<sup>4</sup> Use and occupation will not lie against a trespasser;<sup>5</sup> nor where the possession is adverse;<sup>6</sup> nor where the defendant's entry was tortious;<sup>7</sup> nor on a mere occu-

<sup>1</sup> *Central Mills Co. v. Hart*, 124 Mass. 123; *Gunn v. Scovil*, 4 Day, 228; 4 Am. Dec. 208.

<sup>2</sup> *Taylor on Landlord and Tenant*, sec. 655; *Gunn v. Scovil*, 4 Day, 228; 4 Am. Dec. 208; *Estep v. Estep*, 23 Ind. 114; *Stockett v. Watkins*, 2 Gill & J. 326; 20 Am. Dec. 438; *Crouch v. Briles*, 7 J. J. Marsh. 257; 23 Am. Dec. 404; *La Farge v. Park*, 1 Edm. Sel. Cas. 223; *Chambers v. Ross*, 25 N. J. L. 293; *Dickson v. Moffitt*, 5 Col. 114; *McNairy v. Paine*, 9 Humph. 533; *Grove v. Barclay*, 106 Pa. St. 155; *Horton v. Cooley*, 135 Mass. 587; *Little v. Martin*, 3 Wend. 219; 20 Am. Dec. 699.

<sup>3</sup> *Welcome v. Labontee*, 63 N. H. 124.

<sup>4</sup> 2 *Taylor on Landlord and Tenant*, 8th ed., sec. 636; *Wood on Landlord and Tenant*, 948; *Abbott's Trial Evidence*, 351; *Aull Sav. Bank v. Aull*, 80 Mo. 201; *Hood v. Mathias*, 21 Mo. 308, 313; *Carpenter v. United States*, 17 Wall. 489; *Boston v. Binney*, 11 Pick. 1; 22 Am. Dec. 353; *Mayo v. Fletcher*, 14 Pick. 525; *Holmes v. Williams*, 16 Minn. 164; *O'Fallon v. Boismenn*, 3 Mo. 406; 28 Am. Dec. 673; *Hutton v. Powers*, 38 Mo. 350; *Cohen v. Kyler*, 27 Mo. 122; *Ackerman v. Lyman*, 20 Wis. 54; *De Pere Co. v. Reynen*, 65 Wis. 271; *Bancroft*

*v. Wardwell*, 13 Johns. 490; 7 Am. Dec. 396; *Smith v. Stewart*, 6 Johns. 49; 5 Am. Dec. 186; *Edmonson v. Kite*, 43 Mo. 178; *Espy v. Fenton*, 5 Or. 423; *Lankford v. Green*, 52 Ala. 103; *McCloskey v. Miller*, 72 Pa. St. 154; *Folsom v. Carli*, 6 Minn. 420; 80 Am. Dec. 456; *De Young v. Buchanan*, 10 Gill & J. 149; 32 Am. Dec. 156; *Hoffar v. Dement*, 5 Gill, 132; 46 Am. Dec. 628; *Centre Mills Co. v. Hart*, 124 Mass. 123; *Redden v. Barker*, 4 Harr. (Del.) 179; *Williams v. Hollis*, 19 Ga. 313; *Dudding v. Hill*, 15 Ill. 61; *McNair v. Schwartz*, 16 Ill. 24; *Newby v. Vestal*, 6 Ind. 412; *Scales v. Anderson*, 26 Miss. 94; *Brewer v. Craig*, 18 N. J. L. 214; *Stewart v. Fitch*, 31 N. J. L. 17; *Hall v. Southmayd*, 15 Barb. 32; *Coit v. Planer*, 4 Abb. Pr., N. S., 140; *La Farge v. Park*, 1 Edm. Sel. Cas. 223.

<sup>5</sup> *Hurley v. Lamoreaux*, 29 Minn. 138; *Fallon v. Boismean*, 3 Mo. 405; 28 Am. Dec. 678.

<sup>6</sup> *Inman v. Morris*, 63 Miss. 347; *Stringfellow v. Curry*, 76 Ala. 394; *Preston v. Hawley*, 101 Ill. 586; *Kinkead v. United States*, 18 Ct. of Cl. 504.

<sup>7</sup> *Name v. Alexander*, 49 Ind. 516; *McCloskey v. Miller*, 72 Pa. St. 151; *Turner v. Coal Co.*, 5 Ex. 939; *Ackerman v. Lyman*, 20 Wis. 454; *Hurd v. Miller*, 2 Hilt. 540; *Tew v. Jones*, 13 Mees. & W. 12; *Smith v. Houston*, 16

pation by the defendant, where no permission by the plaintiff nor recognition of his title is shown;<sup>1</sup> nor after a recovery in ejectment to recover rents and profits accruing after the date of the demise in the declaration;<sup>2</sup> nor where a party enters into possession of premises under an agreement to purchase, if the purchase is not consummated, through the fault of the vendor;<sup>3</sup> nor when the rent reserved is to be paid in specific articles, and the contract of lease does not fix their value, nor furnish a rule by which it may be ascertained by mere calculation.<sup>4</sup> Where there is a lease under seal, an action for use and occupation will not lie either against the lessee or his assignee;<sup>5</sup> nor for rent accruing under a written lease, before its termination.<sup>6</sup> Where it is sought to hold a trespasser, the burden of proof is upon the land-owner to show that such person, after entering upon the premises as a trespasser, became a tenant;<sup>7</sup> and the action will not lie against a person who has come into possession as a purchaser from the owner.<sup>8</sup>

§ 2819. **Distress.** — At common law, when the rent is in arrear, the lessor may enter on the land, seize any personal chattels to be found there, and sell them for the payment of the rent due. This proceeding is denominated a distress.<sup>9</sup> In some of the states the remedy by distress has been expressly abolished by statute,<sup>10</sup> while in nearly all it has fallen into disuse, the remedy by attachment

Ala. 111; *Hurley v. Lamoreaux*, 29 Minn. 138; *Hathaway v. Ryan*, 35 Cal. 188; *Murdock v. Brooks*, 38 Cal. 596; *Holmes v. Williams*, 16 Minn. 164; *Mayo v. Fletcher*, 4 Pick. 525; *Boston v. Binney*, 11 Pick. 1; 22 Am. Dec. 353; 2 *Taylor on Landlord and Tenant*, 8th ed., sec. 636; *Abbott's Trial Evidence*, 351.

<sup>1</sup> *Eastman v. Howard*, 30 Me. 58; 50 Am. Dec. 611.

<sup>2</sup> *Butler v. Cowles*, 4 Ohio, 205; 19 Am. Dec. 613.

<sup>3</sup> *Dwight v. Cutler*, 3 Mich. 566; 64 Am. Dec. 105.

<sup>4</sup> *Eastland v. Sparks*, 22 Ala. 607; *Oswald v. Godbald*, 20 Ala. 811.

<sup>5</sup> *Kinstead v. R. R. Co.*, 69 N. Y. 343; 25 Am. Dec. 197; *Hansen v. Meyer*, 81 Ill. 321; 25 Am. Rep. 282; *Smiley v. McLauthin*, 138 Mass. 363.

<sup>6</sup> *Gage v. Smith*, 14 Me. 466; *Blume v. McClurken*, 10 Watts, 380.

<sup>7</sup> *Dixon v. Ahern*, 19 Nev. 422.

<sup>8</sup> *Bancroft v. Wardwell*, 13 Johns. 489; 7 Am. Dec. 396.

<sup>9</sup> 2 *Greenl. Cruise*, 88.

<sup>10</sup> Alabama, Mississippi, New York, Minnesota, Wisconsin, District of Columbia, Utah; 1 *Stinson's American*

and the statutory lien of the landlord taking its place.<sup>1</sup> At common law all movable chattels (with few exceptions) found upon the demised premises, whether belonging to the tenant, or under-tenant, or a stranger, are liable to be distrained.<sup>2</sup> But in the United States the courts have always been averse to the right of distraining goods not the property of the tenant,<sup>3</sup> and hold that where the tenant, in the course of his business, is necessarily put in possession of the property of those with whom he deals, or of those who employ him, such property, although on the demised premises, is not liable to distress for rent due thereon from the tenant.<sup>4</sup> Thus unfinished cloth at a fulling-mill is exempt from distress if it is the property of a stranger;<sup>5</sup> so goods deposited in a warehouse to be taken care of were held not liable to be distrained;<sup>6</sup> so of goods deposited with a pawn-broker, although pledged for more than a year;<sup>7</sup> and goods held by an agent for sale on commission,<sup>8</sup> or a horse sent to a livery-stable to be

Statute Law, sec. 2031. The right of distress having been abolished by statute, the landlord's lien on the tenant's property on the demised premises no longer exists: *Ebling v. Husson*, 54 N. Y. Sup. Ct. 377.

<sup>1</sup> *Stimson's American Statute Law*, sec. 2031. See *Herr v. Johnson*, 11 Col. 393.

<sup>2</sup> *Gorton v. Falkner*, 4 Term Rep. 565; *Giles v. Ebsworth*, 10 Md. 333; *Kennedy v. Lange*, 50 Md. 91; *Harvie v. Wickham*, 6 Leigh, 236; *Stevens v. Lodge*, 7 Blackf. 594; *Karns v. McKinney*, 74 Pa. St. 387; *Kleber v. Ward*, 88 Pa. St. 93; *Connah v. Hale*, 23 Wend. 462.

<sup>3</sup> *McCreery v. Claflin*, 37 Md. 435; 11 Am. Rep. 542; *Youngblood v. Lowry*, 2 McCord, 39; 13 Am. Dec. 698; *Briggs v. Large*, 30 Pa. St. 287; *Stone v. Matthews*, 7 Hill, 428; *Brown v. Sims*, 17 Serg. & R. 138; and see note in 17 Am. Dec. 458-461.

<sup>4</sup> *Karns v. McKinney*, 74 Pa. St. 390.

<sup>5</sup> *Hoskins v. Paul*, 9 N. J. L. 110; 17 Am. Dec. 455. See *Adams v. Grane*, 1 Cromp. & M. 380; *Brown v. Shevill*, 2 Ad. & R. 138.

<sup>6</sup> *Miles v. Furber*, L. R. 8 Q. B. 77. See *Brown v. Sims*, 17 Serg. & R. 138.

<sup>7</sup> *Swire v. Leach*, 18 Com. B., N. S., 479.

<sup>8</sup> *Howe Sewing Machine Co. v. Sloan*, 87 Pa. St. 438; 30 Am. Rep. 376; *McCreery v. Claflin*, 37 Md. 435; 11 Am. Rep. 542. In *Howe Machine Co. v. Sloan*, 87 Pa. St. 438, 30 Am. Rep. 376, the court say: "The rule of the common law that the goods of a stranger on demised premises are subject to the distress of the landlord has yielded, and must continue to give way, to the growing necessities of trade and business. As Chief Justice Gibson has said, 'There is little reason to doubt that the exceptions will, in the end, eat out the rule.' It is not a subject upon which it would be wise to draw refined distinctions. It was settled in *Brown v. Sims*, 17 Serg. & R. 138, that goods on storage were exempt, though the business of the tenant was not exclusively that of a warehouseman. Certainly a man may safely intrust his cattle to a farmer to agist, who raises his own beasts for the drove or the market. Nor is there any reason

fed and cared for.<sup>1</sup> The requisites of a valid distress are, that there shall have been an actual demise or letting of the premises, and the relation of landlord and tenant exist between the parties;<sup>2</sup> that there be a reversion in the landlord;<sup>3</sup> that the rent be certain or capable of being made certain;<sup>4</sup> and that the rent shall be due;<sup>5</sup> and that there shall be a reservation of a certain rent.<sup>6</sup> A distress must be made on the premises,<sup>7</sup> and for the purpose of seizure, the landlord may open the outer door in the ordinary way, but he has no authority to break open forcibly a door which is barred or bolted.<sup>8</sup> Having entered through an open door, he may, however, break an inner door.<sup>9</sup>

§ 2820. **Landlord's Lien** — In a number of states, statutes have been passed giving landlords a lien upon the tenant's goods, or upon the crops growing or grown upon the demised premises, to secure the payment of rent.<sup>10</sup>

why a similar principle should not be applied to the case of goods intrusted to an agent to be sold on commission. It is notoriously the usage for merchants not holding themselves out as commission merchants to receive and sell goods in that way. In the particular case before us, it would seem reasonable to infer that the products of sewing-machine companies, the machines themselves, being known by the name of the manufactures, are usually sold by their agents on commission. There was enough to put the landlord on inquiry, if notice was necessary. The broad principle which governs the case has been succinctly and happily expressed by Mercier, J., in *Karns v. McKinney*, 74 Pa. St. 390: 'The principle,' he says, 'covering these cases during the tenancy, except when the goods are in the custody of the law, is this: where the tenant, in the course of his business, is necessarily put in possession of the property of those with whom he deals, or of those who employ him, such property, although on the demised premises, is not liable to distress for rent due thereon from the tenant.'

<sup>1</sup> *Youngblood v. Lowry*, 2 McCord, 39; 13 Am. Dec. 698.

<sup>2</sup> *Smith on Landlord and Tenant*, 188; *Taylor on Landlord and Tenant*, 561, 563; *Hill v. Stocking*, 6 Hill, 277.

<sup>3</sup> *Preece v. Corrie*, 5 Bing. 24; *Prescott v. De Forest*, 16 Johns. 159; *Lichtenthaler v. Thompson*, 13 Serg. & R. 157; 15 Am. Dec. 584.

<sup>4</sup> *Taylor on Landlord and Tenant*, 861.

<sup>5</sup> *Bailey v. Wright*, 3 McCord, 434. And see note to *Lichtenthaler v. Thompson*, 13 Serg. & R. 157, in 15 Am. Dec. 584-588.

<sup>6</sup> *Diller v. Roberts*, 13 Serg. & R. 60; 15 Am. Dec. 578.

<sup>7</sup> *Grace v. Shively*, 12 Serg. & R. 217; *Christman v. Floyd*, 9 Wend. 340; *Martin v. Black*, 9 Paige, 641; 38 Am. Dec. 574.

<sup>8</sup> *Ryan v. Shilcock*, 15 Jur. 1200; *Williams v. Spencer*, 5 Johns. 352.

<sup>9</sup> *Williams v. Spencer*, 5 Johns. 352.

<sup>10</sup> 1 *Stimson's American Statute Law*, secs. 2034 et seq. See *Hadden v. Knickerbocker*, 70 Ill. 677; 22 Am. Rep. 80; and *Title Liens*.

§ 2821. **Apportionment of Rent.** — Where there is a severance of the reversion, either by the act of the parties or of the law, the rent follows, and is apportioned;<sup>1</sup> that is, it becomes payable to the several grantees or assignees *pro rata*, according to the relative values of their respective portions.<sup>2</sup> The assignee of a reversion is entitled to the rent falling due after the assignment, where there is no reservation of the rent, as rent is incident to the reversion and passes with it.<sup>3</sup> Apportionment of rent may be made between the landlord and a purchaser at a sheriff's sale, and such landlord cannot collect rent accruing after the sale.<sup>4</sup> So rent is apportionable where the tenant becomes owner of part of the premises under an execution sale against the lessor.<sup>5</sup> Where the rent reserved in a lease is a sum of money payable annually, if the lessee surrenders a part of the land to the lessor, the rent for the remainder is not extinguished, but apportioned.<sup>6</sup> Where a tenant for life leases the estate for a term of years at a yearly rent, and dies before one of the rent days, the rent cannot be apportioned, and the tenant may quit free of rent from the last rent day; but if he remains, and the reversioner acquiesces, the latter may recover for his use and occupation from the lessor's death.<sup>7</sup> An apportionment of the rent by the landlord to different persons cannot be made without the tenant's consent.<sup>8</sup> A lessor cannot

<sup>1</sup> Co. Lit. 147 b; 2 Greenl. Cruise, 117; Linton v. Hart, 25 Pa. St. 193; 64 Am. Dec. 691. Rent falling due before the death of the landlord is assets of his estate; rent falling due after his death descends to his heirs as incident to the reversion: Rowan v. Riley, 6 Bart. 67.

<sup>2</sup> Jones v. Felch, 3 Bosw. 63; Crosby v. Loop, 13 Ill. 625; Cole v. Patterson, 25 Wend. 456; Newall v. Wright, 3 Mass. 138; 3 Am. Dec. 98; Reed v. Ward, 22 Pa. St. 144; Russell v. Allen, 2 Allen, 42; Martin v. Martin, 7 Md. 368; 61 Am. Dec. 364. The apportionment must be according to

value, and not quantity or number of acres: Van Rensselaer v. Gallup, 5 Denio, 454.

<sup>3</sup> Martin v. Martin, 7 Md. 368; 61 Am. Dec. 364; Worthington v. Cole, 56 Md. 51.

<sup>4</sup> Moore v. Turpin, 1 Spear, 32; 40 Am. Dec. 589.

<sup>5</sup> Nellis v. Lathrop, 22 Wend. 121; 34 Am. Dec. 285.

<sup>6</sup> Ehrman v. Mayer, 57 Md. 612.

<sup>7</sup> Hoagland v. Crum, 113 Ill. 365; 55 Am. Rep. 424.

<sup>8</sup> Bliss v. Collins, 5 Barn. & Ald. 876; Ryerson v. Quackenbush, 26 N. J. L. 254. At common law, rent pay-

apportion rent under a lease at an annual rent for a term of years, and recover rent for part of a year, where, under a proviso in the lease, he terminates the tenancy before the end of a rent year by a sale of the premises, if the lease does not provide for such apportionment.<sup>1</sup> Rent cannot be apportioned where a tenant *pur auter vie* leases for the life of the *cestui que vie*, the rent being payable annually, and the *cestui que vie* dying before the expiration of the year.<sup>2</sup> Where real and personal property are leased by a single instrument for an amount in gross, and the personalty is a substantial part of the property leased, its destruction without the fault of the lessee, by fire or otherwise, entitles the lessee to an apportionment of the rent.<sup>3</sup> An apportionment will be made at the instance of a tenant where a part of the premises is taken for public use; as where a public street is opened through the demised premises.<sup>4</sup> So where the lease was of a saw-mill and one room in an adjoining factory, and both were destroyed by fire, it was held that the tenant was discharged from rent for the room, but not for the saw-mill.<sup>5</sup>

§ 2822. **Destruction of Premises.** — At common law the express promise to pay rent for the whole term is not affected by the destruction of the premises, before the end of the term, by fire or other casualty, or their being taken possession of by a public enemy, unless there is an express provision in the lease suspending or ending the liability in such case.<sup>6</sup> A clause in a lease excluding the

able on a specified day could not be apportioned as to a part of the time: *Perry v. Aldrich*, 13 N. H. 343; 38 Am. Dec. 493.

<sup>1</sup> *Zule v. Zule*, 24 Wend. 76; 35 Am. Dec. 600.

<sup>2</sup> *Perry v. Aldrich*, 13 N. H. 343; 38 Am. Dec. 493.

<sup>3</sup> *Whitaker v. Hawley*, 25 Kan. 674; 37 Am. Rep. 277.

<sup>4</sup> *Cuthbert v. Kuhn*, 3 Whart. 357; 31 Am. Dec. 513.

<sup>5</sup> *Womack v. McQuarry*, 28 Ind. 103; 92 Am. Dec. 306.

<sup>6</sup> *Gear on Landlord and Tenant* sec. 99; *Laugher v. Glenn*, 37 Minn. 4; *Pollard v. Shaffer*, 1 Dall. 210; 1 Am. Dec. 239; *Hallett v. Wylie*, 3 Johns. 44; 3 Am. Dec. 457; *Linn v. Ross*, 10 Ohio, 412; 36 Am. Dec. 95. Or by the building falling down: *Davis v. Smith*, 15 Mo. 467. The liability of a lessee to pay rent subsists, notwithstanding the leasehold has been appropriated

liability of the tenant to restore the house in case of fire does not relieve him from paying rent in case of destruction by fire.<sup>1</sup> In the absence of an express stipulation to the contrary, a lessee cannot claim a *pro rata* return of the rent paid in advance, on account of a partial destruction by fire, during the term, of the leased buildings.<sup>2</sup> But in several states the hard rule of the common law has been altered by statute.<sup>3</sup> This rule has been so modified by statute in New-York as to give the tenant the option of surrendering possession of premises destroyed by fire, and declaring his lease at an end. He continues answerable under his lease, however, until he exercises his option and effects a full and absolute surrender of the premises. If the landlord rebuilds premises after their destruction by fire, the tenant has the right to enter upon the premises and hold them, including the new structures, to the end of the term. But the landlord has no right to enter upon leased premises injured by fire, for the purpose of rebuilding, without the assent of the tenant, in the absence of a covenant to rebuild.<sup>4</sup> In a recent case it is held that where there is a substantial destruction of the subject-matter, out of which rent is reserved, in a lease for years, by an act of God, or of public enemies, the tenant may elect to rescind, and on surrendering all benefit thereunder, shall be discharged from the payment of rent. If the tenant be deprived of the beneficial enjoyment of the leased premises according to the intent of

for a street: *Foot v. City of Cincinnati*, 11 Ohio, 408; 38 Am. Dec. 737. On a lease of lands, with the right of quarrying stone, the destruction of a lime-kiln on the lands does not relieve from liability to pay rent, although the kiln was the principal inducement and the principal source of profits: *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446.

<sup>1</sup> *Beach v. Farish*, 4 Cal. 339.

<sup>2</sup> *Chamberlain v. Godfrey*, 50 Ala. 530.

<sup>3</sup> 1 Stimson's American Statute Law, sec. 2062. The New Jersey statute providing that if buildings on leased premises are burned, without the fault of the lessee, the rent stops until the lessor repairs, was held not to protect a lessee who maintains a fire in a barn in a stove, the pipe of which passes through the barn-roof: *Dorr v. Harkness*, 49 N. J. L. 571; 60 Am. Rep. 656.

<sup>4</sup> *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362.

the lease, that is a destruction of the subject-matter of the lease within the meaning of those terms as herein used, whether there be a physical destruction of the premises or not. To complete the defense, the tenant must show that he rescinded the contract by a surrender, or offer to surrender, of all benefit therein which remained to him.<sup>1</sup> Where it is stipulated in a lease that if the property should be burned down the rent should cease, the happening of the contingency determines the lease, and the lessor will be entitled to possession.<sup>2</sup> On the lease of a building merely, or of apartments therein, their destruction will wholly end the lease.<sup>3</sup> A condition in a lease which exonerates the lessees from payment of rent in case a building becomes untenable by fire applies only to the entire building, and not a portion thereof.<sup>4</sup> So partial injury of a building by fire, so as to render part of it uninhabitable until repaired, does not authorize the tenant to terminate a lease thereof which provides "that if the premises shall be destroyed by fire, the payment of rent and the relation of landlord and tenant shall cease at the election of either party."<sup>5</sup> A provision that in the event of the destruction of the premises, and their being rendered uninhabitable, an abatement of rent shall be allowed, entitles the tenant to recover back a proportionate part of the rent paid in advance.<sup>6</sup>

<sup>1</sup> *Coogan v. Parker*, 2 S. C. 255; 16 Am. Rep. 659.

<sup>2</sup> *Buschman v. Wilson*, 29 Md. 553.

<sup>3</sup> *Gear on Landlord and Tenant*, sec. 47; *Winton v. Cornish*, 5 Ohio, 477; *McMillan v. Solomon*, 42 Ala. 356; *Kerr v. Merchants' Exchange*, 3 Edw. Ch. 316; *Graves v. Berdan*, 26 N. Y. 498; 29 Barb. 109; *Harrington v. Watson*, 11 Or. 143; 50 Am. Rep. 465; *Alexander v. Dorsey*, 12 Ga. 12; 56 Am. Dec. 443. And in case the lessor rebuilds the house, the lessee is not entitled to it for the remainder of his term, although he has paid the rent in advance for his full term: *Stockwell v. Hunter*, 11 Met. 448; 45

Am. Dec. 220. A re-entry by the owner of the building for the purpose of rebuilding is no eviction of such lessee so as to defeat an action for rent: *Alexander v. Dorsey*, 12 Ga. 12; 56 Am. Dec. 443.

<sup>4</sup> *Kip v. Merwin*, 34 N. Y. Sup. Ct. 531; 52 N. Y. 542.

<sup>5</sup> *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 65; *Vanderpool v. Smith*, 2 Daly, 135; *Conn. Ins. Co. v. United States*, 21 Ct. of Cl. 195.

<sup>6</sup> *Rich v. Smith*, 121 Mass. 328. And see *Cary v. Whiting*, 118 Mass. 363. But the tenant cannot recover rent subsequently paid even under protest: *Regan v. Baldwin*, 126 Mass. 485.

But under such a provision the lessee is not entitled to an abatement of rent, in case of injury to the premises resulting from the neglect of the landlord to repair adjoining tenements, nor without proving that the premises were so rendered unfit for use or habitation.<sup>1</sup> And the provision is waived by the tenant if he continues in possession after the fire, using the remaining buildings for the purpose contemplated by the lease; nor is it necessary that the lessor, before he can claim that such stipulation has been waived, should have demanded the surrender of the premises.<sup>2</sup> But the fact that the tenant or a subtenant continues to occupy a portion of the premises after a fire is not of itself conclusive evidence that the premises are tenantable. Evidence of the circumstances which induced the tenant to remain is proper.<sup>3</sup> Where the lease binds the lessee to insure the personalty in a specified amount for the benefit of the lessor, and he fulfills this covenant, the lessee is relieved by destruction of all the leased property by fire from the subsequent payment of any rent, although he has covenanted to keep the premises in repair.<sup>4</sup> Where on a release of the premises the lessor engages, by parol, to insert in the lease a provision that the rent should cease if the premises were casually burned, which provision is inadvertently omitted, an injunction will lie on behalf of the lessee to restrain the lessor from proceeding at law to recover the rent subsequent to the burning of the premises.<sup>5</sup>

A tenant is not liable, in the absence of an express agreement, for the accidental destruction by fire of the buildings occupied.<sup>6</sup> A tenant of part of a building, the other part of which is occupied by his landlord, and in

<sup>1</sup> *Welles v. Castles*, 3 Gray, 323.

<sup>2</sup> *Chamberlain v. Godfrey*, 50 Ala. 530.

<sup>3</sup> *Kip v. Merwin*, 52 N. Y. 512.

<sup>4</sup> *Whitaker v. Hawley*, 25 Kan. 674; 37 Am. Rep. 277.

<sup>5</sup> *Gates v. Green*, 4 Paige, 355; 27 Am. Dec. 68; *Wood v. Hubbell*, 10 N. Y. 470.

<sup>6</sup> *Wainescott v. Silvers*, 13 Ind. 497.

both parts of which there are chattels of the landlord, is liable for the accidental destruction of the landlord's part and its contents by fire caused by his negligence in heating his own part; but he is not liable for the destruction of his own part, unless he was recklessly negligent; and as to the landlord's chattels in his own part, it depends upon the nature of the bailment.<sup>1</sup>

ILLUSTRATIONS.—There was a condition in a lease of land and a hotel-building to use the same for hotel purposes. *Held*, broken by a failure to rebuild after a fire within the term: *Allen v. Howe*, 105 Mass. 241. A mill and premises were leased, and the lessee covenanted to leave it in repair, and the mill, during the lease, is carried off by ice. *Held*, that the lessee was bound to pay the rent and to perform the covenants, including the covenant to repair: *Ross v. Overton*, 3 Call, 309; 2 Am. Dec. 552. The lessee of a room in a block covenanted to keep the premises in good repair, but if the premises were destroyed, the lease was to become void. A building was thereafter erected on an adjoining lot by third persons, whereby the demised premises were to a great extent cut off from light and ventilation, and rendered damp and unhealthy, but were capable of being made tenantable by repairs. *Held*, that the lessee was not authorized to abandon the lease and refuse payment of rent, either under the contract, or under a statute providing that where leased buildings shall be destroyed or be so injured by the elements, or any other cause, as to be unfit for occupancy, the liability for rent shall cease: *Hillard v. Coal Co.*, 41 Ohio St. 662; 52 Am. Rep. 99.

§ 2823. Conditions in Leases—In General.—Conditions are qualifications annexed to the estate of the lessee, whereby it may be defeated or avoided.<sup>2</sup> A lessor may annex any condition he pleases at the time of the grant, provided it is not illegal, unreasonable, or against public policy.<sup>3</sup> But a reservation, exception, or condition in a lease, repugnant to the estate previously described in the granting or *habendum* clause of the instrument, is void.<sup>4</sup> To create a good condition upon which a term granted by

<sup>1</sup> *Lothrop v. Thayer*, 138 Mass. 466; 52 Am. Rep. 286.

<sup>2</sup> *Boone on Real Property*, sec. 102.

<sup>3</sup> *Boone on Real Property*, sec. 102.

<sup>4</sup> *Pynchon v. Stearns*, 11 Met. 312; 45 Am. Dec. 211.

a lease shall end before it expires by lapse of time, a right to re-enter on breach must be expressly reserved.<sup>1</sup> In the absence of an express stipulation that the lessor may re-enter for breach of a mere covenant, his only remedy therefor is an action for damages. Otherwise as to a breach of condition.<sup>2</sup> Whether particular words in a lease amount to a condition or a covenant is a matter of construction.<sup>3</sup> A lessor may generally waive the conditions of a written lease without any consideration therefor.<sup>4</sup> Conditions against underletting or assigning the demised premises without the lessor's consent are inserted solely for his benefit, and can only be taken advantage of, if broken, by him or his assigns.<sup>5</sup>

**§ 2824. Covenants in Leases — In General — Implied Covenants.**—A covenant is an agreement under seal to do or not to do a certain thing.<sup>6</sup> No particular form of words is required.<sup>7</sup> Covenants in leases are either express or implied.<sup>8</sup> Implied covenants are such as arise by construction from the use of certain words or forms of expression. The covenants usually implied on the part of the grantor are, that he has a title, and therefore a right to make a lease;<sup>9</sup> that, in consideration of the rent to be paid him, the lessee shall not be disturbed in the possession by the lessor, or those claiming under him, during the term of the lease;<sup>10</sup> that the premises shall be

<sup>1</sup> *Vanatta v. Brewer*, 32 N. J. Eq. 268; *Warrington v. Casey*, 78 Ill. 317; *Sigmund v. Howard Bank of Baltimore*, 29 Md. 324; *Hamilton v. Wright*, 28 Mo. 199;

<sup>2</sup> *Johnson v. Gurley*, 52 Tex. 222.

<sup>3</sup> *Langley v. Ross*, 55 Mich. 163.

<sup>4</sup> *Stevens v. Taylor*, 58 Iowa, 664.

<sup>5</sup> *Shumway v. Collins*, 6 Gray, 227.

<sup>6</sup> *Sampson v. Easterby*, 6 Bing. 644; *Randall v. Lynch*, 12 East, 182.

<sup>7</sup> *Gear on Landlord and Tenant*, sec. 82. And see *ante*, *Contracts — Contracts under Seal*.

<sup>8</sup> On a lease by a guardian there are no implied covenants: *Webster v. Conley*, 46 Ill. 13; 92 Am. Dec. 234.

<sup>9</sup> *Streeter v. Streeter*, 43 Ill. 155; *Gazzolo v. Chambers*, 73 Ill. 75; *Ber-*

*ington v. Casey*, 78 Ill. 317; *Sigmund v. Howard Bank of Baltimore*, 29 Md. 324; *Hamilton v. Wright*, 28 Mo. 199; *Crouch v. Fowle*, 9 N. H. 219; 32 Am. Dec. 350; *Grannis v. Clark*, 8 Cow. 38; *Barney v. Keith*, 4 Wend. 502; *Tone v. Brace*, 11 Paige, 566; affirming *Clarke*, 503. And see *Mayor etc. of N. Y. v. Mabie*, 13 N. Y. 151; 64 Am. Dec. 538; *Coddington v. Dunham*, 35 N. Y. Sup. Ct. 412; *People v. Gedney*, 10 Hun, 151.

<sup>10</sup> *Abrams v. Watson*, 59 Ala. 524; *Pickett v. Ferguson*, 45 Ark. 177; 55 Am. Rep. 545; *Field v. Herrick*, 10 Ill. App. 591; *Streeter v. Streeter*,

open to the entry of the lessee.<sup>1</sup> On the part of the lessee, the covenants implied are, to pay rent, to take proper care of the property, and not commit waste;<sup>2</sup> to make necessary repairs, ordinary wear and tear and accidental injuries accepted.<sup>3</sup> There is no implied covenant in a lease of a building for a particular use that it is suitable for that use, or that it is safe and well built;<sup>4</sup> nor in a lease of a dwelling, that it is fit for habitation;<sup>5</sup> nor that the landlord will repair,<sup>6</sup> or keep the premises in a tenantable condition;<sup>7</sup> nor that the lessor may re-enter for a disorderly use of the premises;<sup>8</sup> nor that the lessor warrants against the acts of strangers.<sup>9</sup> When express covenants are made, the law will imply none upon the same subject,<sup>10</sup> but an implied covenant may be qualified by an

43 Ill. 155; *Berrington v. Casey*, 78 Ill. 317; *Avery v. Dougherty*, 102 Ind. 443; 52 Am. Rep. 680; *Dexter v. Manley*, 4 Cush. 14; *Baughner v. Wilkins*, 16 Md. 35; 77 Am. Dec. 279; *Sigmund v. Howard Bank of Baltimore*, 29 Md. 324; *Crouch v. Fowle*, 9 N. H. 219; 32 Am. Dec. 350; *Tone v. Brace*, 11 Paige, 566; *Vann v. Rouse*, 94 N. Y. 401; *Lynch v. Onondaga Salt Co.*, 64 Barb. 558; *Mack v. Patchin*, 42 N. Y. 167; 1 Am. Rep. 506; affirming 29 How. Pr. 20; *McCleary v. Edwards*, 27 Barb. 239; *Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170; *Coddington v. Dunham*, 35 N. Y. Sup. Ct. 412; *People v. Gedney*, 10 Hun, 151; *Tone v. Brace*, 8 Paige, 597; *Mayor v. Mabie*, 13 N. Y. 151; 64 Am. Dec. 538; *Vernam v. Smith*, 15 N. Y. 327; *Burr v. Stenton*, 43 N. Y. 462; *Holder v. Taylor*, Hob. 12 a; *Ludwell v. Newman*, 6 Term Rep. 458; *Adams v. Gibney*, 6 Bing. 656; *Poston v. Jones*, 2 Ired. Eq. 350; 38 Am. Dec. 683; *Edwards v. Perkins*, 7 Or. 149; *Maule v. Ashmead*, 20 Pa. St. 482; *Ross v. Dysart*, 33 Pa. St. 452; *Eldred v. Leahy*, 31 Wis. 546; *Owens v. Wight*, 5 McCrary, 642; *Brookhaven v. Baggot*, 61 Miss. 383.

<sup>1</sup> *King v. Reynolds*, 67 Ala. 229; 42 Am. Rep. 157; *Berrington v. Casey*, 78 Ill. 317; *Bethell v. Bethell*, 54 Ind. 428; *Hertzberg v. Beisenback*, 64 Tex. 262; *Knapp v. Marlboro*, 29 Vt. 282.

But the implied covenant does not bind the lessor to put the lessee in possession: *Gazzolo v. Chambers*, 73 Ill. 75.

<sup>2</sup> *Nave v. Berry*, 22 Ala. 382; *Hughes v. Valentine*, 24 Mo. App. 637; *Walker v. Tucker*, 70 Ill. 527.

<sup>3</sup> *Walker v. Tucker*, 70 Ill. 527; *Hughes v. Valentine*, 24 Mo. App. 637; *United States v. Bostwick*, 94 U. S. 53.

<sup>4</sup> *Libbey v. Tolford*, 48 Me. 316; 77 Am. Dec. 227; *Jaffe v. Harteau*, 56 N. Y. 398; 15 Am. Rep. 438. And see *Clark v. Babcock*, 23 Mich. 164; *Edwards v. R. R. Co.*, 25 Hun, 635.

<sup>5</sup> *Foster v. Peyser*, 9 Cush. 242; 57 Am. Dec. 43. A lease of an unfinished building implies that it shall be finished fit for use: *Lafarge v. Mansfield*, 31 Barb. 345.

<sup>6</sup> See *post*, § 2828 a.

<sup>7</sup> *Id.*

<sup>8</sup> *Miller v. Foreman*, 37 N. J. L. 55.

<sup>9</sup> See *post*, § 2827.

<sup>10</sup> *Hurd v. Smith*, 5 Col. 233; *Maeder v. Carondelet*, 26 Mo. 112; *Vanderkarr v. Vanderkarr*, 11 Johns. 122; *Lynch v. Onondaga Salt Co.*, 64 Barb. 558; *Burr v. Stenton*, 43 N. Y. 462; *Tooker v. Grotenkemper*, 1 Cin. Rep. 88; *O'Connor v. Memphis*, 7 Lea, 219; *Porter v. Drew*, L. R. 5 C. P. D. 143; *Messent v. Reynolds*, 3 Com. B. 194; *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 4 Bing. N. C. 678; *Noke's Case*, 4 Coke, 80 b; *Webb v. Plummer*, 2 Barn. & Ald. 750.

express covenant,<sup>1</sup> and may subsist, if not contradictory to the express covenant.<sup>2</sup> Equity will never imply a covenant in restraint of a beneficial use of property.<sup>3</sup>

§ 2825. **What Covenants Run with Land.**—Covenants are also either real or personal. Real covenants are such as run with the land, and the performance or non-performance of which affect the value, nature, or quality of the premises. Such covenants are binding upon the assignee by privity of estate.<sup>4</sup> Personal covenants are such as have no relation to the land; they are mere personal obligations, and are binding upon the person making them alone.<sup>5</sup> A covenant for the benefit of an estate runs with the land, and extends to the assignee, though not named; and the assignee, though not named, is liable for the performance of every duty issuing out of or directly relating to the land.<sup>6</sup> A covenant relating wholly to matters collateral to the land demised is personal, and cannot be made to bind assigns, though named.<sup>7</sup> But if a collateral covenant affecting premises not demised requires something to be done or omitted which respects the premises

<sup>1</sup> *Kent v. Welch*, 7 Johns. 258; 5 Am. Dec. 266; *Sumner v. Williams*, 8 Mass. 201; 5 Am. Dec. 83; *Merrill v. Frame*, 4 Taunt. 329; *Crouch v. Fowle*, 9 N. H. 219; 32 Am. Dec. 350.

<sup>2</sup> *Gates v. Caldwell*, 7 Mass. 68; *Christine v. Whitehill*, 16 Serg. & R. 98; *Morris v. Harris*, 9 Gill, 19; *Hutton v. Warren*, 1 Mees. & W. 466.

<sup>3</sup> *Brugman v. Noyes*, 6 Wis. 1.

<sup>4</sup> *Latian v. Naglee*, 9 Cal. 662; 70 Am. Dec. 678; *Roche v. Ullman*, 104 Ill. 11; *Scheidt v. Belz*, 4 Ill. App. 431; *Wheeler v. Schad*, 7 Nev. 204; *Nesbit v. Nesbit*, 1 Cam. & N. 324; *Camp v. Scott*, 47 Conn. 366; *Allen v. Wooley*, 1 Blackf. 143; *Hurd v. Curtis*, 19 Pick. 459; *Plymouth v. Carver*, 16 Pick. 183; *Taylor v. Owen*, 2 Blackf. 301; 20 Am. Dec. 115; *Demarest v. Willard*, 8 Cow. 206; *Tallman v. Coffman*, 4 N. Y. 134; *Columbia College v. Lynch*, 47 How. Pr. 273; *Jones's Adm'r v. Smith*, 14 Ohio, 606; *Wooliscroft v. Norton*, 15 Wis. 198. Whether a covenant is to

be considered as running with the land, or merely a personal or collateral covenant, is not affected by a statute giving to the assignee of a lease the same remedy which lessee might have had against lessor: *Norman v. Wells*, 17 Wend. 136.

<sup>5</sup> *Howard Co. v. Water Lot Co.*, 53 Ga. 689; *Jones v. Smith*, 14 Ohio, 606; *Poage v. R. R. Co.*, 24 Mo. App. 199.

<sup>6</sup> *Gear on Landlord and Tenant*, sec. 84.

<sup>7</sup> *Gibson v. Holden*, 115 Ill. 199; 56 Am. Rep. 146; *Conover v. Smith*, 17 N. J. Eq. 51; 86 Am. Dec. 247. A covenant in a lease of a lot in a town by the owner of the latter that the lessee shall have the exclusive right to keep a store in the town for a period of ten years is not binding upon persons leasing other lots in the same town from such owner, although they have notice thereof: *Taylor v. Owen*, 2 Blackf. 301; 20 Am. Dec. 115.

demised, it runs with the land.<sup>1</sup> Covenants relating to a thing not *in esse*, to be done upon the land, bind the assignee if named, otherwise not.<sup>2</sup> Hence it has been held that a covenant to pay for improvements does not run with the land if the assigns are not named.<sup>3</sup> Generally, all implied covenants run with the land. As an assignee of a lease is bound by the covenant running with the land, he is also entitled to the benefit of such as are beneficial to him; such as to renew, to repair, for quiet enjoyment, and for further assurance.<sup>4</sup>

A covenant to pay taxes and assessments runs with the land,<sup>5</sup> and binds the assignees of the term.<sup>6</sup> So does a covenant to insure;<sup>7</sup> to reside on the premises;<sup>8</sup> to repair, or to deliver up in good condition;<sup>9</sup> for quiet enjoyment;<sup>10</sup> to pay rent;<sup>11</sup> to improve or build;<sup>12</sup> not to assign or underlet;<sup>13</sup> for further assurance;<sup>14</sup> for quiet enjoyment;<sup>15</sup> in

<sup>1</sup> *Poage v. R. R. Co.*, 24 Mo. App. 199.

<sup>2</sup> *Hansen v. Meyer*, 81 Ill. 321; 25 Am. Rep. 282; *Talman v. Coffin*, 4 N. Y. 134; *Coffin v. Talman*, 8 N. Y. 465; *Thompson v. Rose*, 8 Cow. 266. See *Giffs v. Gile*, 7 Mo. 76; *Grey v. Cuthbertson*, 4 Doug. 351; *Spencer's Case*, 5 Coke, 16; *Doughty v. Bowman*, 11 Q. B. 444; *Greenaway v. Hart*, 14 Com. B. 340; *Balley v. Wells*, 3 Wils. 27, 28; *Thomas v. Hayward*, L. R. 4 Ex. 311; *Mayor v. Pattison*, 10 East, 135.

<sup>3</sup> *Gardner v. Watson*, 18 Ill. App. 386; *Hansen v. Meyer*, 81 Ill. 321; 25 Am. Rep. 282; *Thompson v. Rose*, 8 Cow. 266; *Coffin v. Talman*, 8 N. Y. 465; *Bream v. Dickenson*, 2 Humph. 126; *Cronin v. Watkins*, 1 Tenn. Ch. 125; *Grey v. Cuthbertson*, 4 Doug. 351. *Contra*, *Conover v. Smith*, 17 N. J. Eq. 52; 86 Am. Dec. 247.

<sup>4</sup> *Wheeler v. Earle*, 5 Cush. 31; 51 Am. Dec. 41.

<sup>5</sup> *Taylor on Landlord and Tenant*, sec. 260.

<sup>6</sup> *Post v. Kearney*, 1 Sand. 105; 2 N. Y. 394; 51 Am. Rep. 303; *Astor v. Miller*, 2 Paige, 68; *State v. Martin*, 14 Lea, 92; 52 Am. Rep. 167.

<sup>7</sup> *Doe v. Peck*, 1 Barn. & Adol. 423.

<sup>8</sup> *Doe v. Lockwood*, 8 East, 185; *Tatem v. Chaplin*, 2 H. Black. 133.

<sup>9</sup> *Dean of Windsor's Case*, 5 Rep. 24; *Demarest v. Willard*, 8 Cow. 206; *Pol-lard v. Shaffer*, 1 Dall. 210; 1 Am. Rep. 239; *Allen v. Culver*, 3 Denio, 284; *Shelby v. Hearne*, 5 Yerg. 512.

<sup>10</sup> *Markland v. Crump*, 1 Dev. & B. 94; *Shelton v. Codman*, 3 Cush. 318.

<sup>11</sup> *Graves v. Porter*, 11 Barb. 592; *Jacques v. Short*, 20 Barb. 269; *Hurst v. Rodney*, 1 Wash. C. C. 375; *Howland v. Coffin*, 12 Pick. 125. See *Noonan v. Orton*, 4 Wis. 342; *Hunt v. Danforth*, 2 Curt. 592.

<sup>12</sup> *Harris v. Goslin*, 3 Harr. (Del.) 383; *Thomas v. Vonkapff*, 6 Gill & J. 372; *Gamhart v. Finney*, 40 Mo. 449; *Conover v. Smith*, 17 N. J. Eq. 51; 86 Am. Dec. 247.

<sup>13</sup> *Brolaskey v. Hood*, 6 Phila. 193.

<sup>14</sup> *Bennett v. Waller*, 23 Ill. 97; *Roe v. Haley*, 12 East, 464; *Middlemore v. Goodhall*, Cro. Car. 503; *Kingdon v. Nottle*, 4 Maule & S. 53; *King v. Jones*, 5 Taunt. 418.

<sup>15</sup> *Dearing v. Hall*, 2 Stew. & P. 243; *Scheidt v. Beiz*, 4 Ill. App. 431; *Heath v. Whidden*, 24 Me. 383; *Shelton v. Codman*, 3 Cush. 318; *Hamilton v. Wright*, 28 Mo. 199; *Carter v. Denman*, 23 N. J. L. 260; *Suydam v.*

respect to the manner of use or occupation of the premises;<sup>1</sup> for a renewal of the lease;<sup>2</sup> to pay for improvements;<sup>3</sup> to give an option to purchase;<sup>4</sup> to share an excess of profits from assigning or subletting;<sup>5</sup> to supply water for a house;<sup>6</sup> to maintain a fence;<sup>7</sup> to give a right of passage;<sup>8</sup> to prosecute mining with diligence;<sup>9</sup> to surrender the premises at the end of the term in good repair,<sup>10</sup> or with improvements thereon;<sup>11</sup> to remove all rubbish and spalls;<sup>12</sup> that rent shall be a lien upon crops or improvements of the lessee;<sup>13</sup> to grind grain toll free;<sup>14</sup> a surety's guaranty of rent;<sup>15</sup> to

Jones, 10 Wend. 180; 25 Am. Dec. 552; Hunt v. Amidon, 4 Hill, 345; 40 Am. Dec. 283; 1 Smith's Lead. Cas., 4th ed., 46; Martin v. Baker, 5 Blackf. 232; Markland v. Crump, 1 Dev. & B. 94; 27 Am. Dec. 230; Lewis v. Campbell, 8 Taunt. 715; 3 Moo. 35, 51; Campbell v. Lewis, 3 Barn. & Ald. 392; Noke v. Awder, Cro. Eliz. 373, 436.

<sup>1</sup> McDaniel v. Callam, 75 Ala. 327; Callam v. McDaniel, 72 Ala. 96; Wheeler v. Earle, 5 Cush. 31; 51 Am. Dec. 41; Barron v. Richards, 3 Edw. Ch. 96; De Forest v. Bryne, 1 Hilt. 43; St. Andrew's Ch. App., 67 Pa. St. 512; Hooper v. Clark, 8 Best & S. 150; Tatem v. Chaplin, 2 H. Black. 133; Cockson v. Cock, Cro. Jac. 125; Mayor v. Pattison, 10 East, 130; Wilkinson v. Rogers, 2 De Gex, J. & S. 62; Norval v. Pascoe, 10 Jur., N. S., 792.

<sup>2</sup> Robinson v. Perry, 21 Ga. 183; 68 Am. Dec. 455; Sutherland v. Goodnow, 108 Ill. 523; 48 Am. Rep. 56; Mossy v. Mead, 2 La. 161; Leppla v. Mackey, 31 Minn. 75; Blackmore v. Boardman, 28 Mo. 420; Biggot v. Mason, 1 Paige, 412; Wilkinson v. Pettit, 47 Barb. 230; Barclay v. Steamship Co., 6 Phila. 558; Noonan v. Orton, 4 Wis. 335. Or to procure a renewal: Simpson v. Clayton, 4 Bing. N. O. 758.

<sup>3</sup> Frederick v. Callahan, 40 Iowa, 311; Stockett v. Howard, 34 Md. 121; Flagg v. Dow, 99 Mass. 18; Conover v. Smith, 17 N. J. Eq. 52; 86 Am. Dec. 247; Lametti v. Anderson, 6 Cow. 302; Anderson v. Ammonett, 9 Lea, 1; Ecke v. Fetzer, 65 Wis. 55; Hunt v. Danforth, 2 Curt. 592; Mansell v. Nor-

ton, L. R. 22 Ch. Div. 769; Gorton v. Gregory, 3 Best & S. 90, 99.

<sup>4</sup> Laffan v. Naglee, 9 Cal. 662; 70 Am. Dec. 678; Robinson v. Perry, 21 Ga. 183; 68 Am. Dec. 455; Maughlin v. Perry, 35 Md. 352; Kerr v. Day, 14 Pa. St. 112; 53 Am. Dec. 526; Napier v. Darlington, 70 Pa. St. 64; Corson v. Mulvany, 49 Pa. St. 88; 88 Am. Dec. 485; Hagar v. Buck, 44 Vt. 285; 8 Am. Rep. 368; Willard v. Taylor, 8 Wall. 557. But see Elder v. Robinson, 19 Pa. St. 364; Winton's Appeal, 111 Pa. St. 387.

<sup>5</sup> Constantine v. Wake, 1 Sweeny, 239.

<sup>6</sup> Jourdain v. Wilson, 4 Barn. & Ald. 266.

<sup>7</sup> Bronson v. Coffin, 108 Mass. 175; 11 Am. Rep. 335; Duffy v. R. R. Co., 2 Hilt. 496; Kellogg v. Robinson, 6 Vt. 276; 27 Am. Dec. 550.

<sup>8</sup> West V. T. Co. v. O. R. P. L. Co., 22 W. Va. 600; Cole's Case, 1 Salk. 196; Bush v. Cadis, 1 Show. 380.

<sup>9</sup> Bradford Oil Co. v. Blair, 113 Pa. St. 83; 57 Am. Rep. 442.

<sup>10</sup> Hayes v. N. Y. G. M. Co., 2 Col. 273; Scheidt v. Belz, 4 Ill. App. 431; Shelby v. Hearne, 6 Yerg. 512; Martyn v. Clue, 18 Q. B. 661; Demarest v. Willard, 8 Cow. 206; Myers v. Burns, 33 Barb. 401; Harris v. Goslin, 3 Harr. (Del.) 340; Payne v. Haine, 16 Mees. & W. 541.

<sup>11</sup> Coburn v. Goodall, 72 Cal. 498.

<sup>12</sup> Coppinger v. Armstrong, 5 Ill. App. 637.

<sup>13</sup> Doty v. Heth, 52 Miss. 530; Webster v. Nichols, 104 Ill. 160.

<sup>14</sup> Dunbar v. Jumper, 2 Yeates, 74.

<sup>15</sup> Allen v. Culver, 3 Denio, 284.

sell the fixtures of the tenant;<sup>1</sup> not to erect any building in front of the demised premises;<sup>2</sup> not to sell or dispose of any wood or timber off and from the demised premises, without permission in writing from the landlord;<sup>3</sup> or to plant a certain number of trees on the demised premises, and to replace those which decay or are destroyed, so as always to preserve the given number during the term.<sup>4</sup>

But it has been held that the following covenants do not run with the land, viz.: A stipulation that if premises are offered for sale, the lessee shall have the option of purchasing on as favorable terms as they shall be offered to any other person;<sup>5</sup> a covenant to pay part of the cost of a party-wall;<sup>6</sup> not to darken the windows of hotel property;<sup>7</sup> not to permit a mill to be erected on other premises;<sup>8</sup> to erect cattle-guards;<sup>9</sup> to appoint an arbitrator;<sup>10</sup> to pay a debt not in the nature of rent;<sup>11</sup> a covenant against encumbrances;<sup>12</sup> to give a right to draw water;<sup>13</sup> to pass toll free;<sup>14</sup> not to increase rent, or not to give notice to quit;<sup>15</sup> to surrender chattels included in the lease;<sup>16</sup> to pay the price received from products of a farm until rent is thereby paid;<sup>17</sup> to pay the tenant part of oil produced during the term, in consideration of a surrender of the lease.<sup>18</sup> Where a written lease does not in terms bind the lessor's assigns, the lessee cannot maintain an action against a grantee of the premises from the lessor for breach of a covenant on the part of the lessor to put in

<sup>1</sup> *Hayes v. New York etc. Co.*, 2 Col. 273.

<sup>2</sup> *Trustees v. Cowen*, 4 Paige, 510; 27 Am. Dec. 80.

<sup>3</sup> *Verplanck v. Wright*, 23 Wend. 506; *Clarke v. Cummings*, 5 Barb. 339.

<sup>4</sup> *Blescker v. Smith*, 13 Wend. 530.

<sup>5</sup> *Elder v. Robinson*, 19 Pa. St. 364.

<sup>6</sup> *Gear on Landlord and Tenant*, sec. 84.

<sup>7</sup> *Thurston v. Murkle*, 32 Md. 487.

<sup>8</sup> *Harsha v. Reid*, 45 N. Y. 415.

<sup>9</sup> *Cook v. R. R. Co.*, 36 Wis. 45.

<sup>10</sup> *Grey v. Cuthbertson*, 4 Doug. 351.

<sup>11</sup> *Dolph v. White*, 12 N. Y. 295; *Mason v. Rogers*, 109 Pa. St. 319.

<sup>12</sup> *Kellogg v. Malin*, 62 Mo. 429; *Woodburn v. Renshaw*, 32 Mo. 197;

*Carter v. Denham*, 23 N. J. L. 260; *Heath v. Whidden*, 24 Me. 383.

<sup>13</sup> *Wheelock v. Thayer*, 16 Pick. 68.

<sup>14</sup> *Morse v. Garner*, 1 Strob. 514; 47 Am. Dec. 565.

<sup>15</sup> *Roberts v. Tregaskis*, 38 L. T., N. S., 176.

<sup>16</sup> *Allen v. Culver*, 3 Denio, 284; *Spencer's Case*, 5 Coke, 16.

<sup>17</sup> *Barber v. Marble*, 2 Thomp. & C. 114.

<sup>18</sup> *Gear on Landlord and Tenant*, sec. 84.

fixtures.<sup>1</sup> A covenant by a lessor to pay for any improvements, if there should be any left on the land by the lessee at the termination of the lease, there being no covenant by the lessee to make improvements, is not a covenant running with the land, but personal merely, and does not bind the assignee of the reversion.<sup>2</sup>

**§ 2826. "Usual" or "Ordinary" Covenants in Leases — What Covenants not Implied.**—The usual covenants to be found in a lease for any term of years at the present day are these: On the part of the lessor,—covenants for quiet enjoyment, against encumbrances, for further assurance, to repair, to renew the lease, and to pay taxes and assessments;<sup>3</sup> on the part of the lessee the usual covenants are,—to pay rent, to repair, to pay taxes and assessments, and insure, not to assign, to reside on the premises, to build after a certain pattern, not to use the premises for certain purposes, for particular modes of cultivation, and to redeliver fixtures.<sup>4</sup> A parol agreement to execute a lease for one year at a stated rental, payable in monthly installments, is not broken by a refusal to execute a lease which imposes terms and conditions not imposed by the law, and of which no mention was made in the agreement.<sup>5</sup> An agreement that the "usual covenants" shall be inserted in a lease does not include a covenant not to assign;<sup>6</sup> nor that the lessee shall personally occupy the premises, or will not cultivate the land by agents or servants.<sup>7</sup>

**§ 2827. The Lessor's Covenants — Covenant for Quiet Enjoyment.**—The covenant for quiet enjoyment is im-

<sup>1</sup> *Hansen v. Meyer*, 81 Ill. 321; 25 Am. Rep. 282.

<sup>2</sup> *Bream v. Dickenson*, 2 Humph. 126.

<sup>3</sup> 1 Schouler on Personal Property, sec. 29.

<sup>4</sup> 1 Schouler on Personal Property, sec. 29.

<sup>5</sup> *Hayden v. Lucas*, 18 Mo. App. 325.

<sup>6</sup> *Buckland v. Papillon*, L. R. 1 Eq. 477; *Hampshire v. Wickens*, 38 L. T., N. S., 408.

<sup>7</sup> *Clark v. Clark*, 49 Cal. 586.

plied in every lease;<sup>1</sup> and if it is broken, the landlord must indemnify the tenant against losses resulting from the breach.<sup>2</sup> It implies that the demised premises shall be open to entry by the lessee at the time fixed for taking possession,<sup>3</sup> and that the lessee shall have the free and peaceable enjoyment of the premises during the term, so as to enable him to make use thereof for the purposes for which they are intended, without any interruption or disturbance by the lessor.<sup>4</sup> But it is not broken until eviction, herein differing from a covenant of seisin.<sup>5</sup> So it is broken if the lessee is prevented from entering by a person who had title at the date of the lease.<sup>6</sup> The erection by authority of the lessor of a wall upon land under the eaves of a leased building is a breach of the covenant.<sup>7</sup> A recovery in an action of trespass brought by a prior lessee against a subsequent lessee of the same land is a sufficient eviction to constitute a breach of the covenant for quiet enjoyment contained in the subsequent lease, although the action was not commenced until after the expiration of the prior

<sup>1</sup> 1 Schouler on Personal Property, sec. 30; Mack v. Patchin, 42 N. Y. 167; 1 Am. Rep. 506; Baugher v. Wilkins, 16 Md. 35; 77 Am. Dec. 279; Boreel v. Lawton, 90 N. Y. 293; 43 Am. Rep. 170; Field v. Herrick, 10 Ill. App. 519. An express covenant in a lease to aid the lessee in keeping possession of the premises excludes the implied covenant for quiet enjoyment: O'Connor v. Memphis, 7 Lea, 219.

<sup>2</sup> See cases in last note. In case of entry upon the demised premises by the lessor during the term, the lessee's remedy is at law for breach of covenant, not in equity for an accounting: Owens v. Wight, 18 Fed. Rep. 865; 5 McCrary, 642. "Demise," in a lease for years, implies a covenant of power in the lessor to give the lease: Grannis v. Clark, 8 Cow. 36; Sumner v. Williams, 8 Mass. 201. "Grant," in a lease for years, is a warranty of the lessor's title: Grannis v. Clark, 8

Cow. 36. The word "lease" implies a covenant for quiet enjoyment: Maule v. Ashmead, 20 Pa. St. 482. *Aliter* in a lease for life: Black v. Gilmore, 9 Leigh, 446; 33 Am. Dec. 253. A covenant that the lessee shall hold and occupy the demised premises for a certain time amounts to a general covenant for quiet enjoyment during the term: Ellis v. Welch, 6 Mass. 246; 4 Am. Dec. 122.

<sup>3</sup> King v. Reynolds, 67 Ala. 229; 42 Am. Rep. 157.

<sup>4</sup> Dexter v. Manley, 4 Cush. 14.

<sup>5</sup> Hayes v. Ferguson, 15 Lea, 1; 54 Am. Rep. 398; Real v. Hollister, 20 Neb. 112; Anderson v. Buchanan, 20 Neb. 272.

<sup>6</sup> Stott v. Rutherford, 92 U. S. 107; Grannis v. Clark, 8 Cow. 36; Gardner v. Keteltas, 3 Hill, 330; 38 Am. Dec. 637.

<sup>7</sup> Sherman v. Williams, 113 Mass. 481; 18 Am. Rep. 522.

lease.<sup>1</sup> But the covenant, whether expressed or implied, only means that the tenant shall not be evicted or disturbed by good title in the possession of the demised premises, or some part thereof; it does not mean that the tenant shall be guaranteed from all molestation or damage from the wrongful acts of strangers having no right or title to the demised premises, or any part thereof;<sup>2</sup> or, for example, the removal of a party-wall by an adjoining owner.<sup>3</sup> And a mere fugitive trespass by a landlord on the leased property does not constitute a breach of the covenant for quiet enjoyment;<sup>4</sup> nor the location of a public way over the land.<sup>5</sup> The express covenant for quiet enjoyment continues to the end of the term,<sup>6</sup> and is not discharged by the acceptance of a renewed lease taken in pursuance of a covenant to renew;<sup>7</sup> but the implied covenant ceases with the estate of the lessor, though the term be not expired.<sup>8</sup> It does not cover injuries occurring before the demise.<sup>9</sup> A grantee cannot sue his grantor upon his covenants for quiet enjoyment on account of the eviction of his lessee, until he has first satisfied the lessee upon his own covenant.<sup>10</sup> Where a lease contains an express covenant for quiet enjoyment, no further or other covenant in respect to enjoyment will be implied.<sup>11</sup>

<sup>1</sup> *McAlester v. Landers*, 70 Cal. 79.

<sup>2</sup> *Moore v. Weber*, 71 Pa. St. 429; 10 Am. Rep. 708; *Baugh v. Wilkins*, 16 Md. 35; 77 Am. Dec. 279; *Gardner v. Keteltas*, 3 Hill, 330; 38 Am. Dec. 637; *Surget v. Arighi*, 11 Smedes & M. 87; 49 Am. Dec. 46; *Abrams v. Watson*, 59 Ala. 524; *Snodgrass v. Reynolds*, 79 Ala. 452; *King v. Reynolds*, 67 Ala. 229; 42 Am. Rep. 107; *Gazzolo v. Chambers*, 73 Ill. 75; *Sigmund v. Howard Bank of Baltimore*, 29 Md. 324; *Trull v. Granger*, 8 N. Y. 115; *Field v. Herrick*, 14 Ill. App. 181; *Kimball v. Grand Lodge*, 131 Mass. 59.

<sup>3</sup> *Barns v. Wilson*, 116 Pa. St. 303.

<sup>4</sup> *Avery v. Dougherty*, 102 Ind. 443. Because a lessee apprehends a breach of the covenant for quiet enjoyment

he cannot withhold rent due: *Pickett v. Ferguson*, 45 Ark. 177; 55 Am. Rep. 545.

<sup>5</sup> *Ellis v. Welch*, 6 Mass. 246; 4 Am. Dec. 122.

<sup>6</sup> *Gear on Landlord and Tenant*, sec. 92.

<sup>7</sup> *Lord v. Vreeland*, 15 Abb. Pr. 122.

<sup>8</sup> *Adams v. Gibney*, 6 Bing. 656. If a landlord leases premises, agreeing to deliver possession on a certain day, his covenant does not extend beyond the day. If, after the day, a trespasser withholds possession, the landlord is not liable: *Hertzberg v. Beisenbach*, 64 Tex. 262.

<sup>9</sup> *Anderson v. Oppenheimer*, L. R. 5 Q. B. 602.

<sup>10</sup> *Baxter v. Ryerss*, 13 Barb. 267.

<sup>11</sup> *Burr v. Stenton*, 43 N. Y. 462.

**ILLUSTRATIONS.**—A lease embraced a building built of wood, the sides being only lathed and plastered. Alongside of it was a brick building, built entirely on another lot, owned by another person. The owner of the brick building removed it, leaving the wooden building unprotected from the weather on that side, in consequence of which the lessee's goods and stock in trade were injured. *Held*, that the tenant had no right of action against the landlord for permitting the brick building to be torn down: *Moore v. Weber*, 71 Pa. St. 429; 10 Am. Rep. 708. An undivided half of leased land was sold during the term under a judgment prior to the lease. *Held*, that the lessee could recover from his lessor, under the covenant of quiet enjoyment, so much of the rent, as he was obliged to pay to the purchaser: *Kane v. Mink*, 64 Iowa, 84. A lease contained a covenant for quiet enjoyment, was for a term of three years, with the privilege of two more, if the lessor did not dispose of the demised premises before the expiration of the three years, and the lessor not having sold the premises at the end of the three years, the lessee elected to keep them for two years more. *Held*, that the covenant took effect for the full term of five years: *Levitzky v. Canning*, 33 Cal. 299. The lessor permitted rooms above those occupied by the lessee as a lawyer's office to be used for the business of printing, which disturbed the lessee and compelled him sometimes to leave his office, and broke the ceilings, and damaged his furniture and books by leakage, but he did not surrender possession. *Held*, that he could not set off the damage against the rent: *Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170.

**§ 2828. Covenant to Repair.**—No covenant on the part of a landlord to repair the demised premises is implied in a lease;<sup>1</sup> nor to rebuild in case of their destruc-

<sup>1</sup> *Brewster v. De Fremery*, 33 Cal. 341; *Estep v. Estep*, 23 Ind. 114; *Fowler v. Bott*, 6 Mass. 63; *Sherwood v. Seaman*, 2 Bosw. 127; *Post v. Vetter*, 2 E. D. Smith, 248; *McCarty v. Ely*, 4 E. D. Smith, 375; *City Council v. Moorhead*, 2 Rich. 430; *Brown v. Burlington*, 36 Vt. 40; *Kramer v. Cook*, 7 Gray, 553; *Clancy v. Byrne*, 56 N. Y. 129; 15 Am. Rep. 391; *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555; *Morse v. Muddix*, 17 Mo. 569; *Cowell v. Lumley*, 39 Cal. 151; 2 Am. Rep. 430; *Mumford v. Brown*, 6 Cow. 475; 16 Am. Dec. 440; *Krueger v. Ferrant*, 29 Minn. 385; 43 Am. Rep. 223; *Weinsteine v. Harrison*, 66 Tex.

546; *Rogan v. Dockery*, 23 Mo. App. 313; *Hughes v. Vanstone*, 24 Mo. App. 637. It is no defense to an action for rent that the leased premises had become dilapidated and unsafe, in the absence of an express undertaking on the part of the landlord to keep them in repair: *Burnes v. Fuchs*, 28 Mo. App. 279. But see *West Side Bank v. Newton*, 57 How. Pr. 152. But legislation in some of the states has altered "the old and harsh rule as to require the landlord to keep his premises in repair or lose his tenant"; 1 Schouler on Personal Property, sec. 30. Thus in California, the lessor of a building intended for the occupation

tion by fire.<sup>1</sup> If the landlord, after the lease is entered into, promises to make them, the promise is without consideration, and will not support an action.<sup>2</sup> Where the terms of a lease are in writing, it cannot be shown by parol that the landlord, at the time of executing it, promised to repair.<sup>3</sup> Voluntary repairs by a landlord raise no presumption of a contract to repair.<sup>4</sup> A covenant to pay the expenses of repairs is not a covenant to make repairs.<sup>5</sup> A covenant to "make all necessary repairs" binds the landlord to restore the premises to their original condition for the purposes for which they were leased.<sup>6</sup> And where no time is specified when such repairs shall be made, the law will presume that they are to be made in a reasonable time.<sup>7</sup> The landlord is only required to exercise reasonable diligence in ascertaining what repairs are necessary, and in making such repairs as due inspection would show to be proper. He does not by his contract guarantee that the premises will never in fact be out of repair.<sup>8</sup> The lessor is entitled to notice that the building is out of repair, unless it appears that he knew it.<sup>9</sup> So

of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenable, except such as are caused by the negligence of the tenant. If, within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the costs of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions: Cal. Civ. Code, secs. 1942, 1943. So in Georgia: *Lewis v. Chisholm*, 68 Ga. 40. But this statute does not extend to patent defects known alike to both parties at the time when the premises

are offered for rent: *Driver v. Maxwell*, 56 Ga. 11.

<sup>1</sup> *Cowell v. Lumley*, 39 Cal. 151; 2 Am. Rep. 430; *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362.

<sup>2</sup> *Libbey v. Telford*, 48 Me. 316; 97 Am. Dec. 229; *Gottaberger v. Radway*, 2 Hilt. 342; *Eblin v. Miller*, 78 Ky. 371. But see *Oettinger v. Levy*, 4 E. D. Smith, 288.

<sup>3</sup> *Cleves v. Willoughby*, 7 Hill, 83.

<sup>4</sup> *Moore v. Weber*, 71 Pa. St. 429.

<sup>5</sup> *Lomis v. Ruetter*, 9 Watts, 516.

<sup>6</sup> *Ward v. Kelsey*, 38 N. Y. 80; 97 Am. Dec. 773; *Bissell v. Lloyd*, 100 Ill. 214; *Myers v. Burns*, 33 Barb. 401; 35 N. Y. 269. A landlord's covenant to repair is a continuing covenant, liable to successive breaches, for each of which, as they occur, tenant may sue: *Block v. Ebner*, 54 Ind. 544.

<sup>7</sup> *Lunn v. Gage*, 37 Ill. 19; 87 Am. Dec. 235.

<sup>8</sup> *Frank v. Conradi*, 50 N. J. L. 23.

<sup>9</sup> *Thomas v. Kingsland*, 12 Daly, 315.

when certain repairs are agreed to be done "during the tenancy," no certain time being indicated, a notice to perform from the tenant is requisite to put the landlord in default.<sup>1</sup> But a lessee may maintain an action on a covenant of his lessor to repair, without previous notice to him of want of repair; if the lease contains a covenant that the lessor may enter "to view and make improvements."<sup>2</sup> The reservation of the right to enter and make repairs during certain months does not authorize an entry to make them at any other time. In the absence of such a reservation, the landlord has no such right of entry, though the repairs are necessary from the unsafe condition of the building.<sup>3</sup>

The lessee, at common law, is not released from paying rent, nor can he abandon the premises, because the landlord fails to make repairs; his remedy is to sue him for a breach of the covenant.<sup>4</sup> But the tenant, in case of a breach of the covenant, may make the repairs, and charge the expense to the landlord; but he is not bound so to do, and may recover, as damages for the breach, the value of the use of any portion of the premises during the time it is rendered untenable because of failure to make the repairs.<sup>5</sup> A lessor who covenants to keep the leased premises in good repair and condition cannot, in an action for damages for breach of such condition, excuse his non-performance of the contract by proof of the lessee's negligence and want of care; the lessee's failure to exercise due care to prevent injury to himself by the lessor's neglect can be considered by the jury only in

<sup>1</sup> Gerzebek v. Lord, 33 N. J. L. 240.

<sup>2</sup> Hayden v. Bradley, 6 Gray, 425; 66 Am. Dec. 421.

<sup>3</sup> Goebel v. Hough, 26 Minn. 252.

<sup>4</sup> Speckles v. Sax, 1 E. D. Smith, 253; Tibbets v. Percy, 24 Barb. 39. If a lease does not provide that rent shall be suspended while the lessor is repairing, a reduction cannot be claimed: McClenahan v. New York, 102 N. Y. 75.

<sup>5</sup> Hexter v. Knox, 63 N. Y. 561; 39 N. Y. Sup. Ct. 109. Where a tenant had the right under lease to make the necessary repairs, and deduct the expense from the rent, he was not allowed to claim a compensation by way of damages because the premises were not kept in repair, having given the lessor no notice of any want of repairs: Wolcott v. Sullivan, 6 Paige, 117.

reduction of damages.<sup>1</sup> Equity will not enforce specific performance of a lessor's covenant in a lease to repair damages by fire.<sup>2</sup> One who leases property with a condition that certain improvements are to be made in lieu of rent is not responsible for the debts of his tenant contracted in making such improvements.<sup>3</sup>

ILLUSTRATIONS. — Plaintiff occupied the lower portion of a house, and another tenant the upper portion. The roof and upper story having been destroyed by fire, in an action by plaintiff against the landlord the judge charged the jury that it was the landlord's duty to proceed with diligence, after the fire, to put on the roof, and that he was liable for damages to plaintiff caused by delay. *Held*, error, there being no express covenant to repair: *Doupe v. Genin*, 45 N. Y. 119; 6 Am. Rep. 47. A lessor covenanted, upon notice, to make all necessary repairs upon the outside of the buildings. There were mutual covenants that if the buildings should be destroyed by fire, either party, upon notice to the other, might terminate the lease. During the term a stable was burned. The lessee demanded that it should be rebuilt. The lessor refused to rebuild. Neither party gave notice to terminate the lease. *Held*, that the lessor was liable for breach of covenant: *Crocker v. Hill*, 61 N. H. 345; 60 Am. Rep. 322. A agreed to rent a building from B for one year from a future day, if B would put in certain repairs. No time was specified for the completion of such repairs. A took possession on the day, but shortly moved out for want of the repairs. *Held*, that the completion of the repairs on the first day of the term, or within a reasonable time after it, constituted a condition precedent to the rent: *Barnes v. Strohecker*, 17 Ga. 340. A lessor covenanted to put the fences on a farm in good repair for his tenant, and, after repairing the same, the farm was accepted by the tenant without objection. *Held*, that the latter was estopped by such acceptance from afterwards claiming damages for a breach of the covenant: *Williamson v. Miller*, 55 Iowa, 86.

### § 2829. Liability of Landlord for Injuries to Tenant.

—A tenant has no remedy against a landlord for injury from the defective condition of the premises, or from suffering the premises to get out of repair, unless the landlord has agreed to keep them in repair.<sup>4</sup> A complaint by

<sup>1</sup> *Flynn v. Trask*, 11 Allen, 550.

<sup>2</sup> *Beck v. Allison*, 56 N. Y. 366; 15 Am. Rep. 430.

<sup>3</sup> *Jones v. O'Farrel*, 1 Nev. 354.

<sup>4</sup> *Kahn v. Love*, 3 Or. 206; *Mumford v. Brown*, 6 Cow. 475; 16 Am. Dec.

a tenant against a landlord for damages sustained through the unsafe condition of the building must state facts affirmatively which show it was the duty of the landlord to make repairs.<sup>1</sup> But one who builds and leases houses is bound to construct them in a proper manner, and with good materials and competent workmen, and neither good faith nor even the best faith will relieve him from liability for injuries resulting from failure to do so.<sup>2</sup> And the lessor is liable if the lessee is injured through concealed and dangerous defects, known to the lessor, and which a careful examination of the premises by the lessee would not discover.<sup>3</sup> And a landlord letting a house, knowing it to be unsafe, but concealing the fact from the tenant, is liable if the tenant is injured by the defect.<sup>4</sup> So if one, in letting the upper stories of his building, represents the floors to be strong enough for certain uses, knowing the fact to be otherwise, and the lessee carelessly and negligently overloads the floors, so that they break through, the injured tenant of the lower story may maintain an action against both.<sup>5</sup> The owner of a tenement-house owes to tenants of apartments therein, and to strangers rightfully on the premises, the duty of keeping the stairways and hall-ways in safe repair.<sup>6</sup> The landlord of a building is liable for injury to the goods of a subtenant by water, which the janitor, in the employ of the landlord,

440; *Howard v. Doolittle*, 3 Duer, 364; *Brewster v. De Fremery*, 33 Cal. 341; *Sherwood v. Seaman*, 2 Bosw. 127; *Doupe v. Genin*, 45 N. Y. 119; 6 Am. Rep. 47; 37 How. Pr. 5; 1 Sweeny, 25; *Joyce v. De Giverville*, 2 Mo. App. 596; *Mendel v. Fink*, 8 Ill. App. 378; *Loupe v. Wood*, 51 Cal. 586; *Kabus v. Frost*, 50 N. Y. Sup. Ct. 72; *Spellman v. Bannigan*, 36 Hun, 174; *Little v. McAndrus*, 29 Mo. App. 332; *Simons v. Seward*, 54 N. Y. Sup. Ct. 406. But see *Eagle v. Swayze*, 2 Daly, 140.

<sup>1</sup> *Kahn v. Love*, 3 Or. 206.

<sup>2</sup> *Carson v. Godley*, 26 Pa. St. 111; 67 Am. Dec. 404; *Godley v. Hagerty*, 20 Pa. St. 387; 59 Am. Dec. 731.

<sup>3</sup> *Cowen v. Sunderland*, 145 Mass. 363; 1 Am. St. Rep. 469.

<sup>4</sup> *Coke v. Gutkese*, 80 Ky. 598; 44 Am. Rep. 499.

<sup>5</sup> *Brunswick-Balke-Collender Co. v. Rees*, 69 Wis. 442; 2 Am. St. Rep. 748.

<sup>6</sup> *Donohue v. Kendall*, 15 N. Y. Sup. Ct. 386; *Looney v. McLean*, 129 Mass. 33; 37 Am. Rep. 295; *Sawyer v. McGillicuddy*, 81 Me. 318; 10 Am. St. Rep. 260. But see, *contra*, *Words v. Cotton, Co.*, 134 Mass. 357; 45 Am. Rep. 344; *Purcell v. English*, 86 Ind. 34; 44 Am. Rep. 255; *Bowe v. Hunking*, 135 Mass. 380; 44 Am. Rep. 471.

negligently permits to escape from a wash-basin in the building.<sup>1</sup> A landlord operating an elevator for the benefit of his tenants is bound to exercise due care for their safety, and is liable to them for the negligence of his employees in operating the elevator.<sup>2</sup> So where one rents the lower stores of a building, and the landlord retains control of the upper ones, the latter is liable for injury to the tenant caused by the want of repair of the roof or upper stories, or their negligent use.<sup>3</sup> If the landlord, in making repairs, neglects to use ordinary skill, and thereby causes a personal injury to the tenant, he is liable therefor, although his undertaking to make the repairs was gratuitous and by the tenant's solicitation.<sup>4</sup> But a landlord who employs a workman is not liable to the tenant for damages resulting from defective work when there is no evidence to show that the man selected was not a competent workman.<sup>5</sup> In suit for rent, the tenant cannot set up that he has sustained damage in the death of a member of his family, which he alleges was due to the lessor's neglect to repair and improve the premises, as contracted in the lease.<sup>6</sup> And in a recent case in Massachusetts, it is held that a lessee who sustains personal injuries occasioned by the defective condition of the building cannot maintain an action of tort against the lessor, founded upon a breach by the lessor of an agreement to repair the building within a reasonable time.<sup>7</sup>

<sup>1</sup> *Pike v. Brittan*, 71 Cal. 159; 60 Am. Rep. 527.

<sup>2</sup> *Tousey v. Roberts*, 114 N. Y. 312; 11 Am. St. Rep. 655.

<sup>3</sup> *Toole v. Beckett*, 67 Me. 544; 24 Am. Rep. 54; *Guthman v. Castleberry*, 49 Ga. 272; *Friedenberg v. Jones*, 63 Ga. 612; *Jones v. Friedenberg*, 66 Ga. 505; 42 Am. Rep. 86; *Marshall v. Cohen*, 44 Ga. 489; 9 Am. Rep. 170; *Gluckauf v. Maurer*, 75 Ill. 289; 20 Am. Rep. 238; *Center v. Davis*, 39 Ga. 210.

<sup>4</sup> *Gill v. Middleton*, 105 Mass. 477; 7 Am. Rep. 548.

<sup>5</sup> *Meany v. Abbott*, 6 Phila. 256; *Morton v. Thurbur*, 85 N. Y. 550. But see *Worthington v. Parker*, 11 Daly, 545. A person making repairs upon demised premises by the landlord's direction is liable for injuries caused by his negligence to the servant of the tenant: *Lamparter v. Wallbaum*, 45 Ill. 414; 92 Am. Dec. 225.

<sup>6</sup> *Collins v. Karatovsky*, 36 Ark. 316.

<sup>7</sup> *Tuttle v. Gilbert Mfg. Co.*, 143 Mass. 169.

**ILLUSTRATIONS.**— Under the immediate supervision of a tenant who had been occupying a store, the landlord repaired the flooring, and the tenant rented for a term, agreeing that no repairs should be required of the landlord. The flooring gave way under a heavy load. *Held*, that the tenant could not set off the damages against the rent: *Bosworth v. Thomas*, 67 Ga. 640. A landlord covenanted to make certain repairs before a certain date, but failed to do so. Afterwards, an accident resulted, which would have been avoided had the repairs been made, and the tenant was obliged to pay damages to the third person, who sustained injury. *Held*, that the tenant could not recover the amount so paid from his landlord: *Sparks v. Bassett*, 49 N. Y. Sup. Ct. 270. A local building act required fire-escapes on buildings where more than a certain number of operatives were employed, and imposed a penalty for a violation of the law, and also provided for an injunction. *Held*, that an operative employed in such a building having no fire-escape could not maintain an action against the owner for an injury sustained because he was compelled to jump from the building: *Grant v. Slater Mill and Power Co.*, 14 R. I. 380.

**§ 2830. Warranty, Implied and Express, as to Condition of House.**— There is, as a rule, no implied covenant that the premises are or will remain in a tenable condition;<sup>1</sup> or are reasonably fit for habitation;<sup>2</sup> or are fit or suitable for the purpose for which they are intended to be used,<sup>3</sup> or are expressly designed for.<sup>4</sup> Consequently, their unfitness for such a purpose will not justify the tenant in abandoning the premises, and on such grounds making defense to an action for rent, unless there has been a fraudulent misrepresentation or concealment by the lessor as to the state or condition of the premises, or the premises are uninhabitable by reason of some wrongful act or default of the lessor.<sup>5</sup> The maxim *caveat emptor* applies to the letting of houses, and the lessor is not

<sup>1</sup> *Gear on Landlord and Tenant*, sec. 99; *Foster v. Peyser*, 9 Cush. 242; 57 Am. Dec. 43.

<sup>2</sup> *Foster v. Peyser*, 9 Cush. 242; 57 Am. Dec. 43; *Lucas v. Coulter*, 104 Ill. 81.

<sup>3</sup> *Wilkinson v. Clauston*, 29 Minn. 91; *Clark v. Babcock*, 23 Mich. 164; *Mur-*

*rell v. Jackson*, 33 La. Ann. 134; *Murray v. Albertson*, 50 N. J. L. 167; 7 Am. St. Rep. 787.

<sup>4</sup> *Samuel v. Scott*, 13 Phila. 64; *Roosevelt v. Abbott*, 2 Robt. 156.

<sup>5</sup> *Murray v. Albertson*, 50 N. J. L. 167; 7 Am. St. Rep. 787.

bound to disclose defects in the premises;<sup>1</sup> and the landlord is exempted from liability for injuries caused by such defects in the building, in the absence of warranty, fraud, deceit, or misrepresentation.<sup>2</sup> There is no implied warranty on the lease of a store or warehouse that it is safe, well built, or fit for any particular purpose.<sup>3</sup> A representation that a house is new and in perfect order is not a warranty that it shall continue habitable;<sup>4</sup> a representation that a building is "good, strong, and substantial, and fit for the hatters' business," is not a warranty that it is not leaky.<sup>5</sup> Where a statute provides that tenement-houses shall be provided with fire-escapes, the landlord is liable for damages caused by an omission to provide them.<sup>6</sup>

**ILLUSTRATIONS.**—A statute required all buildings in a city to be provided with ladders and fire-escapes, and a house which A rented of B, and in which he and his family resided, was not so provided, and A's wife was burned to death. *Held*, that B was liable to A in damages, and that A was not guilty of con-

<sup>1</sup> *McGlashan v. Tallmadge*, 37 Barb. 313; *Smith v. Kinkaid*, 1 Ill. App. 620; *Davis v. Smith*, 15 Mo. 467; *Coulson v. Whiting*, 14 Abb. N. C. 60; *Mumford v. Brown*, 6 Cow. 475; 16 Am. Dec. 440; *Libbey v. Tolford*, 48 Me. 316; 77 Am. Dec. 229; *Bowe v. Hunking*, 135 Mass. 380; 46 Am. Rep. 471.

<sup>2</sup> *Davidson v. Fischer*, 11 Col. 583; 7 Am. St. Rep. 267.

<sup>3</sup> *Dutton v. Gerrish*, 9 Cush. 89; 55 Am. Dec. 45; *Libbey v. Tolford*, 48 Me. 316; 77 Am. Dec. 229. But see *Whittle v. Webster*, 55 Ga. 180.

<sup>4</sup> *Fowler v. Stevens*, 49 N. Y. Sup. Ct. 479.

<sup>5</sup> *Schermerhorn v. Gouge*, 13 Abb. Pr. 315.

<sup>6</sup> *Willy v. Mulledy*, 78 N. Y. 310; 34 Am. Rep. 536; the court saying: "Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire-escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty causing damage, it cannot be doubted that the tenants have a remedy.

It is a general rule that whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative; and where a duty is imposed, there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen: *Cooley on Torts*, 654; *Hover v. Barkhoff*, 44 N. Y. 113; *Jetter v. R. R. Co.*, 2 Abb. App. 458; *Heeney v. Sprague*, 11 R. I. 450; 23 Am. Rep. 502; *Couch v. Steele*, 3 El. & B. 402. In *Comyn's Digest*, title *Action upon Statute*, F, it is laid down as the rule that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done him contrary to the said law."

tributory negligence in remaining in the house, knowing that it was not provided with a fire-escape: *Willy v. Mulledy*, 78 N. Y. 310; 34 Am. Rep. 536.

§ 2831. **Furnished Houses or Apartments.**—In England it has been held in several cases that on the letting of a furnished house there is an implied warranty that the premises are in a fit state for habitation, and that the premises are not in such a state as to be likely to occasion great discomfort or danger to health.<sup>1</sup> Thus where the house was infested with bugs,<sup>2</sup> and where the drainage was so bad as to endanger the health of the occupants,<sup>3</sup> it was held that the warranty was broken, and the tenant was justified in removing. If the tenant of a furnished house agrees to put it into good repair, the implied condition will, it seems, be excluded so far as regards unfitness for habitation arising from dilapidation. But an agreement by the tenant merely to keep the house in repair will not affect the implied condition.<sup>4</sup> In a Massachusetts case Chief Justice Shaw intimated that where "furnished rooms in a lodging-house are let for parlor, bedroom, and the like, for a particular season of the year, a warranty may be implied that the rooms are properly furnished and suitably fitted for such particular use."<sup>5</sup> But in a recent case in New Jersey the premises rented consisted of a house with the furniture in it, situate at a seaside resort. The letting was for a term of five months, and by a lease under seal. The tenant abandoned the premises, on the ground

<sup>1</sup> *Campbell v. Wenlock*, 4 Fost. & F. 716. In *Smith v. Marrable*, 11 Mees. & W. 5, Lord Abinger told the jury that, in order to find for the tenant of a furnished house, in an action against him for use and occupation, the nuisance, in consequence of which he refused to occupy, must be "so intolerable as to render it impossible that he could live in the house with any reasonable comfort." And on the motion for a new trial, Parke, B., said that "if the premises are encumbered with

a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up." *Contra*, *Fisher v. Lighthall*, 4 Mackey, 82; 54 Am. Rep. 258. See *ante*, § 2829.

<sup>2</sup> *Smith v. Marrable*, 11 Mees. & W. 5.  
<sup>3</sup> *Wilson v. Finch Hatton*, L. R. Ex. Div. 336.

<sup>4</sup> *Wilson v. Finch Hatton*, L. R. Ex. Div. 336.

<sup>5</sup> *Dutton v. Gerrish*, 9 Cush. 89; 1 Am. Dec. 45.

that the cellar was in a damp and unhealthy condition by reason of water that was in it. It was held that, there being no false representation or fraudulent concealment by the lessor, the tenant could not set up the unhealthy condition of the cellar, and his abandonment of the premises for that reason, as a defense to an action for rent.<sup>1</sup>

**§ 2832. Implied Warranty as to Condition of House—As to Health.**—It is held in some cases that the unhealthy condition of the premises at the time of renting, or becoming so during occupancy, is a constructive eviction, and ground to be released from the payment of rent.<sup>2</sup> But in other cases this doctrine is denied.<sup>3</sup> Where certain defects exist that are likely to injuriously affect the health of the tenant or his family, it is the landlord's duty to disclose the facts, and failing to do so, he is liable to the tenant for all the damages resulting to the tenant which are the immediate and proximate result of such failure. There is a strong tendency to hold that the tenant is absolved from the lease (or rent) if there are latent defects in the premises, or causes not readily dis-

<sup>1</sup> *Murray v. Albertson*, 50 N. J. L. 167; 7 Am. St. Rep. 787.

<sup>2</sup> *Crump v. Morrell*, 12 Phila. 249; *Bradley v. Gorcurie*, 67 How. Pr. 76; *Smith v. Marrable*, 1 Mees. & W. 5; *Edwards v. Hetherington*, 7 Dowl. & R. 117; *Collins v. Barrow*, 1 Moody & R. 112; *Salisbury v. Marshall*, 4 Car. & P. 65; *Cowie v. Goodwin*, 9 Car. & P. 378; *Gilhooley v. Washington*, 4 N. Y. 217; *Gallagher v. Waring*, 9 Wend. 20; *Van Bracklin v. Fonda*, 12 Johns. 468; 7 Am. Dec. 339; *Gray v. Cox*, 4 Barn. & C. 108; *Laing v. Fidgeon*, 6 Taunt. 108; *Howard v. Hoey*, 23 Wend. 350; 35 Am. Dec. 572; *Pickering v. Dawson*, 4 Taunt. 779; *Jones v. Bright*, 5 Bing. 533. This is so by statute in some states. But a building is not rendered "untenantable and unfit for occupancy" within the statute because of unpleasant and unwholesome odors, the origin of which is uncertain: *Sutphin v. Seelass*, 12 Daly,

139. The fact that the tenant, before the expiration of the term, is forced to move from the house because of gases and odors from adjacent premises does not absolve him from inability for the rent agreed on: *Franklin v. Brown*, 53 N. Y. Sup. Ct. 474.

<sup>3</sup> 2 *Smith on Landlord and Tenant*, 262; *Woodfall on Landlord and Tenant*, 493; *Taylor on Landlord and Tenant*, sec. 381; 1 *Parsons on Contracts*, 589; 1 *Washburn on Real Property*, 473; *Hart v. Windsor*, 12 Mees. & W. 68; *Chappell v. Gregory*, 34 Beav. 250; *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Cleves v. Willoughby*, 7 Hill, 83; *Royce v. Guggenheim*, 106 Mass. 202; 8 Am. Rep. 322; *Elliott v. Aiken*, 45 N. H. 36; *Alston v. Grant*, 3 El. & B. 127; *Leavitt v. Fletcher*, 10 Allen, 121; *Brewster v. De Francey*, 33 Cal. 341; *Doupe v. Genine*, 45 N. Y. 119; 6 Am. Rep. 47; 2 *Story on Contracts*, 422.

coverable on examination, which render the premises unfit for occupancy, of which the landlord knew and did not inform the tenant; but this is not well established, and is contrary to the weight of authority.<sup>1</sup> In a New York case the court held that it was a good defense to an action for rent that the landlord did not tell the tenant of a stench in the house which he knew existed, and which subsequently caused the tenant's sickness; saying that "if the landlord knew of any cause which renders the house unhealthy, he must disclose it. If he does not, it is procuring an innocent person to rent a house which he knows is unfit."<sup>2</sup> Where, however, the landlord, to induce the tenant to take the house, has falsely represented it to be in good condition, and the tenant has taken it, relying on the false representations, and it is permeated by sewer-gas, and the tenant is obliged to abandon it, the landlord cannot recover rent after the abandonment,<sup>3</sup> unless the tenant knew of the defect when he took the house.<sup>4</sup> A statement by the landlord that the plumbing was in good order will be deemed, ordinarily, the mere expression of an opinion.<sup>5</sup>

It has been held a good defense to an action for rent that the landlord knew that the house had formerly been occupied as a brothel, and concealed that fact from the tenant, who was compelled to remove in consequence of the annoyance, on the ground of fraudulent concealment.<sup>6</sup>

<sup>1</sup> Wood on Landlord and Tenant, 624; citing *Minor v. Sharon*, 112 Mass. 477; 27 Am. Rep. 122; *Wilson v. Finch*, L. R. 2 Ex. Div. 236; *Eakin v. Brown*, 1 E. D. Smith, 36; *Wallace v. Lent*, 1 Daly, 481; *Staples v. Anderson*, 3 Robt. 327; *Meeks v. Bawerman*, 1 Daly, 100. And see *Westlake v. De Graw*, 25 Wend. 667; *Robbins v. Mount*, 4 Robt. 553; *O'Brien v. Cadwell*, 59 Barb. 504; *Cleves v. Willoughby*, 7 Hill, 83; *Howard v. Doolittle*, 3 Duer, 464; *Scott v. Simons*, 54 N. H. 429.

<sup>2</sup> *Wallace v. Lent*, 1 Daly, 481. And see *Sutton v. Temple*, 12 Mees. & W. 52.

<sup>3</sup> *Jackson v. Odell*, 12 Daly, 345; 14 Abb. N. C. 42.

<sup>4</sup> *McDonald v. Flamme*, 13 Abb. N. C. 456.

<sup>5</sup> *Coulson v. Whiting*, 12 Daly, 408.

<sup>6</sup> *Staples v. Anderson*, 3 Robt. 327; *Camfout v. Fowke*, 6 Mees. & W. 359; *Rhineland v. Seaman*, 13 Abb. N. C. 455. *Contra*, *Meeks v. Bawerman*, 1 Daly, 100. If a tenant, to whom the bad repute of a house has not been disclosed, continues to occupy after ascertaining the fact, he must pay rent: *Carhart v. Ryder*, 11 Daly, 101.

Where the owner of premises, knowing them to be infected with the small-pox, or other contagious disease, leases them to a tenant, who, ignorant of their condition, occupies the premises, whereby he is attacked by the disease, the landlord is liable for this fraudulent concealment.<sup>1</sup> Where a landlord, having discontinued the use of gas upon a portion of his premises, removed the fixtures, leaving the pipes open, and afterwards an explosion took place upon the premises, then in the possession of a tenant, caused by a tenant of another portion of the building introducing gas for his convenience, and by the landlord's permission, the latter was held responsible for the ensuing damages, although the negligence of a third party concurred in the accident.<sup>2</sup> The landlord is responsible to a tenant for damages arising from the faulty construction and user of a sewer on another part of the premises by him, although the sewer was made previous to the beginning of the tenancy.<sup>3</sup>

**ILLUSTRATIONS.**—A lease stipulated that the lessee should not use the premises otherwise than as a dwelling-house. The lessee, before taking the lease, proposed to institute an examination concerning drainage and plumbing, but was deterred by the lessor's false and fraudulent representations that these matters were all right. *Held*, that when sued for rent, the lessee could defend by showing payments for plumbing, etc., exceeding the rent, and necessary to remedy defects in the drainage and plumbing: *Wolfe v. Arrott*, 109 Pa. St. 473.

**§ 2833. Covenant to Renew.**—A covenant to renew (which is never implied) must be definite, precise, and certain, both as to the term and the rent to be paid.<sup>4</sup> Thus an agreement to renew, "the rent to be proportioned to the valuation of said premises at said time," is too

<sup>1</sup> *Minor v. Sharon*, 112 Mass. 477; 17 Am. Rep. 127; *Cesar v. Karutz*, 60 N. Y. 229; 19 Am. Rep. 164.

<sup>2</sup> *Kimmell v. Burfeind*, 2 Daly, 155.

<sup>3</sup> *Alston v. Grant*, 3 El. & B. 123; *Scott v. Simons*, 54 N. H. 426.

<sup>4</sup> *Pray v. Clark*, 113 Mass. 286; *Cunningham v. Patee*, 99 Mass. 283; *Norton v. Snyder*, 2 Hun, 82; *Brown v. Parsons*, 22 Mich. 24; *Morrison v. Rossignal*, 5 Cal. 64; *Abel v. Radcliff*, 13 Johns. 296; 7 Am. Dec. 377.

uncertain to be enforced.<sup>1</sup> So a stipulation in the lease of a store, for a term certain, that the lessee is to "have the preference of renting said property so long thereafter as it shall be rented for a store," is void for uncertainty.<sup>2</sup> So is a clause that at the end of the term buildings shall be taken at a valuation, or the lessees grant a new lease for a specified term, "upon such terms as the lessors, their heirs, etc., should think proper, and be approved of by the tenant."<sup>3</sup> So is a stipulation that, at its expiration, the lessee "shall have the first right to lease the said premises for the next succeeding year or years."<sup>4</sup> But a covenant that the lessee shall be entitled to a renewal at the expiration of the term, provided he "is willing to give as much as any other responsible party will agree to give," fixes the amount of rent with sufficient certainty.<sup>5</sup> Leases with provisions for continued renewals are not favored, as they tend to create perpetuities.<sup>6</sup> A covenant in a lease providing for renewals will not be so construed as to create a perpetuity.<sup>7</sup> But a covenant for a perpetual renewal of a lease, when clearly made, will be enforced.<sup>8</sup> In Ohio it has been held that after assignment of his interest, a lessee, under a lease renewable forever, was not liable on his covenant to pay rent.<sup>9</sup>

When a lessee has performed the conditions which entitle him to a renewal of the lease, and the landlord refuses

<sup>1</sup> *Pray v. Clark*, 113 Mass. 283.

<sup>2</sup> *Delashmutt v. Thomas*, 45 Md. 140.

<sup>3</sup> *Whitlock v. Duffield*, 1 Hoff. Ch. 110; 26 Wend. 54.

<sup>4</sup> *Reed v. Campbell*, 43 N. J. Eq. 406.

<sup>5</sup> *Arnot v. Alexander*, 44 Mo. 25; 100 Am. Dec. 252.

<sup>6</sup> *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Banker v. Braker*, 9 Abb. N. C. 411; *Morrison v. Rossignol*, 5 Cal. 64.

<sup>7</sup> *Syms v. New York*, 105 N. Y. 153.

<sup>8</sup> *Blackmore v. Boardman*, 28 Mo. 420.

<sup>9</sup> *Worthington v. Hewes*, 19 Ohio St. 66, the court saying: "The nature

of the estate forbids any such construction. For all substantial purposes it is a leasehold estate in name and in form only. The lessor in effect parts at once with his entire estate for a stipulated consideration in money, payable in specified installments, and secured by a lien on the land; and the lessee takes the entire estate, an estate of inheritance, subject only to the payment of the money. In form merely, it is a chattel; it is in fact an estate in fee." A lease for years, rent payable annually, with perpetual right of renewal, does not divest the lessor of his fee in the premises: *Page v. Esty*, 54 Me. 319.

to renew, the lessee has a right to elect whether he will proceed at law for damages, or in equity for specific performance.<sup>1</sup> Where the lessor will not comply with his covenant of renewal on a valuation, but acts in bad faith to prevent an appraisal, the unexecuted covenant for renewal does not, at law, prevent his suing for use and occupation, or bringing ejectment. But the lessee may come into equity to restrain such action.<sup>2</sup> And it is been held that equity need not compel an arbitration, but may receive evidence on and determine the question of value, and compel giving a lease as agreed.<sup>3</sup> Where the lessee holds over by consent until the appraisal is made and the new lease tendered, he is only liable for rent at the original rate until such appraisal.<sup>4</sup> The word "renew," *ex vi termini*, imports the giving a new lease like the old one, on the same terms, except the renewal covenant.<sup>5</sup> There must be a new lease, to demise the premises for another term, if the lessee elects to take a renewal.<sup>6</sup> Under such a lease, the lessee is required to elect during the first term; otherwise, he has no rights as against the lessor.<sup>7</sup> But this requirement may be waived by the landlord.<sup>8</sup> Thus an acceptance of the rent after the expiration of the original term is a waiver of the right to a notice. The lease will therefore be presumed to be renewed if the tenant holds over, and the landlord accepts rent after the original term has expired.<sup>9</sup> The election need not be express (in the absence of a special

<sup>1</sup> Arnot v. Alexander, 44 Mo. 25; 100 Am. Dec. 252.

<sup>2</sup> Tscheider v. Biddle, 4 Dill. 55.

<sup>3</sup> Strohmaier v. Zeppenfeld, 3 Mo. App. 425.

<sup>4</sup> Ryder v. Jenny, 2 Rob. (N. Y.) 56.

<sup>5</sup> Cunningham v. Patten, 99 Mass. 243; Creighton v. McKee, 2 Brewst. 393; Austin v. Stevens, 38 Hun. 41; Ranlet v. Cook, 44 N. H. 512; 84 Am. Dec. 92; Banker v. Banker, 9 Abb. N. C. 411; Muhelbrink v. Pooler, 40 Hun. 526.

<sup>6</sup> Hunter v. Silvers, 15 Ill. 174;

Thiebaud v. Bank, 42 Ind. 212; Creighton v. McKee, 7 Phila. 324; Ryder v. Jenny, 2 Rob. (N. Y.) 56.

<sup>7</sup> Renoud v. Daskham, 34 Conn. 512; Thiebaud v. Bank, 42 Ind. 212.

<sup>8</sup> Bradford v. Patten, 108 Mass. 153; Kramer v. Crook, 73 Mass. 550.

<sup>9</sup> Woodcock v. Roberts, 66 Barb. 498; Schroeder v. Gemeinder, 10 Nev. 355; Kramer v. Cook, 73 Mass. 550; Bradford v. Patten, 108 Mass. 153; Dolese v. Barberot, 9 La. Ann. 352; Thiebaud v. First Nat. Bank, 42 Ind. 212.

form required by the lease), but may be inferred from acts and conduct.<sup>1</sup> Whether he has made an election is a question of fact for the jury.<sup>2</sup> And having elected, he may, at the option of the landlord, be required to accept a new lease.<sup>3</sup> If the tenant merely holds over without notifying the landlord of his intention to take another term, he will not thereby obtain, as against the landlord, any right in the premises, and the latter then has the option whether to demand the premises or to treat the lessee as still tenant of the premises.<sup>4</sup> By holding over, the tenant elects to take the premises either as a tenant from year to year, or from month to month, as the case may be, or for another term under the lease. Since the law creates a tenancy from year to year only in the absence of an agreement, the holding is referred to the contract, and he is deemed to elect to take the premises for another term.<sup>5</sup> Payment of rent when it becomes due, and performance of other covenants of a lease, under which a tenant is in possession of leased premises, with the privilege of renewing the lease at the end of the term, are conditions precedent to the exercise of the right of renewal.<sup>6</sup> An election by the lessor to renew a lease may be made on the last day of the term, there being no requirement that it shall be made earlier.<sup>7</sup> But where the owner of the leasehold interest has failed to obtain a renewal within the term, according to the literal wording of the covenant for renewal, equity will relieve him, and compel the owner of the reversion to execute a new lease, provided the application be made in a reasonable time.<sup>8</sup> A covenant on the

<sup>1</sup> *Clarke v. Merrill*, 51 N. H. 415; *Ins. etc. Co. v. Mo. Bank*, 71 Mo. 58; *Despard v. Walbridge*, 15 N. Y. 374.

<sup>2</sup> *Bradford v. Patten*, 108 Mass. 153.

<sup>3</sup> *Kelso v. Kelly*, 1 Daly, 419.

<sup>4</sup> *Dolese v. Barberot*, 9 La. Ann. 352; *Thiebaud v. First Nat. Bank*, 42 Ind. 212.

<sup>5</sup> *Kelso v. Kelly*, 1 Daly, 419; *Clarke*

*v. Merrill*, 51 N. H. 415; *Woodcock v. Roberts*, 66 Barb. 498; *Kramer v. Cook*, 73 Mass. 550; *Ins. etc. Building Co. v. Mo. Bank*, 71 Mo. 58.

<sup>6</sup> *Behrman v. Barto*, 54 Cal. 131.

<sup>7</sup> *Darling v. Hoban*, 53 Mich. 599.

<sup>8</sup> *Banks v. Haskie*, 45 Md. 207; *New York Life Ins. and Trust Co. v. St. George's Church*, 64 How. Pr. 511; 12 Abb. N. C. 50.

part of the lessor for a new lease at the expiration of the term, without a corresponding covenant on the part of the lessee to accept it, does not bind the lessee to accept.<sup>1</sup> But that a covenant of renewal is binding only upon the lessor does not preclude the lessee from his option whether to accept a renewal or not, in the absence of express provisions to the contrary.<sup>2</sup> A renewal may be claimed by the tenant under an independent covenant in the lease that he shall have one, notwithstanding the original term has not yet expired, and notwithstanding some rent remains due from him to the landlord on account of the original term.<sup>3</sup> If a tenant for a year, with the privilege of renewal if the lessor does not sell the premises, sublets beyond the end of the first year, such sublease is terminated by the lessor's sale of the premises.<sup>4</sup>

But a lease for a certain term with a privilege to the lessee to hold for a longer term is to be distinguished from a lease with a covenant for renewal. The latter contemplates the execution of some further instrument by the lessor, and generally by both lessor and lessee. But where the provision is for a longer term under the lease, the lease itself is as to the additional term a lease *de futuro* requiring only the lapse of the preceding term and the election of the lessee to become a lease *in presenti*.<sup>5</sup> In case of such a lease, it is not necessary that any notice of the election shall be given to the landlord.<sup>6</sup> His continuance in occupation of the premises is conclusive.<sup>7</sup> If the tenant elects to remain at all after the expiration of the first term, he will be held to have

<sup>1</sup> *Bruce v. Fulton Nat. Bank*, 79 N. Y. 154; 35 Am. Rep. 505.

<sup>2</sup> *Bruce v. Fulton Nat. Bank*, 16 Hun, 615; 79 N. Y. 154; 35 Am. Rep. 505.

<sup>3</sup> *Tracy v. Ex. Co.*, 7 N. Y. 472; 57 Am. Dec. 539.

<sup>4</sup> *Sutherland v. Goodnow*, 108 Ill. 523; 43 Am. Rep. 560.

<sup>5</sup> *Chretien v. Doney*, 1 N. Y. 419; *Kramer v. Cook*, 73 Mass. 550; *Delasham v. Berry*, 20 Mich. 292; 4 Am. Rep. 392.

<sup>6</sup> *Kramer v. Cook*, 73 Mass. 550.

<sup>7</sup> *Delasham v. Berry*, 20 Mich. 293; 4 Am. Rep. 392.

elected under and according to the terms of the lease, which gives him no right to elect a term for any other period except the optional term therein provided.<sup>1</sup> Where a lessor agrees with a lessee that at the expiration of the term "he shall have the refusal of the premises for another year," the lessor is bound to renew the lease upon the same terms as the previous year.<sup>2</sup> The privilege of a renewal is a vendible interest, so far as third persons are concerned.<sup>3</sup> So where it was the custom of a church to renew its leases, the good-will, or privilege of renewal, was held to be a subject of sale by the lessee.<sup>4</sup>

ILLUSTRATIONS. — A lessee conveyed his estate during a portion of his term by deed, reserving a rent different and payable at different times from the rent reserved in the original lease, reserving also a right of entry on non-payment of rent, and providing for a surrender of the premises to him at the end of the term, but also providing that the under-lessee might, at his election, have an extension of the term until the end of the lessee's original term. *Held*, that the instrument was an under-lease, and not an assignment: *Collins v. Hasbrouck*, 56 N. Y. 157; 15 Am. Rep. 407. A provision in a lease that unless three months' notice of an intention to terminate it is given, it shall continue in force for another term of one year, and so on indefinitely, such notice to be given three months before the termination of any one year, *held*, not to be a mere covenant for renewal, but that, upon failure to give such notice, the lease would continue in operation: *Dix v. Atkins*, 130 Mass. 171. A sealed lease for a certain term gave to the lessee the privilege of continuing the lease for two years more at an increased rent, on giving written notice at a specified time. The lessee did not give the notice, but held over for four months, paying the increased rent, and then vacating the premises. *Held*, that the provision as to the notice was waived, and that the lessee was liable to the end of the two years: *Long v. Stafford*, 108 N. Y. 274. By a lease the buildings erected were subject to forfeiture for a failure to pay rent, and a new lease made such conditions of the prior lease binding as were not changed by the "terms or express words" of the new lease, and one of those terms mort-

<sup>1</sup> *Delasham v. Berry*, 20 Mich. 293; 4 Am. Rep. 392.

<sup>2</sup> *McAdoo v. Callum*, 86 N. C. 419; *Tracy v. Albany Exchange Co.*, 7 N. Y. 472; 57 Am. Dec. 539.

<sup>3</sup> *Phyfe v. Wardell*, 5 Paige, 268; 28 Am. Dec. 430; *Johnson's Appeal*, 115 Pa. St. 129; 2 Am. St. Rep. 539.

<sup>4</sup> *Phyfe v. Wardell*, 2 Edw. Ch. 47; 5 Paige, 268; 28 Am. Dec. 430.

gaged the buildings to secure the rent. *Held*, that no right of forfeiture existed under the new lease: *Cheatham v. Plinke*, 1 Tenn. 576. A lease provided for the "additional term of one, two, or three years after the expiration of said term of two years, at the election of said party of the second part." *Held*, that there could be but one election, whether for one, two, or three years: *Falley v. Giles*, 29 Ind. 114. A lessor covenanted that the lessee should have "the refusal of the premises at the expiration of the lease, for three years longer." Before the expiration of the lease, the lessee requested a renewal of it for three years longer, at the same rent; the lessor refused to renew, unless the lessee would agree to pay an increased rent. Afterwards, the lessee took from the lessor a new lease, for one year, at an increased rent, protesting, at the same time, against the right of the lessor to exact an increased rent, and claiming to reserve his right of action. *Held*, that the covenant bound the lessor to renew the lease for the same rent; that it was violated by the refusal of the lessor; and that the acceptance, under the circumstances of the new lease, was not a waiver of the covenant: *Tracy v. Albany Exchange Co.*, 7 N. Y. 472; 57 Am. Dec. 538. A covenant in a lease for years provided for the payment of double rent for each day the tenant held over after the expiration of the term. There was also a covenant giving the tenant the privilege to renew for a further term at the same rent as in the first. The tenant held over for several years, paying the old rate of rent. There was no new lease, neither party requiring it. *Held*, that the tenant must be taken to have held under the covenant for renewal, and was liable as he would have been under a new lease: *Insurance and Law Building Co. v. Missouri Bank*, 71 Mo. 58.

**§ 2834. Covenant against Encumbrances.** — The covenant against encumbrances is for indemnity to the lessee, supposing some one, as a prior mortgagee, should enforce his rights, under an encumbrance, so as to molest the lessee and interfere with his peaceable possession.<sup>1</sup> A covenant against encumbrances is broken at once by the existence of an encumbrance,<sup>2</sup> but a covenant against particular encumbrances is not broken until possession is disturbed under them.<sup>3</sup> It is broken by the existence of any right or interest in the land which diminishes its

<sup>1</sup> Taylor on Landlord and Tenant, secs. 318-322; 4 Kent's Com. 74; 1 Schouler on Personal Property, sec. 30.

<sup>2</sup> Gear on Landlord and Tenant, sec. 90.

<sup>3</sup> Anderson v. Knox, 20 Ala. 156.

value.<sup>1</sup> But it is not broken by a mere equitable claim;<sup>2</sup> nor by a public highway in actual use;<sup>3</sup> nor by a notorious easement obviously affecting the physical condition of the land;<sup>4</sup> nor by an executory agreement for a future term.<sup>5</sup> The fact that the lessee knew of the encumbrance is no defense.<sup>6</sup>

**§ 2835. Covenant for Further Assurance.** — The covenant for further assurance, which is implied in the covenant for quiet enjoyment, binds the lessor expressly to perform and execute all such further reasonable acts and writings as may be needful to complete the transfer of the term or to perfect the lessee's title.<sup>7</sup> Under this covenant the lessor will be required to convey a title afterwards purchased,<sup>8</sup> or to remove an encumbrance.<sup>9</sup> He must procure the instrument of further assurance to be drawn and tendered for execution,<sup>10</sup> and give the covenantor a reasonable time to consider.<sup>11</sup> The covenant inures to the benefit of a sublessee.<sup>12</sup>

**§ 2836. Right of Landlord to Re-enter.** — When a tenancy is legally terminated, the landlord has a right to peaceably enter the premises and take possession,<sup>13</sup> and he may remove the trespassing tenant's goods to a con-

<sup>1</sup> Gear on Landlord and Tenant, sec. 90.

<sup>2</sup> Marble v. Scott, 41 Ill. 50.

<sup>3</sup> Scribner v. Holmes, 16 Ind. 142.

<sup>4</sup> Kutz v. McCune, 22 Wis. 628; 99 Am. Dec. 85.

<sup>5</sup> Weld v. Traip, 80 Mass. 330.

<sup>6</sup> Dunn v. White, 1 Ala. 645; Calum v. Br. Bank, 4 Ala. 21; Hubbard v. Norton, 10 Conn. 431; Snyder v. Lane, 10 Ind. 424; Neller v. Hiatt, 8 Ind. 171; Barlow v. McKinley, 24 Iowa, 69; Williamson v. Hall, 62 Mo. 405; Kellogg v. Ingersoll, 2 Mass. 97; Harlow v. Thomas, 15 Pick. 48; Pritchard v. Atkinson, 3 N. H. 335; Roberts v. Levy, 3 Abb. Pr., N. S., 311.

<sup>7</sup> Taylor on Landlord and Tenant, secs. 323-326.

<sup>8</sup> Middlebury College v. Cheney, 1 Vt. 336.

<sup>9</sup> King v. Jones, 5 Taunt. 427.

<sup>10</sup> Bennet's Case, Cro. Eliz. 9; Stafford v. Bottorne, Cro. Eliz. 298; Baker v. Bulstrode, 1 Mod. 104.

<sup>11</sup> Millar v. Parsons, 9 Johns. 336; Sweitzer v. Hummel, 3 Serg. & R. 228. See Mauser's Case, 2 Coke, 3 a; Wolton v. Cook, 3 Dyer, 331 b; Symms v. Smith, Cro. Car. 299.

<sup>12</sup> Middlemore v. Goodale, Cro. Car. 503.

<sup>13</sup> Stearns v. Sampson, 59 Me. 568; 8 Am. Rep. 442; Sterling v. Warden, 51 N. H. 217; 12 Am. Rep. 80; Low v. Elwell, 121 Mass. 309; 23 Am. Rep. 272; Chesley v. Welch, 37 Me. 106.

venient distance, doing them no unnecessary damage.<sup>1</sup> But a lessor has no right to re-enter on the land leased, during the term, though the land be vacant.<sup>2</sup> So where a tenant removes from the leased premises during his term, the landlord is not authorized to re-enter and put another in possession.<sup>3</sup> A landlord entitled to possession may not re-enter during the tenant's temporary absence, without a legal warrant, and hold forcible possession.<sup>4</sup> A lessor cannot re-enter on the ground of a forfeiture for the non-payment of rent, without complying strictly with all the formalities required by the law.<sup>5</sup> Where a tenant holds over, and the landlord enters by force and turns him out, he cannot maintain trespass against the landlord.<sup>6</sup> A tenant can bring trespass against his landlord for forcibly breaking and entering the leased premises during the term.<sup>7</sup>

§ 2837. **The Lessee's Covenants—To Pay Rent.**—A covenant to pay rent is implied in a lease.<sup>8</sup> Nevertheless it is usually inserted, in addition to the usual reservation of rent.<sup>9</sup> In the absence of a provision therefor in the lease, non-payment of rent does not work a forfeiture.<sup>10</sup> To work a forfeiture under a perpetual lease for non-payment of rent, the landlord must make a demand on the very day the rent becomes due, and at the very place where it is payable.<sup>11</sup> But no demand for rent is neces-

<sup>1</sup> *Whitney v. Swett*, 22 N. H. 10; 53 Am. Dec. 228; *Loesch v. Pickett*, 36 Kan. 216; *Weeks v. Sly*, 61 N. H. 89.

<sup>2</sup> *Brown v. Kite*, 2 Over. 233; *Shannon v. Burr*, 1 Hilt. 39.

<sup>3</sup> *Chancey v. Smith*, 25 W. Va. 404; 52 Am. Rep. 217.

<sup>4</sup> *Mason v. Hawes*, 52 Conn. 12; 52 Am. Rep. 553.

<sup>5</sup> *Jackson v. Harrison*, 17 Johns. 66. See *Remsen v. Couklin*, 18 Johns. 447.

<sup>6</sup> *Hyatt v. Wood*, 4 Johns. 150; 4 Am. Dec. 253; *Overdeer v. Lewis*, 1 Watts & S. 90; 37 Am. Dec. 440.

<sup>7</sup> *Barneycastle v. Walker*, 92 N. C. 198.

<sup>8</sup> *Van Rensselaer v. Smith*, 27 Barb. 140; *Lynch v. Onondaga Salt Co.*, 64 Barb. 550; *Kimpton v. Walker*, 9 Vt. 198.

<sup>9</sup> 1 Schouler on Personal Property, sec. 31. Where a sealed lease stipulates for a certain rent, a parol agreement to pay more rent cannot be enforced, although made because of additional expenses incurred by the lessor in putting up a new building on the land: *Smith v. Kerr*, 33 Hun, 567.

<sup>10</sup> *Buckner v. Warren*, 41 Ark. 532.

<sup>11</sup> *Willard v. Benton*, 57 Vt. 286.

sary, in order to create a forfeiture, where a lease provides that the non-payment without demand shall determine the lease.<sup>1</sup>

§ 2838. **To Repair.**—In the absence of any covenant on the subject, the law obliges the lessee to so use the premises that no substantial injury shall be occasioned to them.<sup>2</sup> But this implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary as far as possible. It is, in effect, only a covenant against voluntary waste.<sup>3</sup> The lessee is not obliged to make good the ordinary ravages of time, or of the elements, unless he has expressly agreed to do so. And if a tenant puts repairs on the premises without the consent of the landlord, he cannot charge the landlord for them.<sup>4</sup> Where the lessee covenants to keep the premises in repair, he must keep them wind and water tight, and put on fair and tenantable repairs.<sup>5</sup> An express and unconditional covenant to repair and keep in repair binds him to rebuild in case of destruction by fire or other accident;<sup>7</sup> and an exception in a covenant to repair of damages by the elements or the act of God will not include damages to which human agency in any way contributed.<sup>8</sup> Good repair is a relative term, and

<sup>1</sup> *Sweeney v. Garrett*, 2 Disn. 601.

<sup>2</sup> 1 Schouler on Personal Property, sec. 31; *United States v. Bostwick*, 94 U. S. 53.

<sup>3</sup> *United States v. Bostwick*, 94 U. S. 53. If the tenant abandons the leased premises in a ruinous condition, the result of damage beyond reasonable wear and tear, he violates an implied covenant: *Genau v. District of Columbia*, 20 Ct. of Cl. 389.

<sup>4</sup> 1 Schouler on Personal Property, sec. 31; *Johnson v. Dixon*, 1 Daly, 178; *Bald v. O'Brien*, 12 Daly, 160; *Fash v. Kavanaugh*, 24 How. Pr. 347. But see *Long v. Fitzsimmons*, 1 Watts & S. 530; *Ulrich v. McCabe*, 1 Hilt. 251. It is the duty of a tenant who has leased a farm on shares to keep the

fences in repair, in the absence of a contrary covenant: *Fenton v. Montgomery*, 19 Mo. App. 156.

<sup>5</sup> *Kline v. Jacobs*, 68 Pa. St. 57.

<sup>6</sup> 1 Schouler on Personal Property, sec. 31.

<sup>7</sup> *Ross v. Overton*, 3 Call, 309; 2 Am. Dec. 552; *Scott v. Scott*, 18 Gratt. 166; *Schmidt v. Pettit*, 1 McAr. 179; *Abbey v. Billups*, 35 Miss. 618; 72 Am. Dec. 143; *Hoy v. Holt*, 91 Pa. St. 88; 3 Am. Rep. 659; *Monk v. Noyes*, 1 Car. & P. 265. "Damages by the elements," in a covenant to repair, includes destruction by fire without the lessee's fault: *Van Wormer v. Crane*, 51 Mich. 363; 47 Am. Rep. 582.

<sup>8</sup> *Polack v. Pioche*, 35 Cal. 416; 9 Am. Dec. 115.

varies with the age of the building, the purpose for which it is leased and occupied, and other similar circumstances.<sup>1</sup> Such a covenant does not bind the tenant either to put or leave the premises in better repair than they were at the date of the covenant.<sup>2</sup> A covenant to keep up all repairs does not bind the lessee to insure against natural wear and decay, but only to do ordinary repairs.<sup>3</sup> Perfectly good repair only requires the property to be put in as good condition as can be done without change of form or material.<sup>4</sup> A lessee of a wooden building covenanting to rebuild in case of fire is released by the enactment of a valid ordinance prohibiting the erection of a wooden building.<sup>5</sup>

ILLUSTRATIONS.—A lessee covenanted to keep a gate "in repair." Some one unknown carried away the gate. *Held*, that the lessee was bound to replace it: *Beach v. Crain*, 2 N. Y. 86; 49 Am. Dec. 369. A lease stipulated that the lessees should take the premises in the condition they were then in, and that whatever work the lessees should need and desire should be done by them at their own expense. *Held*, that under this agreement they were not liable for work done by the landlord without their request: *Wicker v. Lewis*, 40 Ill. 251. A lessee agreed to do all the plumbing, to keep the sewer connections in repair, etc. Certain repairs of this nature had been ordered by the board of health before the lessee took his lease. *Held*, that the lessor, having made these repairs as ordered, could recover the amount from the lessee: *Hull v. Burns*, 17 Abb. N. C. 317. The lessee covenanted to keep the leased building in good repair and condition. At the time he took possession the roof and steps were in bad condition. The lessee made such repairs only as were required for his own comfort, and the steps became rotten, and the roof leaked so as to injure the walls. After the lessee's term expired, the lessor had the roof shingled, gutter repaired, and new steps made. *Held*, that these were repairs within the covenant of the lease, and that the lessee was liable for the expense of making them: *Green v. Eden*, 2 Thomp. & C. 582. A lessee

<sup>1</sup> 1 Schouler on Personal Property, sec. 31; *Flint v. Pierce*, 11 R. I. 576; *White v. R. R. Co.*, 17 Hun, 98.

<sup>2</sup> *West v. Hart*, 7 J. J. Marsh. 258.

<sup>3</sup> *Harris v. Coulbourn*, 3 Harr. (Del.) 338; *Ball v. Wyeth*, 8 Allen, 275.

<sup>4</sup> *Ardesco Oil Co. v. Richardson*, 63 Pa. St. 162.

<sup>5</sup> *Cordes v. Miller*, 39 Mich. 581; 33 Am. Rep. 430.

was, by the terms of his lease, to have the use of the premises for five years, and in payment, was to make certain repairs and additions complete within the first two years; and in default of such completion, the lessor to have the right to enter and expel the lessee; and the repairs being nearly, but not quite, made within the two years stipulated, the lessor expelled the lessee. *Held*, that the lessee was entitled to recover, at the expiration of the five years, for labor and materials if the real value of his repairs exceeded the fair value of his use and occupation down to the time he was expelled: *Smith v. Newcastle*, 48 N. H. 70.

§ 2839. **As to Use of Premises.**—In the absence of an express covenant on the subject, the tenant has a right to use premises for any lawful purpose he pleases, and to carry on therein any trade or business which he may desire.<sup>1</sup> So a subtenant may carry on any legitimate and unharmed business he chooses which is not prohibited by the original lease.<sup>2</sup> But covenants restricting the use of the premises are valid, and run with the land.<sup>3</sup> Injunction will lie to prevent a lessee or his assignees from converting the demised premises to uses inconsistent with the terms of the lease, or making material alterations for such purposes.<sup>4</sup> A covenant in restraint of any beneficial use of the property will not be implied from a mere provision for a particular use, in the absence of restrictive words;<sup>5</sup> nor will a covenant forbidding one use of the premises by implication forbid a different use not

<sup>1</sup> Gear on Landlord and Tenant, sec. 97; *Nave v. Berry*, 22 Ala. 382. Parol evidence of an express notice by the lessor at the time of the lease against certain uses of the premises is admissible when the lease is silent as to such uses: *N. O. C. R. Co. v. Darms*, 30 La. Ann. 766.

<sup>2</sup> *Taylor v. Owen*, 2 Blackf. 301; 20 Am. Dec. 115.

<sup>3</sup> Gear on Landlord and Tenant, sec. 97. See *ante*, Title Real Property, § 2839, Covenants as to Use of Premises.

<sup>4</sup> *Maddox v. White*, 4 Md. 72; and

see note to this case in 59 Am. Dec. 70-72; *Stewart v. Winters*, 4 Sand. Ch. 587. An injunction by the lessor restraining a lessee from the use of the demised premises gives him a cause of action against his lessor which accrues upon the service of the injunction, and not at the commencement of the injunction suit: *Madox v. Humphries*, 24 Tex. 195.

<sup>5</sup> *Brugman v. Noyes*, 6 Wis. 1; *Ree v. Lewis*, 74 Ind. 433; 39 Am. Rep. 88; *Burr v. Spencer*, 26 Conn. 163; 6 Am. Dec. 379. *Contra*, *Deforest v. Bryne*, 1 Hilt. 45.

inconsistent with the forbidden use.<sup>1</sup> A demise of farming lands implies a covenant that they shall be used as such,<sup>2</sup> and a lease of a mining privilege confers no rights to use the land for any purpose except as incident to the mining right.<sup>3</sup> But an implied contract on the part of a lessee to make brick is not created by the lease of a brick-yard.<sup>4</sup>

A covenant not to carry on any trade or business is broken by the use of the premises as a private hospital;<sup>5</sup> or for a charity, where a small compensation is charged;<sup>6</sup> or for a school;<sup>7</sup> or a boarding-house;<sup>8</sup> or a public-house.<sup>9</sup> A covenant not to exercise the trade of a butcher is broken by selling meat, though the animals are slaughtered elsewhere;<sup>10</sup> or though the contract of sale is made off of the premises, if the meat is exposed for sale thereon.<sup>11</sup> A covenant not to occupy as a jobber is broken by the occupancy as an auctioneer.<sup>12</sup> A covenant to keep the premises clean, and not to occupy them as a saloon or a meat market, forbids their use for any foul or unclean occupation.<sup>13</sup> One who hires a house for the storage of furniture, and in violation of his contract places therein other heavy articles, by which the destruction of the building is shown to have been caused, is liable in damages.<sup>14</sup> The use, for the manufacture of caps, of prem-

<sup>1</sup> *Simons v. Farren*, 1 Bing. N. C. 126; *Pease v. Coates*, L. R. 2 Eq. 688; *London etc. R. R. Co. v. Garnett*, L. R. 9 Eq. 26; *Holt v. Collyer*, L. R. 16 Ch. Div. 718; *Jones v. Bone*, L. R. 9 Eq. 674; *Hickman v. Isaacs*, 4 L. T., N. S., 285; *Jones v. Thorne*, 1 Barn. & C. 715; *Wilkinson v. Rogers*, 2 De Gex. J. & S. 62.

<sup>2</sup> *Walker v. Tucker*, 70 Ill. 527.

<sup>3</sup> *Harlow v. Lake Superior Iron Co.*, 26 Mich. 105; *Fire Brick Co. v. Pond*, 38 Ohio St. 65. See *Burr v. Spencer*, 26 Conn. 159; 68 Am. Dec. 379; *Brainard v. Arnold*, 27 Conn. 617.

<sup>4</sup> *Smiley v. McLauthlin*, 138 Mass. 363.

<sup>5</sup> *Bramwell v. Lacy*, L. R. 10 Ch. Div. 691; 27 Week. Rep. 463. But *aliter*

as to a private lunatic asylum: *Wetherell v. Bird*, 2 Ad. & E. 161.

<sup>6</sup> *Rolls v. Miller*, L. R. 25 Ch. Div. 206; L. R. 27 Ch. Div. 71.

<sup>7</sup> *Wilkinson v. Webster*, 6 El. & B. 387; *Johnstone v. Hall*, 2 Kay & J. 414; *Kemp v. Sober*, 1 Sim., N. S., 517; *Bish v. Keeling*, 1 Maule & S. 95.

<sup>8</sup> *Gannett v. Albree*, 103 Mass. 372.

<sup>9</sup> *Bray v. Fogarty*, 4 Ired. Eq. 544.

<sup>10</sup> *Gaskell v. Spry*, 1 Barn. & Ald. 617.

<sup>11</sup> *Davis v. Eslam, Moody & M.* 189.

<sup>12</sup> *Steward v. Winters*, 4 Sand. Ch. 587.

<sup>13</sup> *Clementson v. Gleason*, 36 Minn. 102.

<sup>14</sup> *Brooks v. Clifton*, 22 Ark. 54.

ises leased "to be occupied for the same purposes they now are," and which were occupied at the time of the lease for the manufacture of carpet-bags, is not an alteration in the occupation.<sup>1</sup> A covenant to use a house as a private house only is not broken by an auction sale on the premises of the furniture belonging to the house.<sup>2</sup> A covenant to use the premises for a particular purpose is not broken by a partial non-user.<sup>3</sup>

A lessee, in the absence of an agreement to that effect, or of an express permission from his lessor, has no right to make alterations in the demised premises, as, for example, taking down partitions.<sup>4</sup> But he may remove an obstruction injurious to his use of the premises.<sup>5</sup> The erection, on the sidewalk, of a permanent awning, screwed to the house, is a violation of a covenant not to make any alteration in the house.<sup>6</sup> So is the erection of buildings on the premises.<sup>7</sup> Even where the lease authorizes the lessee to make inside alterations as he might think proper, provided the same do not injure the premises, while the clause authorizes alterations which in point of law, and technically, would be waste, yet they must be such acts only as are unaccompanied with actual injury to the premises; and the acts of alteration must not be wanton and capricious, but must be made with a purpose to facilitate the transaction of the lessee's business.<sup>8</sup> Where, for eight years, a lessor acquiesces in the tenant's use of the premises as an apartment-house by accepting rent without objection, it is then too late to insist that because of such use a forfeiture of the lease may be insisted on.<sup>9</sup>

ILLUSTRATIONS. — A lease contained the covenant that "in case the lessee should suffer or permit more than one family to every hundred acres to reside on, use, or occupy any part of the prem-

<sup>1</sup> *Shumway v. Collins*, 6 Gray, 227.

<sup>2</sup> *Reeves v. Cattell*, 24 Week. Rep. 485.

<sup>3</sup> *Croft v. Lumley*, 6 H. L. Cas. 672.

<sup>4</sup> *Agate v. Lowenbein*, 57 N. Y. 604.

<sup>5</sup> *Bryan v. French*, 20 La. Ann. 366.

<sup>6</sup> *Trenor v. Jackson*, 15 Abb. Pr., N. S., 115.

<sup>7</sup> *Whitwell v. Harris*, 106 Mass. 532.

<sup>8</sup> *Agate v. Lowenbein*, 57 N. Y. 604.

<sup>9</sup> *Smith v. St. Philip's Church*, 107 N. Y. 610.

ises, the lease should be void," etc. *Held*, that letting parts of the premises to persons for a year to cultivate for shares constituted such persons tenants; and there being more than one such tenant to each hundred acres, the lease became thereby void: *Jackson v. Brownell*, 1 Johns. 267; 3 Am. Dec. 326. A provision in a lease of a room in a Masonic temple was against any use that should make the risk from fire "above ordinary or common." *Held*, to refer to the estimate of risks by insurers, and to entitle the lessor to an injunction to restrain the assignee of the lessee from introducing a caloric engine into the premises: *Nova etc. Lodge v. White*, 2 Cin. Rep. 6. A lease contained a covenant by the lessee not to allow any house on the land demised to be used as a "beer-shop." The lessee carried on the trade of a grocer in a house on the demised premises in partnership with his brother. The brother took out an excise license to sell beer at the house by retail, to be consumed off the premises, and did so sell beer there. *Held*, a breach of the covenant: *Bishop of St. Albans v. Battersby*, 26 Week. Rep. 679. A lessee covenanted to use the premises only to keep a lager-beer saloon, and after the beginning of the term fitted up a restaurant thereon at considerable expense, and with no objection from the lessor, although the lessor's representative under a power of attorney knew thereof. *Held*, that the covenant must be deemed to have been waived in that regard: *Malley v. Thalheimer*, 44 Conn. 41. One leased a mill for ten years, with option to purchase it within three years, and on the same day executed a separate agreement not to use it for making packing-boxes, except for certain parties, but within three years took an absolute conveyance of the mill. *Held*, that the restriction upon such manufacture terminated with the lease: *Buffum v. Breed*, 116 Mass. 582.

§ 2840. **To Pay Taxes and Assessments.**—The covenant to pay taxes and assessments will be implied as against the lessor.<sup>1</sup> But the law treats the tenant as the person primarily liable for taxes and assessments on the premises, and the tenant, when called upon, has a right to pay them, making them a charge against the rent due or to be due.<sup>2</sup> The lessee may bind himself by covenant to pay taxes, assessments, or other charges on the property, but his liability in such case must not be extended beyond

<sup>1</sup> 1 Schouler on Personal Property, sec. 30; Taylor on Landlord and Tenant, secs. 341, 342.

<sup>2</sup> Taylor on Landlord and Tenant, secs. 341, 342; 1 Schouler on Personal Property, sec. 30.

the reasonable meaning of the terms employed.<sup>1</sup> A covenant to pay taxes, in a lease of a part of an estate, binds the lessee to pay a proportional part of taxes assessed to the entire estate.<sup>2</sup> The covenant includes such assessments only as are valid, or such as can be legally enforced against the lessor, or against the property.<sup>3</sup> But it includes not only such charges as may be imposed by law then in force, but also such as may be authorized by law afterwards enacted,<sup>4</sup> and likewise taxes for the last year of the term, if assessed before the expiration of the lease, though not levied till after that day.<sup>5</sup> A covenant to pay "all taxes, general and special," assessed against certain property, *prima facie* includes an assessment levied on the property to pay for the reconstruction, or the paving or grading of an adjoining street.<sup>6</sup> Assessments for paving of streets are not embraced in "taxes and other public dues in any manner accruing."<sup>7</sup> A stipulation in a lease of city lots that the lessee should "pay all assessments whatsoever levied," etc., on the premises, does not bind him to pay state, county, and city taxes for general purposes.<sup>8</sup> A lessee is not entitled to a proportionate

<sup>1</sup> *Trinity Church v. Higgins*, 48 N. Y. 532. Compare *Sapsford v. Fletcher*, 4 Term Rep. 511; *Garner v. Hannah*, 6 Duer, 262; *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 64; *Paul v. Chickering*, 117 Mass. 265; *Boone on Real Property*, sec. 103; *Love v. Howard*, 6 R. I. 116; *Codman v. Johnson*, 104 Mass. 491; *Shepardson v. Elmore*, 19 Wis. 424; *Jeffrey v. Neals*, L. R. 6 Com. P. 240. The covenant includes water taxes: *Garner v. Hannah*, 6 Duer, 262; *Hackett v. Richards*, 3 E. D. Smith, 13.

<sup>2</sup> *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 65; *Codman v. Allen*, 9 Allen, 335. The lessor may prove a usage to apportion the taxes among the different tenants according to the amount of rent paid by each: *Amory v. Melvin*, 112 Mass. 83.

<sup>3</sup> *Clark v. Coolidge*, 8 Kan. 189.

<sup>4</sup> *Post v. Kearney*, 2 N. Y. 394; 51 Am. Dec. 303; *Kearney v. Post*, 1 Sand. 105; *Walker v. Whittemore*, 112

Mass. 187. And although the work was done before the commencement of their term, the certificate having been issued and the amount there inserted in the assessment roll during the term: *Shepardson v. Elmore*, 19 Wis. 424. But not, it seems, where the tax is novel and extraordinary in its character, and could not have been in the contemplation of the parties when the covenant was made: *Love v. Howard*, 6 R. I. 116; *Second Universalist Society v. Providence*, 6 R. I. 235.

<sup>5</sup> *Waterman v. Harkness*, 2 M. App. 494; *Wilkinson v. Libbey*, Allen, 375.

<sup>6</sup> *Thomas v. Hooker-Colville Pump Co.*, 22 Mo. App. 8; *Cassady v. Hammer*, 62 Iowa, 359.

<sup>7</sup> *Bolling v. Stokes*, 2 Leigh, 178; 10 Am. Dec. 606; *Twycross v. R. R. Co.*, 10 Gray, 293.

<sup>8</sup> *Stephani v. Catholic Bishop*, 2 M. App. 249.

return of taxes paid by him to the lessor, although the premises are afterwards, and during the year for which the taxes are assessed, destroyed by fire, and the lease is thereby terminated.<sup>1</sup> So a sale of the premises by the lessor after the term has been brought to a close by fire, and upon due notice, does not affect the lessee's covenant.<sup>2</sup> Although a lessor accepting rent after the failure of the lessee to pay taxes waives his right to claim a forfeiture for such failure, the continued failure to pay the taxes within a reasonable time after the receipt of the rent by the lessor occasions a new forfeiture.<sup>3</sup>

ILLUSTRATIONS. — A lease, in 1874, for ten years stipulated that the lessee should pay taxes in addition to rent. During the term, the lessor agreed orally that if the lessee would pay rent promptly, he would assume the taxes. Two months after paying the taxes for 1882, the lessor notified the lessee that unless he would renew the lease, he would be called upon for taxes of that year. The lessee refused to renew. *Held*, that he was liable to the lessor for taxes of 1882: *Bowditch v. Chickering*, 39 Mass. 283. A sale was made of the tenant's leasehold interest by virtue of a warrant for collection of his unpaid residue of an assessment. *Held*, to be no breach of his covenant to pay the taxes: *Goode v. Ruehle*, 23 Mich. 30.

§ 2841. **Covenant to Insure.** — A covenant to insure is never implied, but must be expressed.<sup>4</sup> And an agreement, in a lease of a building, to insure is presumed to mean an insurance against fire.<sup>5</sup> The covenant is broken by the tenant's delaying to insure, however short a time.<sup>6</sup> The neglect of the lessee to procure insurance as covenanted renders him liable for all damages sustained.<sup>7</sup> A fire policy taken by the lessor in his own behalf does not inure to the benefit of a tenant who is bound by a covenant to rebuild;<sup>8</sup> nor is the realization of the money

<sup>1</sup> *Wood v. Bogle*, 115 Mass. 30.

<sup>2</sup> *Paul v. Chickering*, 117 Mass. 265.

<sup>3</sup> *Conger v. Duryee*, 24 Hun, 617.

<sup>4</sup> *Schouler on Personal Property*, sec. 32.

<sup>5</sup> *Rhone v. Gale*, 12 Minn. 54.

<sup>6</sup> *Dore v. Peck*, 1 Barn. & Adol. 428; *Gregory v. Wilson*, 9 Hare, 683.

<sup>7</sup> *Post*, § 2880, Damages.

<sup>8</sup> *Lovett v. United States*, 9 Ct. of Cl. 479; *Ely v. Ely*, 80 Ill. 532; *Leeds v. Cheetham*, 1 Sim. 146.

thereon by the lessor a defense to an express covenant by the tenant to pay rent.<sup>1</sup> Under a lease providing that the lessee shall keep the building insured "by policies, in the name of the lessor, or assigned to her," equity will not decree a forfeiture, where the policies are kept in the name of the lessee, but will regard them as held in trust.

**ILLUSTRATIONS.**—A lease provided that the lessee should pay all extra insurances occasioned by any use to which he might put the premises. He paid a certain sum to the lessor for extra insurance for a certain year, and took a receipt "in full settlement of all extra insurance." During the year the companies all failed, and the lessor reinsured, and paid a further sum for extra insurance. *Held*, that the lessee was not liable therefor. *Quincy v. Carpenter*, 135 Mass. 102. A lessee for a term of years covenanted to keep the premises insured for a certain sum during the term, in companies approved by the lessor, the lease to be forfeited on his neglect. *Held*, that the lessee might take out the insurance on the property for the benefit of both lessor and lessee, according to their respective interests, and was not bound to renew a policy previously taken out by the lessor on his own interest merely: *Sherwood v. Harral*, 39 Conn. 333.

**§ 2842. To Redeliver Possession.**—A covenant to "redeliver or restore the property in the same condition or plight" (or other words of like import) do not bind the tenant to rebuild, in case of casual consumption by fire. Such a covenant amounts to an agreement to take ordinary, reasonable care of the property, according to its nature, and to surrender possession at the expiration of the term.<sup>2</sup> But whatever repairs are necessary to keep the premises in such condition and order must be made by the lessee.<sup>3</sup> A covenant to deliver the premises, at the expiration of the term, in good, tenantable repair, in every respect, binds the covenantor to restore the premises

<sup>1</sup> *Busmann v. Ganster*, 72 Pa. St. 285; *Magaw v. Lambert*, 3 Pa. St. 444. See *Kingsbury v. Westfall*, 61 N. Y. 356.

<sup>2</sup> *Eberts v. Fisher*, 54 Mich. 294.

<sup>3</sup> *Levey v. Dyess*, 51 Miss. 501; *Miller v. Morris*, 55 Tex. 412; 40 Am.

Dec. 814; *Howeth v. Anderson*, 2 Tex. 557; 78 Am. Dec. 539; *Moss v. Old Dominion Iron Co.*, 75 Va. 9; *Moore v. Townsend*, 33 N. J. L. 28; *Hess v. Newcomber*, 7 Md. 325. *Contr.* *Schmidt v. Petit*, 1 McAr. 179.

<sup>4</sup> *Jaques v. Gould*, 4 Cush. 384.

such tenantable condition, without reference to the condition in which he received them.<sup>1</sup> A covenant to surrender the demised premises, "and all the improvements that may be placed thereon by the said" lessees, and all of which are to be surrendered up in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted," embraces additions, erections, or alterations made by the tenants during the term, and these become the property of the lessors.<sup>2</sup>

§ 2843. **Not to Assign or Sublet.**—A covenant frequently inserted in leases is the covenant not to assign or sublet without the consent of the lessor.<sup>3</sup> Covenants or conditions in restraint of alienation in leases for lives or years are valid.<sup>4</sup> Nevertheless such covenants are not regarded with favor by the courts, and will be construed strictly against the lessor, and liberally in favor of the lessee.<sup>5</sup> The covenant not to assign is not broken by underletting the premises;<sup>6</sup> nor by a deposit of the lease as security for a debt;<sup>7</sup> nor a devise of the term;<sup>8</sup> nor by an assignment by a decree in bankruptcy;<sup>9</sup> nor by a sale

<sup>1</sup> *Brashear v. Chandler*, 6 T. B. Men. 30. But see *Coppinger v. Armstrong*, 111 Ill. App. 210. Leaving nine horse-loads of rubbish on the demised premises was held to be no breach of the tenant's agreement peaceably to build up, etc., in good, tenantable repair: *Thorndike v. Burrage*, 111 Mass. 1.

<sup>2</sup> *French v. New York*, 29 Barb. 30; *New York v. Exchange etc. Ins. Co.*, 9 Bosw. 424; *New York v. Hamilton etc. Ins. Co.*, 10 Bosw. 537. <sup>3</sup> *Schouler on Personal Property*, § 32.

<sup>4</sup> *De Peyster v. Michael*, 6 N. Y. 57; 57 Am. Dec. 470; *Lea v. Hoague*, Tex. App. Civ. Cas., sec. 607. <sup>5</sup> *Smith v. Putnam*, 3 Pick. 223; *Lynd v. Fraternity Ass'n*, 16 Ill. App. 4; *Livingston v. Stickles*, 7 Hill, 253;

8 Paige, 404; *Cooney v. Hayes*, 40 Vt. 478; 94 Am. Dec. 425; *Bockover v. Post*, 25 N. J. L. 285.

<sup>6</sup> *Den v. Post*, 25 N. J. L. 285; *Spear v. Fuller*, 8 N. H. 174; 28 Am. Dec. 391; *Hargrave v. King*, 5 Ired. Eq. 430; *McKildoe v. Darracott*, 13 Gratt. 278.

<sup>7</sup> *Doe v. Hogg*, 4 Dowl. & R. 226; *Doe v. Beavan*, 2 Maule & S. 353; *Riggs v. Pursell*, 66 N. Y. 193. But see *Becker v. Werner*, 98 Pa. St. 555.

<sup>8</sup> *Fox v. Swan*, Styles, 482.

<sup>9</sup> *Mitcherson v. Henson*, 8 Term Rep. 57; *Yarnold v. Morehouse*, 1 Russ. & M. 364; *Jackson v. Corlis*, 7 Johns. 531. But *aliter*, where the covenant expressly covers such an assignment: *Boone on Real Property*, sec. 102.

upon execution;<sup>1</sup> nor by a void assignment;<sup>2</sup> nor by a mere change in the business firm of the lessees incident to the admission of a new partner or the withdrawal of an old one.<sup>3</sup> Where a lease is made to one and his assigns, a condition against assigning is repugnant and void.<sup>4</sup> An assignment has been held not a breach of a covenant not to let or underlet,<sup>5</sup> and the lessee's agreement to allow a third person to place a sign upon the outside wall of a leased building, for a certain time, in consideration of an annual payment, creates a license merely, and is not a breach of a covenant not to underlet any part of the premises.<sup>6</sup> The lessor may waive the condition.<sup>7</sup> On a covenant that the lessee shall not assign without the consent of the lessor, such license, once given, removes the restriction forever.<sup>8</sup>

§ 2844. **Assignment of Lease—Distinguished from Sublease.**—Unless restrained by his lease, a tenant for years may assign over his interest, whether the term is in possession or is to commence *in futuro*.<sup>9</sup> To constitute an assignment, the entire interest of the lessee in all the premises included in the assignment must pass to the assignee.<sup>10</sup> Where the lessor leases a part of the premises to another for the remainder of his term, with easements in the other part, this is an under-lease, and not an assignment.<sup>11</sup> So is a lease by the lessee for the unexpired term

<sup>1</sup> *Smith v. Putnam*, 3 Pick. 223; 68 Am. Dec. 455; *Roberts v. Geis*, 2 Weil v. Raymond, 142 Mass. 206; 68 Am. Dec. 455; *Roberts v. Geis*, 2 Jackson v. Kipp, 3 Wend. 230; 478; 94 Am. Dec. 425; *Garner v. Munkwitz v. Uhlig*, 64 Wis. 380. 478; 94 Am. Dec. 425; *Garner v.*

<sup>2</sup> *Doe v. Powell*, 5 Barn. & C. 308.

<sup>3</sup> *Roosevelt v. Hopkins*, 33 N. Y. 81.

<sup>4</sup> *Burton on Real Property*, sec. 852; *Boone on Real Property*, sec. 102.

<sup>5</sup> *Lynde v. Hough*, 27 Barb. 415; *But see Den v. Post*, 25 N. J. L. 285.

<sup>6</sup> *Lowell v. Strahan*, 145 Mass. 1; 1 Am. St. Rep. 422.

<sup>7</sup> *Porter v. Merrell*, 124 Mass. 534.

<sup>8</sup> *Chipman v. Emeric*, 5 Cal. 49; 63 Am. Dec. 80.

<sup>9</sup> *Robinson v. Perry*, 21 Ga. 183;

68 Am. Dec. 455; *Roberts v. Geis*, 2 Daly, 535; *Cooney v. Hayes*, 40 Vt. 478; 94 Am. Dec. 425; *Garner v. Byard*, 23 Ga. 289; 68 Am. Dec. 527; *Crommelin v. Theiss*, 31 Ala. 412; 70 Am. Dec. 497; *Nave v. Berry*, 22 Ala. 383; *Gould v. Eagle Creek Dist.*, 8 Minn. 627; *Dworak v. Graves*, 16 Neb. 706.

<sup>10</sup> *Van Rensselaer v. Gallup*, 5 Denio, 454; *Ind. etc. v. R. R. Co.*, 45 Ind. 281; *Childs v. Clark*, 3 Barb. Ch. 52; 49 Am. Dec. 165. See *Post v. Kearney*, 2 N. Y. 394; 51 Am. Dec. 303.

<sup>11</sup> *McNeil v. Kendall*, 128 Mass. 245; 35 Am. Rep. 373.

a larger rent, and reserving the right of re-entry.<sup>1</sup> While the assignment of a lease carries the whole interest for the term, an under-lease still reserves to the lessee some portion, however small, of that interest.<sup>2</sup> An agreement whereby a lessee sells to another the right to use and possess real estate as long as the lessee could, the rent to be paid to the latter, and he to pay the lessor, is an assignment of the lease.<sup>3</sup> If he parts with his entire interest, he makes a complete assignment; if he transfers his entire interest in a part of the premises, he makes an assignment *pro tanto*.<sup>4</sup> And although the instrument may be in form a sublease, yet if it conveys the whole estate, it will operate as an assignment.<sup>5</sup> But if the lessee retains a reversion in himself, he has made a sublease.<sup>6</sup>

#### § 2845. Assignment—Form of—Rights and Liabilities

**Parties.**—No set form of words is essential to effect the transfer, provided only that the intention of the parties is sufficiently shown;<sup>7</sup> nor need a consideration be expressed.<sup>8</sup> The grant of his entire estate by a lessee amounts to an assignment of the lease, whether the instrument be in form a lease or in terms an assignment.<sup>9</sup> Where the lease is required by the statute of frauds to be in deed or in writing, an assignment of it must be by an instrument of as high a character.<sup>10</sup> A lessee remains liable on his covenants and on his express agreement to pay rent, notwithstanding he may have assigned his lease with

Townsend v. Read, 15 Abb. N. C.

1 Schouler on Personal Property, § 36.

Indianapolis etc. Union v. R. R. Co., 45 Ind. 281.

Woodhull v. Rosenthal, 61 N. Y.

Bedford v. Terhune, 30 N. Y. 457; Am. Dec. 394; McNeil v. Kendall,

8 Mass. 245; 35 Am. Rep. 373; Parmenter v. Webber, 8 Taunt. 593; Langd v. Selmes, 3 Kay & J. 229.

Woodhull v. Rosenthal, 61 N. Y.

391; Collins v. Hasbrouck, 56 N. Y. 157; 15 Am. Rep. 407; Smiley v. Van Winkle, 6 Cal. 605; Constantine v. Wake, 1 Sweeny, 239; Davis v. Morris, 36 N. Y. 569. See Martin v. O'Connor, 43 Barb. 522.

<sup>1</sup> Parmenter v. Webber, 8 Taunt. 593.

<sup>2</sup> Peabody v. Fenton, 3 Barb. Ch. 451.

<sup>3</sup> Boone on Real Property, sec. 101.

<sup>10</sup> Hess v. Fox, 10 Wend. 437; Bridgman v. Tileston, 5 Allen, 371; Brewer v. Dyer, 7 Cush. 337.

the lessor's assent,' and the lessor has accepted rent from the assignee.<sup>3</sup> But where the obligation of the lessee to pay rent is only that which is implied by law from his occupation of the premises, his assignment of the lease and surrender of possession to the assignee with the assent of the lessor extinguishes the privity of estate between the lessor and lessee, and the consequent implied liability of the lessee to pay rent.<sup>3</sup> And the assent of the lessor to such assignment, in the absence of anything appearing to the contrary, may be implied from his charging the rent to the new tenant and accepting payment thereof from him.<sup>4</sup> A lessee can recover rent from the assignee only when he himself has paid the rent to the lessor.<sup>5</sup>

An assignee of a lease, by accepting the assignment thereof, takes it subject to all the covenants running with the land and the payment of the rent which shall there after become due.<sup>6</sup> But the assignee may exonerate himself from further liability by assigning to another, though the latter be a beggar, provided the possession be relinquished, and the assignment not colorable merely.<sup>7</sup> Where one not the lessee of premises is found in possession thereof, the presumption is that he holds as assignee of

<sup>3</sup> *Farrington v. Kimball*, 126 Mass. 313; 30 Am. Rep. 680; *Fletcher v. McFarlane*, 12 Mass. 43; *House v. Burr*, 24 Barb. 525; *Port v. Jackson*, 17 Johns. 237; *Gordon v. George*, 12 Ind. 408; *Greenleaf v. Allen*, 127 Mass. 248; *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 64; *Oswald v. Fralenberg*, 36 Minn. 270; *Washington Gas Co. v. Johnson*, 123 Pa. St. 576; 10 Am. St. Rep. 553.

<sup>4</sup> *Lodge v. White*, 30 Ohio St. 569; 27 Am. Rep. 492; *Taylor v. De Bus*, 31 Ohio St. 468; *Sutliff v. Atwood*, 15 Ohio St. 194; *Bailey v. Wells*, 8 Wis. 141; 76 Am. Dec. 233; *Fisher v. Milliken*, 8 Pa. St. 111; 49 Am. Dec. 497.

<sup>5</sup> *Lodge v. White*, 30 Ohio St. 569; 27 Am. Rep. 492; *Harvey v. McGrew*,

44 Tex. 412; *Moale v. Tyson*, 2 Har. M. 387; *Tate v. McCormick*, 23 Hu. 220.

<sup>6</sup> *Lodge v. White*, 30 Ohio St. 569; 27 Am. Rep. 492.

<sup>7</sup> *Farrington v. Kimball*, 126 Mass. 313; 30 Am. Rep. 680.

<sup>8</sup> *Graves v. Porter*, 11 Barb. 59; *Cox v. Fenwick*, 4 Bibb, 538; *McCormick v. Young*, 2 Dana, 294; *Blake Sanderson*, 1 Gray, 332; *Journedy Brackley*, 1 Hilt. 447; *Overman v. Sabor*, 27 Vt. 54; *Stewart v. R. R. Co.*, 102 N. Y. 601; 55 Am. Rep. 84; *Smith v. Brinker*, 17 Mo. 148; 57 Am. Dec. 265.

<sup>9</sup> *Childs v. Clark*, 3 Barb. Ch. 52; *Am. Dec. 164*; *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481.

the lessee.<sup>1</sup> Assignees of undivided and unequal interests in a lease are jointly and severally liable on the covenants to repair and to deliver up in good condition at the end of the term.<sup>2</sup> Where several persons hold the entire interest of the original lessee of premises, not as joint purchasers, but by separate deeds of assignment, each of them an undivided interest, they are not jointly liable to the lessor for the whole rent. Each assignee is severally liable for a part only, according to his interest in the premises as compared with the whole interest under the lease.<sup>3</sup> An assignee cannot be held liable for rent for a breach of covenant committed before he became such.<sup>4</sup> An assignment of all the right, title, and interest of the lessee conveys his right to compensation for new erections on the land covenanted by the lease to be paid for by the lessor; for such a covenant runs with the land.<sup>5</sup> The assignment of a lease as collateral security for a loan does not entitle the assignee to the possession of the demised premises, except upon a breach of the agreement; and he is not liable to the reversioner on the ground of privity of contract, but by privity of estate, or the actual occupation and beneficial enjoyment.<sup>6</sup> A lessee of land who has not paid the rent reserved in the lease cannot maintain an action against an assignee of the lease for such rent.<sup>7</sup> An estate to arise in future cannot be tacked to the estate of a lessee who has assigned his whole term so as to create a reversion in him, and establish the relation of landlord and tenant between him and the assignee, so far as strictly reversionary rights are con-

<sup>1</sup> *Ecker v. R. R. Co.*, 8 Mo. App. 223; *Eblin v. Fuylein*, 2 Mo. App. 252.

<sup>2</sup> *Coburn v. Goodall*, 72 Cal. 498.

<sup>3</sup> *Babcock v. Scovilles*, 56 Ill. 461;

*St. Louis Public Schools v. Ins. Co.*, 5 Mo. App. 91.

<sup>4</sup> *Paul v. Norse*, 8 Barn. & C. 486;

*Culbertson v. Irving*, 4 Hurl. & N. 742;

*Harley v. King*, 2 Crompt. M. & R. 22;

*Johnson v. Sherman*, 15 Cal. 287; 76

Am. Dec. 481; *Kain v. Hoxie*, 2 Hilt.

311; *Hintze v. Thomas*, 7 Md. 346;

*Patten v. Deshon*, 1 Gray, 329; *John-*

*ston v. Bates*, 48 N. Y. Sup. Ct. 180;

*Townshend v. Scholey*, 39 Cal. 18.

<sup>5</sup> *Hunt v. Danforth*, 2 Curt. 592.

<sup>6</sup> *Eugels v. McKinley*, 5 Cal. 153.

<sup>7</sup> *Farrington v. Kimball*, 126 Mass.

313; 30 Am. Rep. 680.

cerned, or prevent that relation from existing between the assignee and the original landlord.<sup>1</sup>

ILLUSTRATIONS.—G. covenanted as lessee to pay rent for use and occupation of "premises for and as a dry-goods and millinery store," and that no assignment or underletting without the written consent of the lessor should be valid. G. assigned the lease to M. with such consent, and M., with the like consent but without the assent or knowledge of G., assigned the lease to S. for use and occupation as a dye-house office. *Held*, that during the occupation of S., G. was released from liability to pay rent: *Fifty Associates v. Grace*, 125 Mass. 161; 28 Am. Rep. 218. A bought a lease from B under an agreement that he should refund any charge that A should be put to by reason of his purchase. The owner of the freehold recovered against him in ejectment, and to remain in possession he was obliged to take a new lease at an increased rent. *Held*, that B was liable for the increase: *Wray v. Lemon*, 81½ Pa. St. 273. A lease forbade assignment without the lessor's assent. This he withheld but accepted rent from the lessee's assignee, made repairs and alterations at his request, and finally bought personalty of him and credited the price on the rent. *Held*, that rent accruing after the assignment could not be collected of the lessee: *Colton v. Gorham*, 72 Iowa, 324.

§ 2846. **Assignment by Operation of Law.**—A lease may be assigned by operation of law. Thus where the lessee becomes bankrupt, his assignee takes the leased premises as part of the estate.<sup>2</sup> By the sale of a term on execution, the purchaser is made an assignee.<sup>3</sup> At common law, on the marriage of a female lessee, the term is transferred by operation of law to her husband.<sup>4</sup> On the death of a lessee, his executor or administrator is liable as assignee of the leasehold estate.<sup>5</sup>

§ 2847. **Right to Sublet—Rights and Liabilities.**—A tenant for years has a right to underlet for so long as his interest continues, unless restrained therefrom by some

<sup>1</sup> *Stewart v. R. R. Co.*, 102 N. Y. 372; *Taylor v. Cole*, 3 Term Rep. 601; 55 Am. Rep. 844.

<sup>2</sup> 1 Schouler on Personal Property, sec. 35. <sup>3</sup> *Co. Lit.* 44 b.

<sup>4</sup> *Tremeere v. Morison*, 1 Bing. N. C. 89; *James v. Dean*, 11 Ves. 393.

covenant or condition in the lease.<sup>1</sup> A tenant under a lease containing no restrictions against subletting, who has been evicted and been prevented by his landlord from subletting, whereby he might have recompensed himself for the rent paid, may maintain an action for such sum against his landlord.<sup>2</sup> But equity enjoined a lessee from subletting, on the ground of fraud, where the lessee, who had occupied the premises during a former term as a drug-store, obtained a new lease, at the instance of the sublessees, for the purpose of subletting the premises to them to use in retailing spirituous liquors, without informing the lessor of the use to be made of the premises, and knowing that the lessor would not rent them for that purpose.<sup>3</sup> In California a tenant who sublets in violation of a covenant in the lease terminates it, and after three days' notice to quit, may be sued in unlawful detainer.<sup>4</sup> A covenant not to sublet will not be broken by an assignment;<sup>5</sup> or by a subdividing of the premises for the separate use of joint lessees;<sup>6</sup> or by taking others into possession with the lessee;<sup>7</sup> or merely putting another in possession;<sup>8</sup> or granting a license or right of way.<sup>9</sup> There is no privity of estate between the original lessor and the sublessee, and the latter is not liable to the former for the rent reserved in the first lease;<sup>10</sup> he is liable only to his immediate lessor for the payment of

Pike v. Eyre, 9 Barn. & C. 909; Jackson v. Harrison, 17 Johns. 70; n v. Post, 25 N. J. L. 285; Roberts v. Geis, 2 Daly, 535; 1 Schouler on Personal Property, sec. 36; Goldsmith v. Wilson, 68 Iowa, 685.

Rowbatham v. Pearce, 5 Del. Ch. 10.

Parkman v. Aicardi, 34 Ala. 393; Am. Dec. 457.

Bernero v. Allen, 68 Cal. 505.

Field v. Mills, 33 N. J. L. 254;

Inde v. Hough, 27 Barb. 415.

Boyd v. Fraternity Ass'n, 16 Ind. App. 574.

Schroeder v. King, 38 Conn. 79;

Roosevelt v. Hopkins, 33 N. Y. 81; Hargrave v. King, 5 Ired. Eq. 430; Boyd v. Fraternity Ass'n, 16 Ill. App. 574.

<sup>8</sup> Church v. Brown, 15 Ves. 265; Williams v. Cheney, 3 Ves. 61.

<sup>9</sup> Pence v. R. R. Co., 28 Minn. 488; Lowell v. Strahan, 145 Mass. 1.

<sup>10</sup> Jennings v. Alexander, 1 Hilt. 154; Dartmouth College v. Clough, 8 N. H. 22; McFarlan v. Watson, 3 N. Y. 286; Amsby v. Woodward, 9 Dowl. & R. 536; 1 Schouler on Personal Property, sec. 36; Fulton v. Stuart, 2 Ohio, 215; 15 Am. Dec. 542; Giddings v. Felker, 70 Tex. 176.

rent and the performance of covenants.<sup>1</sup> Therefore the under-lessee cannot be sued by the original lessor upon the lease, and covenant contained in the lease,<sup>2</sup> and no covenants entered into by the original lessee are binding upon the under-tenant, although they may be covenants running with the land, such as to pay rent, or to keep in repair. A sublessee's remedy for damages caused by the defective condition of premises which the original lessor has agreed to keep in repair is against his immediate lessor and not against the original lessor.<sup>4</sup> The landlord is under no obligation to the subtenant to keep the leased premises in repair, and is therefore not liable in damages for injuries to the property of the subtenant caused by the falling of the building, by reason of the defective condition of its walls, where the subletting and occupancy under it was without the knowledge, notice, or assent of the landlord, and in violation of a covenant not to sublet.<sup>5</sup>

#### § 2848. Liability of Lessee for Acts of Subtenants.

Where there is a demise of premises, the tenant is impliedly, if not expressly, bound to deliver up possession on the expiration of his term, and therefore, if his under-tenants refuse to quit, he will be liable to his landlord for their overholding, as well as for the costs the landlord may incur in obtaining the clear possession.<sup>6</sup> And if the landlord lets the premises in reversion to another, and has to pay damages by reason of having been thus prevented from giving possession, the tenant is liable for damages and costs.<sup>7</sup> A lessee cannot have the lease can-

<sup>1</sup> *Harvey v. McGraw*, 44 Tex. 412; *Taylor on Landlord and Tenant*, secs. 16, 108, 109; *Doe v. Bateman*, 2 Barn. & Adol. 168; *Doe v. Byron*, 1 Com. B. 623; *Davis v. Morris*, 36 N. Y. 569.

<sup>2</sup> *Taylor on Landlord and Tenant*, secs. 16, 108, 109.

<sup>3</sup> *Martindale on Conveyancing*, sec. 313.

<sup>4</sup> *Quay v. Lucas*, 25 Mo. App. 4.

<sup>5</sup> *Donaldson v. Wilson*, 60 Mich. 81 Am. St. Rep. 487.

<sup>6</sup> *Henderson v. Squire*, L. R. 4 Q. B. 170; 38 L. J. Q. B. 73; *Ibbs v. Richardson*, 9 Ad. & E. 849; 1 Perm. & D. 618; *Harding v. Crethorn*, Esp. 57.

<sup>7</sup> *Bramley v. Chesterson*, 2 Com. B. N. S., 592.

held on the ground of another being in possession of the premises, the fact being that such person had been a tenant, and was holding over without right, or at most, upon verbal agreement to execute a lease.<sup>1</sup>

§ 2849. **Assignment by Landlord.**—The lessor may assign or convey his reversion. Such an assignment must be by deed, as his reversion is an incorporeal hereditament.<sup>2</sup> Rents are incident to the reversion, and when the estate is transferred, go to the assignee, unless they are overdue, or are secured by note.<sup>3</sup> A lessor may grant the whole or any part of the premises out of which rent issues, and the lessee will be bound to pay the whole or a proportionate share of the rent to the grantee, and the latter has all the remedies to enforce payment which the lessor had.<sup>4</sup> So a conveyance of the reversion carries the crop growing upon it.<sup>5</sup> A lessor may convey the reversion with the rent, or, retaining the reversion, may assign the rent.<sup>6</sup> A landlord who has assigned the rent for the payment of his debt may at any time pay the balance of the debt and regain the title to the rent.<sup>7</sup> The landlord's estate may likewise be assigned by operation of law, as in the case of his death or bankruptcy.<sup>8</sup>

*Field v. Herrick*, 101 Ill. 110.  
*Schouler on Personal Property*,  
 § 178; A lessor's right to re-enter leased  
 premises for a forfeiture of the lease  
 not assignable: *Trask v. Wheeler*, 7  
 Conn. 109.

*Wilcoxon v. Donnelly*, 90 N. C. 245;  
*Wheeler v. Stagner*, 3 B. Mon. 58; 38 Am.  
 Dec. 178; *Alabama etc. Ins. Co. v. Oli-*  
*ver*, 78 Ala. 158; *Eiseley v. Spooner*, 23  
 Mo. 470; 8 Am. St. Rep. 128; *King v.*  
*R. Co.*, 45 Conn. 226; *Stout v. Kean*,  
*arr. (Del.)* 82; *Dixon v. Nichols*, 39  
 Me. 372; 89 Am. Dec. 312; *Gale v.*  
*Ward*, 52 Me. 363. A purchaser  
 of leased land at a partition sale is  
 not released from liability to the ven-  
 dor until after notice from the ven-

dor claiming the rent: *Gray v. Rogers*,  
 30 Mo. 258.

<sup>1</sup> *Crosby v. Loop*, 13 Ill. 625.

<sup>2</sup> *Burnside v. Weightman*, 9 Watts,  
 46.

<sup>3</sup> *Perrin v. Lepper*, 34 Mich. 292;  
*Beal v. Boston Car Spring Co.*, 125  
 Mass. 157; 28 Am. Rep. 216. An as-  
 signment, executed on August 31st,  
 of "all rents due and coming due to  
 me, until October 1st," from the tenant  
 of a certain estate who pays his rents  
 on the first day of each month, in-  
 cludes the rents which fall due on  
 October 1st: *Kendall v. Kingsley*, 120  
 Mass. 94.

<sup>4</sup> *Hendershott v. Calhoun*, 17 Ill.  
 App. 163.

<sup>5</sup> *Schouler on Personal Property*,  
 sec. 35. The lessor's heirs who suffer  
 tenants to continue their occupation

§ 2850. **Attornment—Payment of Rent without Notice.**—Formerly, in order to make the assignment, it was necessary that the tenant should attorn, that is, recognize the assignee as his landlord. An attornment is a continuation of the existing lease upon the same conditions in all respects, simply putting another in the place of the original landlord. There is a new tenancy only when the terms and conditions of the original lease are departed from.<sup>1</sup> A tenant has a right to attorn to one who has acquired his landlord's title, but not to one who has acquired a title hostile to the landlord, although it may be a better title.<sup>2</sup> This formality is now rendered unnecessary in most of the states, the landlord's conveyance being valid without the attornment of the tenant.<sup>3</sup> But in these states the statutes also provide that a payment of rent made by the tenant in good faith, and without notice of the conveyance to his original landlord, is a good and valid discharge.<sup>4</sup> Payment of rent in advance is good as against the vendee of the leased premises without notice of the payment.<sup>5</sup>

§ 2851. **Covenants as to Improvements.**—A tenant cannot charge the landlord for improvements put upon the property, although he expected to buy it, and although the landlord stood by and witnessed the putting on of the improvements.<sup>6</sup> A lessee having made permanent improvements upon demised premises under a covenant that he shall be repaid their value may seek relief in equity or at law.<sup>7</sup> Where he is evicted for a breach of

as before without questioning the validity of their title, or requiring any change of terms, must be considered as having consented to their occupying upon the terms on which they had entered and had previously occupied: *King v. Woodruff*, 23 Conn. 56; 60 Am. Dec. 625.

<sup>1</sup> *Austin v. Ahearne*, 61 N. Y. 6; *Tilford v. Fleming*, 64 Pa. St. 300.

<sup>2</sup> *Bailey v. Moore*, 21 Ill. 165.

<sup>3</sup> 1 *Stimson's American Statute Law*, sec. 2008; *Burden v. Thayer*, 3 Mo. 76; 37 Am. Dec. 117.

<sup>4</sup> 1 *Stimson's American Statute Law*, sec. 2008.

<sup>5</sup> *Stone v. Patterson*, 19 Pick. 47; 31 Am. Dec. 156.

<sup>6</sup> *Woolley v. Osborne*, 39 N. J. Eq. 8.

<sup>7</sup> *Conover v. Smith*, 17 N. J. Eq. 86 Am. Dec. 247; *Yeatman v. Clement*, 6 Mo. App. 210.

tenant to pay rent, he is entitled to have the value of repairs made by him, under an agreement that the cost thereof should be applied in the payment of the rent, deducted from the rent due at the time of the eviction, although the lessor has never approved them, nor any settlement been made as to their value.<sup>1</sup> A landlord who, in consideration of improvements and repairs made by the tenant, promises the latter that he shall retain possession of the premises as long as he paid a stipulated annual rent, may not evict the tenant without accounting for the improvements.<sup>2</sup> Where the lessee is permitted to make improvements on the demised premises at his own cost, and at the expiration of the lease all such improvements should remain on the premises, the lessor paying the value thereof, the value is to be taken as of the time of the expiration of the lease.<sup>3</sup> Under a stipulation giving the lessee the right at the end of the lease to remove buildings erected during the term, he is entitled to a reasonable time in which to remove them, and if such removal is prevented by an act of the lessor, or by a provision of the lease, or by an independent contract with the lessor, the right will not be suspended, and will revive upon the removal of the obstruction.<sup>4</sup> The tenant is not liable for such necessary damage to the freehold as is occasioned by removing them with due care.<sup>5</sup> A tenant who holds a lease, with all the privileges belonging thereto, as enjoyed by S. H. is not bound by the covenant of S. H. to leave all buildings which he might erect during his tenancy.<sup>6</sup> A tenant by a lessor to build on the leased premises does not, by implication, impose on him the obligation to

*Fillebrown v. Hoar*, 124 Mass. 580.  
 agreement in a lease that the land-  
 will pay for buildings erected by  
 tenant on the demised premises,  
 renew the lease, does not affect the  
 of the landlord to dispossess the  
 tenant for non-payment of rent: *Paine*  
*Trinity Church*, 7 Hun, 89.

<sup>1</sup> *Oneal v. Orr*, 5 Bush, 649.

<sup>2</sup> *Berry v. Van Winkle*, 2 N. J. Eq. 390.

<sup>3</sup> *Cheatham v. Plinke*, 1 Tenn. Ch. 576.

<sup>4</sup> *Hunt v. Potter*, 47 Mich. 197.

<sup>5</sup> *Ombony v. Jones*, 19 N. Y. 234.

rebuild in case of the destruction of the building by fire during the tenancy.<sup>1</sup>

ILLUSTRATIONS. — A lease provided that the lessor at the expiration of the term should pay for improvements, "provided the said premises shall not be relet to the lessee." The tenant, after the term, held over, paying rent monthly. *Held*, not a reletting: *Moseley v. Allen*, 138 Mass. 81. P. covenanted in a lease to pay for certain improvements made by D., if the premises were "sold within three years," otherwise not. P. entered into a contract to sell before the expiration of the three years, but did not execute a deed until thereafter. *Held*, that the premises were not "sold" until a deed was delivered: *Stewart v. Pier*, 58 Iowa, 15. A covenant was, that if, at the expiration of a lease, the lessee did not purchase the premises, the improvements should go to the lessor; the lessee did agree to purchase, and took a bond for title, but never paid. *Held*, that he had never purchased: *Merritt v. Judd*, 14 Cal. 59. A lease of a dwelling-house provided that if the lessor should by notice sooner terminate the lease, the lessee should be paid such sum as a compensation for the loss he might "by such abridgment of the term sustain in consequence of expenditures incurred by the lessee in fitting up the premises, and expenses incurred in removing." The building was then in thorough repair, but the lessee made some changes in it, and furnished it. In an action brought by him therefor after such termination, *held*, 1. That the words "fitting up the premises" included not only the fitting up of the building and premises to the uses of the lessee, but the fitting of his furniture to the building, such as carpets, window-curtains, etc.; 2. That the measure of his damages was the loss sustained by reason of his having incurred such expenditures, the full benefit of which he had lost by the abridgment of his lease, and not the entire cost of fitting up: *Pratt v. Paine*, 119 Mass. 439. A lease provided that in case the lessee should take down and remove the buildings then on the land, or any part thereof, and erect upon said land, in place thereof, a substantial building, that at the expiration of his lease he should be paid by his lessor the value of such building so erected by him. *Held*, that the lessee could not claim payment for improvements made to the building already on the land, although the nature and style of the building was wholly changed: *Smith v. Cooley*, 5 Daly, 401. A lease of a lot contained a covenant that, at the expiration of the term, the landlord should pay the tenant the appraised value of a dwelling-house to be erected thereon by the latter, or otherwise, gran

<sup>1</sup> *Cowell v. Lumley*, 39 Cal. 151; 2 Am. Rep. 430.

a new lease for a like term at a rent equal to seven per cent per annum on the appraised value of the lot. *Held*, that the tenant might retain possession of the premises after the expiration of the term until the landlord or his representatives formed such covenant; that he was not discharged from the payment of rent for time he held over, but became a tenant from year to year, subject to the terms of the original lease; that the landlord was subject to the same terms, and was entitled to rent proportioned to the increased value of the premises: *Holsman v. Abrams*, 2 Duer, 435.

**2852. Option to Purchase.**—An agreement to give the lessee of land the option of purchasing it may be enforced by him, although the election to purchase rests solely with him, and this optional right may be transferred by him to his vendee. The lessee has an equitable estate in the land under his contract for an option to purchase, which passes to his alienee, vesting him with the right to call for a specific execution on declaring his election. And this right may be enforced against a second purchaser with notice from the original vendor.<sup>1</sup> A tenant having, by his lease, the privilege of purchasing the premises, remains, until such privilege has been waived, a mere tenant, subject to the same obligations as other tenants, and answerable for any waste committed by him; but his liability to suit for waste is suspended until it is known whether or not he will avail himself of his privilege.<sup>2</sup>

**2853. Other Covenants and Agreements.**—A covenant to reside on the premises is valid, and will be enforced,<sup>3</sup> but is fulfilled by the occupancy of them by an

*Kerr v. Day*, 14 Pa. St. 112; 53 Am. L. Rep. 526; *De Rutte v. Muldoon*, 16 Cal.

See *Callaghan v. Hawkes*, 121 N. H. 298; *Mason v. Payne*, 47 Mo.

*Schroeder v. Gemender*, 10 Nev. 10; *Prout v. Robey*, 15 Wall. 471;

*King v. Gibbs*, 125 Ill. 85; 8 Am. L. Rep. 345; *Flynn v. Coal Co.*, 72

Pa. 738. *Powell v. R. E. Co.*, 16 Or. 33; 8

St. Rep. 251.

<sup>1</sup> *Doe v. Hawke*, 2 East, 481; *Tatem v. Chaplin*, 2 H. Black. 133; *Doe v. Clarke*, 8 East, 185; *Doe v. Carter*, 8 Term Rep. 57, 300; *Ponsonby v. Adams*, 2 Brown Parl. C. 431. A lease of a dwelling-house to a woman for life containing this provision: "But only for herself to occupy for a residence," and providing that upon any violation of its covenants the lease should thereby terminate, is not vio-

agent.<sup>1</sup> The lessor's covenant to furnish cows fit for dairying, "number not limited," binds him to stock the land.<sup>2</sup> A covenant by the lessor to supply seed is broken by not furnishing good seed, and the tenant may recover for the loss sustained by him from the breach.<sup>3</sup> A covenant to pay the proportionate part of the expense of heating does not include the cost of the heating apparatus and its appliances, the expense of repairing them, nor their depreciation in value.<sup>4</sup> A covenant that the landlord may, in a certain case, evict the lessee's tenant and then relet the premises in behalf of the lessee, the latter being in any case responsible for any deficiency of the rent, is valid.<sup>5</sup> A lessor who covenants that certain acts to be done by him on the leased premises shall be without damage to the lessee is liable for damages occasioned to the latter by reason of such acts, whether the same were done either with or without negligence on his part.<sup>6</sup>

### § 2854. Dependent and Independent Covenants.

Covenants are either dependent or independent; and whether they are the one or the other depends ordinarily on the intention of the parties.<sup>7</sup> As a rule, courts will construe mutual covenants as dependent, where a contrary intention does not appear.<sup>8</sup> If mutually covenanted acts are to be concurrently done, or one which is the consideration for the other is to precede it, they are dependent;<sup>9</sup> but if the acts are to be performed, or may be

performed by her subsequently marrying a husband, who, with four children, came to reside with her upon the leased premises: *Schroeder v. King*, 38 Conn. 78.

<sup>1</sup> *Clark v. Clark*, 49 Cal. 586.

<sup>2</sup> *Griffiths v. Henderson*, 49 Cal. 566.

<sup>3</sup> *Flick v. Wetherbee*, 20 Wis. 392.

<sup>4</sup> *Stanwood v. Comer*, 118 Mass. 54.

<sup>5</sup> *Hall v. Gould*, 13 N. Y. 127.

<sup>6</sup> *Roussinet v. Rebout*, 76 Cal. 454.

<sup>7</sup> *Hill v. Bishop*, 2 Ala. 320; *How-*

*land v. Leach*, 11 Pick. 154; *Lunn v. Gage*, 37 Ill. 19; 87 Am. Dec. 233.

<sup>8</sup> *Abrahams v. Watson*, 59 Ala. 5.

*Mecum v. R. R. Co.*, 21 Ill. 5.

*Clopton v. Bolton*, 23 Miss. 78.

<sup>9</sup> *Grant v. Johnson*, 5 N. Y. 2.

*Dakin v. Williams*, 11 Wend. 4.

*Parker v. Parmalee*, 20 Johns. 13.

*Honnsford v. Fisher*, Wright, 53.

*Day v. Essex Bank*, 13 Vt. 97; *But-*

*v. Manny*, 52 Mo. 497; *Heine v. Tre-*

*well*, 72 Cal. 217.

formed, at different times, without reference to precedence of the consideration, the covenants are independent,<sup>1</sup> and one is not to be construed as a condition precedent to the other unless plainly expressed.<sup>2</sup> A covenant is generally independent where it goes only to a part of the consideration.<sup>3</sup> The following covenants have been held independent covenants, viz.: To pay wages of a fit and proper person to be appointed by the lessor;<sup>4</sup> to allow the lessee to end the term upon the performance of the covenants;<sup>5</sup> to pay rent, and to allow enjoyment of the land;<sup>6</sup> to keep a house in repair after the lessor has repaired it;<sup>7</sup> to repair with material to be found by the lessor;<sup>8</sup> to make improvements with the approbation of competent surveyors to be appointed by the lessor.<sup>9</sup> The following covenants have been held independent, viz.: For quiet enjoyment, and to pay rent and insure;<sup>10</sup> that the lessor shall repair a mill, and that the lessee shall not run it at a certain speed;<sup>11</sup> to commence by a certain day to operate a mine upon which royalty is to be paid;<sup>12</sup> to give

*Front St. M. & O. R. R. Co. v. Porter*, 50 Cal. 577; *Mullins v. Cabiner*, 21; *Craddock v. Aldridge*, 15; *Couch v. Ingersoll*, 2 Pick. 15; *Tileston v. Newell*, 13 Mass. 410; *Alwin v. Holbrook*, 4 Wend. 377; *Wiso v. Madan*, 2 Johns. 145; *Cunham v. Morell*, 10 Johns. 203; 6 Dec. 332; *Pordage v. Cole*, 1 Sand. 320 a; *Campbell v. Jones*, 6 N. Rep. 571; *Heard v. Wadham*, 1 N. Rep. 629; *Terry v. Dantze*, 2 H. Black.

*Front Street M. & O. R. R. Co. v. Porter*, 50 Cal. 577; *Hilsendegen v. Sch.*, 55 Mich. 468.

When a covenant goes only to a part of the consideration, it is usually independent covenant: *Chic. L. N. & B. v. Brown*, 103 Ill. 317; *Nelson v. Nelson*, 41 Ill. 18; *Obermyer v. Nichols*, 10 N. 159; 6 Am. Dec. 439; *Bennett v. Hixley*, 7 Johns. 249; *Butler v. Butler*, 52 Mo. 506; *Smith v. Busby*, 10. 387; 57 Am. Dec. 207; *Boone v. Boone*, 1 H. Black. 273; *Duke of St. Albans v. Shore*, 1 H. Black. 270;

*Pordage v. Cole*, 1 Sand. 320 b; *Baggallay v. Pettit*, 5 Com. B., N. S., 637; *Carpenter v. Cresswell*, 4 Bing. 409.

<sup>4</sup> *Lawton v. Sutton*, 9 Mees. & W. 795.

<sup>5</sup> *Porter v. Shepherd*, 6 Term Rep. 665; *Friar v. Grey*, 5 Ex. 584.

<sup>6</sup> *Abrams v. Watson*, 59 Ala. 524; *Thompson v. Gray*, 2 Stew. & P. 60.

<sup>7</sup> *Slater v. Stone*, Cro. Jac. 645; *Hutchinson v. Reed*, 4 Ex. 761; *Hunt v. Bishop*, 8 Ex. 675; *Neale v. Ratcliff*, 15 Q. B. 916.

<sup>8</sup> *Gear on Landlord and Tenant*, sec. 85.

<sup>9</sup> *Hunt v. Bishop*, 8 Ex. 675; *Coombe v. Greene*, 11 Mees. & W. 480.

<sup>10</sup> *Dawson v. Dyer*, 5 Barn. & Adol. 584. A mere agreement by a tenant from month to month to pay rent in advance is a personal covenant, and not a condition precedent to the right of possession: *Hilsendegen v. Scheich*, 55 Mich. 468.

<sup>11</sup> *Hinckley v. Beckwith*, 23 Wis. 328.

<sup>12</sup> *Barker v. Dale*, 3 Pittab. Rep. 190.

an option to purchase up to a certain date, though the lease ends sooner, by a fire;<sup>1</sup> to repair, the lessor to furnish materials upon notice;<sup>2</sup> to work for a certain term, the employer to furnish a house;<sup>3</sup> to allow keeping repairs out of rent, and to do them to the approval of the lessor;<sup>4</sup> to pay an annuity, and to assign premises to be quietly enjoyed;<sup>5</sup> to pay rent as long as received by the assignee from the sublessee, and to indemnify the lessee;<sup>6</sup> a warrant seaworthiness of a boat leased, and to pay expenses and return in as good condition, etc.;<sup>7</sup> to leave enough compost for soil at the end of the term, certain privileges being granted during the term;<sup>8</sup> and that the lessor may take possession at his option, paying compensation;<sup>9</sup> to procure extension of a lease for a proposed assignee, who may annul the agreement to assign if mortgage security is defective;<sup>10</sup> to pay rent and to repair,<sup>11</sup> or to make improvements,<sup>12</sup> or to furnish seed, rail-stuff, and firewood,<sup>13</sup> or not to lease another part of the building for a saloon;<sup>14</sup> to grant a lease, and to pay money by instalments at stated times;<sup>15</sup> to do work to be left to the superintendence of others;<sup>16</sup> to supply seed and to pay rent.<sup>17</sup>

§ 2855. **Waste — In General.** — Waste is a lasting damage to the reversion caused by the destruction or material alteration of such things on the land as are n

<sup>1</sup> *Edwards v. West*, L. R. 7 Ch. Div. 858.

<sup>2</sup> *Tucker v. Linges*, L. R. 21 Ch. Div. 18.

<sup>3</sup> *Betts v. Perine*, 14 Wend. 219.

<sup>4</sup> *Dallman v. King*, 4 Bing. N. C. 105. See *Stadhart v. Lee*, 3 Best & S. 364.

<sup>5</sup> *Rose v. Poulton*, 2 Barn. & Adol. 822.

<sup>6</sup> *Crossfield v. Morrison*, 7 Com. B. 286.

<sup>7</sup> *Clifford v. Smith*, 4 Ind. 377.

<sup>8</sup> *Dodd v. Innis*, Loft, 56.

<sup>9</sup> *Gardner v. Kennard*, 12 Q. B. 244.

<sup>10</sup> *Pearsoll v. Frazer*, 14 Barb. 564.

<sup>11</sup> *Lewis v. Chisholm*, 68 Ga. 40; *Allen v. Culver*, 3 Denio, 284; *Tibbits*

*v. Percy*, 24 Barb. 39; *Smith v. Will*, 1 Baxt. 419.

<sup>12</sup> *Bryan v. Fisher*, 3 Blackf. 3; *Ellis v. McCormick*, 1 Hilt, 3; *Gourdin v. Davis*, 2 McCord, 5; *Reed v. Seymour*, 24 Minn. 273.

<sup>13</sup> *Benson v. Hobbs*, 4 Har. & J. 2.

<sup>14</sup> *Chic. L. News Co. v. Browne*, 111. 317.

<sup>15</sup> *Manning v. Brown*, 10 Me. 4; *Freeland v. Mitchell*, 8 Mo. 4; *Champion v. White*, 5 Cow. 509; *W. Cox v. Ten Eyck*, 5 Johns. 78; *Benson v. Hobbs*, 4 Har. & J. 285; *Baggal v. Pettit*, 5 Com. B., N. S., 637.

<sup>16</sup> *Cannock v. Jones*, 3 Ex. 233; *Jones v. Cannock*, 5 Ex. 713.

<sup>17</sup> *Benson v. Hobbs*, 4 Har. & J. 2.

cluded in its temporary profits, but which belong to the inheritance.<sup>1</sup> In order to constitute waste, it is essential that the act of the tenant should be prejudicial to the inheritance, or to those entitled to the reversion or remainder.<sup>2</sup> Independently of any agreement, the law imposes upon every tenant, whether for life or for years, the obligation to treat the premises in such a manner that no substantial injury shall be done to them, so that they may revert to the lessor at the end of the term unimpaired by any willful or negligent conduct on his part.<sup>3</sup> Waste is either voluntary, which means the doing of a positive act injurious to the inheritance, or permissive, which means an act of omission which results in a similar injury.<sup>4</sup> Waste forfeits the part of premises wasted, but by a destruction of the dwelling-house the whole premises are forfeited.<sup>5</sup>

§ 2856. **Buildings — Repairs.** — Waste may be committed by pulling down buildings or permitting them to go to decay;<sup>6</sup> or by tearing boards from buildings and destroying fences.<sup>7</sup> The tenant has no right to make improvements or alterations in buildings if they will permanently change the nature of the property and prevent him from restoring it substantially as he received it.<sup>8</sup> Even a stipulation in a lease that the lessee "may make alterations in the building now on said lands, so as to adapt it to other business than that of a livery-stable," does not confer a power to tear down and destroy such a building, even though he should erect a better or more

<sup>1</sup> *Tudor's Lead. Cas. Real Prop.* 90; *Wills v. Layton*, 1 Del. Ch. 226; 12 m. Dec. 91. An action may be maintained by a remainderman or reversioner after the purchase by him of particular estate for waste committed before: *Dupree v. Dupree*, 4 Jones, 57; 69 Am. Dec. 757.

<sup>2</sup> *Pyncheon v. Stearns*, 11 Met. 304; 5 Am. Dec. 207.

<sup>3</sup> *Carlin v. Ritter*, 68 Md. 478; 6 m. St. Rep. 467; *Powell v. R. R. Co.*, 5 Or. 33; 8 Am. St. Rep. 251.

<sup>4</sup> The tenant is liable to the landlord for all waste, by whomsoever committed, having his right of action over against the actual wrong-doer: *Parrott v. Barney*, 2 Abb. C. C. 197.

<sup>5</sup> *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 622.

<sup>6</sup> *Co. Lit.* 53 a; 2 Greenl. Cruise, 124, 126.

<sup>7</sup> *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 622.

<sup>8</sup> *Agate v. Lowenbein*, 57 N. Y. 604; *Winship v. Pitts*, 3 Paige, 262.

expensive one in its place, and such conduct would be waste.<sup>1</sup> It is not waste to erect a new building upon the premises, provided it can be done without destroying or materially injuring the buildings or other improvements already existing there.<sup>2</sup> Erecting new houses or opening ways on premises is not waste, though cellars are dug under the houses and drains are made on each side of the way.<sup>3</sup> If a house is in a ruinous condition when the tenant takes possession, it is not waste to suffer it to remain so,<sup>4</sup> and he may even pull it down if it be dangerous to his cattle.<sup>5</sup> And although a tenant must use ordinary care to prevent buildings going to decay, he is not bound to make extraordinary expenditures for that purpose,<sup>6</sup> and he may defer repairs until they shall be less expensive, if no permanent injury results.<sup>7</sup> A tenant under a lease with a covenant for perpetual renewal may be restrained from tearing down and removing a dwelling-house on the premises only when the security for the rent would be impaired by such removal.<sup>8</sup>

§ 2857. **Cutting Trees.**—Felling timber-trees was always regarded in England as an act of waste.<sup>9</sup> But in this country, for obvious reasons, the reason of the English rule as to cutting timber-trees is not applicable. Therefore it has been held, in states where the land is new, and covered with forests, that the tenant may fell part of the wood and timber, so as to fit the land for cultivation, without being liable for waste;<sup>10</sup> but he cannot

<sup>1</sup> Davenport v. Magoon, 13 Or. 1; 57 Am. Rep. 1.

<sup>2</sup> Winship v. Pitts, 3 Paige, 262.

<sup>3</sup> Pyncheon v. Stearns, 11 Met. 304; 45 Am. Dec. 207.

<sup>4</sup> Clemence v. Steers, 1 R. I. 272; 53 Am. Dec. 622.

<sup>5</sup> Clemence v. Steers, 1 R. I. 272; 53 Am. Dec. 622.

<sup>6</sup> Wilson v. Edmonds, 24 N. H. 517.

<sup>7</sup> Harvey v. Harvey, 41 Vt. 373.

<sup>8</sup> Crowe v. Wilson, 65 Md. 479; 57 Am. Rep. 343.

<sup>9</sup> Boone on Real Property, sec. 114.

<sup>10</sup> Jackson v. Brownson, 7 Johns. 22; 5 Am. Dec. 258; Ward v. Sheppard, 2 Hayw. (N. C.) 283; 2 Am. Dec. 62; McCullough v. Irvine, 13 Pa. St. 43; Harder v. Harder, 26 Barb. 41; Drown v. Smith, 52 Me. 141; Proctor v. Henderson, 29 Mo. 327; Moorhouse v. Cotheal, 22 N. J. L. 52; Findlay v. Smith, 6 Munf. 134; 8 Am. Dec. 733.

cut down all the wood and timber so as permanently to injure the inheritance.<sup>1</sup> To what extent he may do so, without waste, is a question for the jury.<sup>2</sup> Where a lease requires a tenant to reduce to cultivation uncleared portions of the premises, his cutting down trees on those portions will not be enjoined as waste.<sup>3</sup> It is not waste for the tenant to cut down trees under twenty years old, although timber-trees, if cut seasonably and in a proper manner.<sup>4</sup> So he may cut down trees, in the course of proper management, in order to permit the growth of other timber.<sup>5</sup> And in short, he may cut down all trees which will not be timber, and are not trees for ornament or the protection of the estate.<sup>6</sup> Timber cut by permission in clearing his land belongs to the tenant.<sup>7</sup>

§ 2858. In Cultivation of Land.—At common law, the conversion of one kind of land into another, as wood, meadow, or pasture land into arable land, or *vice versa*, was waste.<sup>8</sup> But in this country, the question depends upon whether the change in the mode of culture is justified by good husbandry<sup>9</sup> and the usages of the place.<sup>10</sup> The following have been held to amount to waste, viz.: the impoverishment of fields by constant tillage from year to year;<sup>11</sup> the removal from the premises of the manure made thereon in the course of husbandry;<sup>12</sup> suffering

<sup>1</sup> Jackson v. Brownson, 7 Johns. 27; 5 Am. Dec. 258.

<sup>2</sup> Jackson v. Brownson, 7 Johns. 227; Am. Dec. 258; Harder v. Harder, 26 Barb. 414; Ward v. Sheppard, 2 Hayw. C. 283; 2 Am. Dec. 625.

<sup>3</sup> McDaniel v. Callam, 75 Ala. 327.

<sup>4</sup> Dunn v. Bryan, 7 Ired. Eq. 143.

<sup>5</sup> Crockett v. Crockett, 2 Ohio St. 30.

<sup>6</sup> Keeler v. Eastman, 11 Vt. 293.

<sup>7</sup> Davis v. Gilliam, 5 Ired. Eq. 311; Crockett v. Crockett, 2 Ohio St. 180.

<sup>8</sup> Darcy v. Askwith, Hob. 234; Moore on Real Property, sec. 117; Clark v. Holden, 7 Gray, 8; 66 Am. Dec. 450.

<sup>9</sup> Clemence v. Steere, 1 R. I. 272; 53 Am. Dec. 621; Lewis v. Jones, 17 Pa. St. 262; 55 Am. Dec. 550; Sarles v. Sarles, 3 Sand. Ch. 601; Loomis v. Wilbur, 5 Mason, 13; Crockett v. Crockett, 2 Ohio St. 180; Proffit v. Henderson, 29 Mo. 327.

<sup>10</sup> Webster v. Webster, 33 N. H. 25; 66 Am. Dec. 705; Jones v. Whitehead, 1 Para. Sel. Cas. 304; Wilds v. Layton, 1 Del. Ch. 226; 12 Am. Dec. 91; Pyncheon v. Stearns, 11 Met. 304; 45 Am. Dec. 207; Aughinbaugh v. Coppenheffer, 55 Pa. St. 347.

<sup>11</sup> Sarles v. Sarles, 3 Sand. Ch. 601.

<sup>12</sup> Lewis v. Jones, 17 Pa. St. 262; 55 Am. Dec. 550.

pastures to become overgrown with brush;<sup>1</sup> and where farm is let as a dairy farm, clearing woodland.<sup>2</sup>

**§ 2859. Taking Clay and Minerals—Opening Mines**—It is waste to dig for gravel, lime, clay, brick, earth, stone, or the like, on the demised premises,<sup>3</sup> unless such has been the usual mode of improving the land.<sup>4</sup> But raising the surface of land by depositing earth thereon is not.<sup>5</sup> It is waste to open land to search for mines,<sup>6</sup> or to open new mines, unless the demise includes them.<sup>7</sup> It is not waste to work mines that are open, and to take the profits thereof.<sup>8</sup> And new shafts or pits may be opened in order to follow the same vein,<sup>9</sup> and the tenant may transfer this right to others.<sup>10</sup> So if there is an existing salt-well and a manufactory of salt on the premises, it is not waste to dig a new salt-well in connection with it. A lease of the privilege of quarrying, getting out, working and carrying away granite stone does not confer the right of carrying away rubble-stone.<sup>12</sup> But a liberty to a tenant to smelt ore includes the right to cut down timber for that purpose.<sup>13</sup>

**ILLUSTRATIONS.**—A lease provided that the lessee should "hold the same and enjoy and use all the rights and privileges of real ownership as in fee-simple," so long as he should carry on a certain iron-furnace, and that he should pay the taxes and should pay a royalty to the lessor for every ton of iron ore dug thereon; but gave no express right to dig either iron ore

<sup>1</sup> *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621; *Clark v. Holden*, 7 Gray, 8; 66 Am. Dec. 450; *Jackson v. Andrews*, 18 Johns. 431.

<sup>2</sup> *McGregor v. Brown*, 10 N. Y. 114.

<sup>3</sup> *Livingston v. Reynolds*, 2 Hill, 157; *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 208.

<sup>4</sup> *Huntley v. Russell*, 13 Q. B. 591.

<sup>5</sup> *Pyncheon v. Stearns*, 11 Met. 304; 45 Am. Dec. 207.

<sup>6</sup> *Boone on Real Property*, sec. 116; *Saunders's Case*, 5 Rep. 12; *Viner v. Vaughn*, 2 Beav. 466.

<sup>7</sup> *Owings v. Emery*, 6 Gill, 260;

*United States v. Gear*, 3 How. 12; *Irwin v. Covode*, 24 Pa. St. 162.

<sup>8</sup> *Neel v. Neel*, 19 Pa. St. 324; *Gaine v. Green Pond etc. Co.*, 33 N. J. Eq. 603; *Elias v. Griffith*, L. R. 8 Ch. Div. 521; *Stoughton v. Leigh*, 1 Taunt. 41.

<sup>9</sup> *Id.*; *Billings v. Taylor*, 10 Pick. 460; 20 Am. Dec. 533; *Findlay Smith*, 6 Munf. 134; 8 Am. Dec. 73.

<sup>10</sup> *Kier v. Peterson*, 41 Pa. St. 36; *Irwin v. Covode*, 24 Pa. St. 162.

<sup>11</sup> *Findlay v. Smith*, 6 Munf. 134; Am. Dec. 733.

<sup>12</sup> *Emery v. Owings*, 6 Gill, 191.

<sup>13</sup> *Wilson v. Smith*, 5 Yerg. 379.

limestone. *Held*, that he might quarry limestone on the premises for the use of the furnace: *Watterson v. Reynolds*, 95 St. 474; 40 Am. Rep. 672. A landlord leased premises for express and sole purpose of mining and taking carbon oil therefrom at a fixed royalty. The tenant opened a well which produced both oil and hydro-carbon gas, the latter in large quantities issuing by its own force from the well. The tenant separated the gas from the oil, and by pipes conducted it beyond leased premises, where he sold or appropriated it to his own use. *Held*, that the tenant was not accountable to the landlord for the gas or its value: *Wood Co. Petroleum Co. v. Transp. Co.*, 28 Va. 210; 57 Am. Rep. 659.

**2860. Excusable Waste—Act of God, etc.**—For waste arising from the act of God, the public enemy, or the act of the law, the tenant is not responsible.<sup>1</sup> But where a house which a lessee for a year held under a lease without special covenants was destroyed by an armed mob, which the lessee had reason to believe would attack the house on account of his using the same for the purpose of distributing a certain newspaper, it was held that the lessee was liable for waste.<sup>2</sup>

**2861. Remedy for Waste—At Law.**—At common law a writ of waste might be brought by him who had the immediate estate of inheritance in reversion or remainder against the tenant for life, tenant in dower, tenant by the entirety, or tenant for years; it might also be brought by a tenant in common or joint tenant against another who wasted the estate held in common or joint tenancy. It did not lie between coparceners; and in many other cases, also, the courts of law had no effective jurisdiction of waste.<sup>3</sup> In this country the action for waste is to a great extent regulated by statute.<sup>4</sup> To sustain the action, the plaintiff must have title to the land.<sup>5</sup> But it

*White v. Wagner*, 4 Har. & J. 373; 12 Am. Dec. 674.

*White v. Wagner*, 4 Har. & J. 373; 12 Am. Dec. 676.

*Quell's Equity*, 493; *Miles v. Smith*, 32 N. H. 147; 64 Am. Dec. 644.

<sup>1</sup> See 1 Stimson's American Statute Law, sec. 135.

<sup>2</sup> *Hughlett v. Harris*, 1 Del. Ch. 349; 12 Am. Dec. 104; *Gillett v. Treganza*, 13 Wis. 472; *Whitney v. Morrow*, 34 Wis. 644; *London v. Warfield*, 5 J. J. Marsh. 196.

has been held that a trustee may sue,<sup>1</sup> also a *cestui qui* *trust*.<sup>2</sup>

§ 2862. **Remedy for Waste — In Equity.** — The remedy for waste afforded by courts of equity is more complete. They have extended their relief to cases where the remedies provided in the courts of common law could not be made to apply; and to cases where the titles of the parties were purely of an equitable nature; and to cases where the waste was what is commonly termed equitable waste, meaning acts which were deemed waste only in courts of equity; and to cases where no waste had been actually committed, but was only meditated or apprehended. Where the waste is trivial and of small extent, equity will not interfere;<sup>4</sup> and the mere apprehension that waste will be committed is not sufficient ground for an injunction. The aid of equity is also restricted to cases in which the title is clear and undisputed;<sup>6</sup> and, as a general rule, is never granted against a defendant in possession claiming adversely to the plaintiff.<sup>7</sup>

§ 2863. **Termination of Lease — By Lapse of Time or Agreement.** — Where there is a lease for a certain fixed period, the tenancy will terminate without notice upon the expiration of the time or the happening of the event by which it is limited.<sup>8</sup> An express provision that the

<sup>1</sup> *Woodman v. Good*, 6 Watts & S. 169.

<sup>2</sup> *Wyant v. Dieffendafer*, 2 Grant Cas. 334.

<sup>3</sup> *Snell's Equity*, 494; *Story's Eq. Jur.* 912; *Kane v. Vanderburgh*, 1 Johns. Ch. 4; *Wilds v. Layton*, 1 Del. Ch. 226; 12 Am. Dec. 91; *Duvall v. Waters*, 1 Bland, 569; 18 Am. Dec. 350; *Smith v. City Council*, 19 Ga. 89; 63 Am. Dec. 298.

<sup>4</sup> *Barry v. Barry*, 1 Jacob & W. 631.  
<sup>5</sup> *Watson v. Hunter*, 5 Johns. Ch. 169; 9 Am. Dec. 295; *Hanson v. Gardiner*, 7 Ves. 307.

<sup>6</sup> *Storm v. Mann*, 4 Johns. Ch. 21;

*Higgins v. Woodward*, 1 Hopk. C. 342; *Tessier v. Wise*, 3 Bland, 6; *Hough v. Martin*, 2 Dev. & B. Eq. 37; 34 Am. Dec. 403.

<sup>7</sup> *Lansing v. Steam Co.*, 7 Johns. Ch. 162; *Pillsworth v. Hopton*, 6 Ves. 51.

<sup>8</sup> *Jackson v. Parkhurst*, 5 Johns. 12; *Bedford v. McElherron*, 2 Serg. & L. 47; *Ellis v. Paige*, 1 Pick. 43; *Luford v. Barber*, 1 Term Rep. 86; *Acland v. Sutley*, 9 Ad. & E. 879; *Ridgely v. Keyser*, 54 Pa. St. 86; *Jackson Brandt*, 2 Caines, 169; *Chesley Welch*, 37 Ma. 106. When possession is obtained by vendee under an agree-

lessor may terminate the lease on notice, and paying for improvements, does not exclude his right, upon equitable grounds, to have a rescission of the lease for breach of the lessee's obligations.<sup>1</sup> Where one gives a lease reserving the right to terminate it by a sale of the premises, a sale terminates the lease, if made in good faith, although for a nominal consideration; but it is otherwise if the sale is a sham and a subterfuge.<sup>2</sup> A lease of land "for the term of the life" of the lessee, "and the life of" her husband and of another person named, is not terminated by the death of the lessee.<sup>3</sup> A lease given during the absence of the land-owner from the country, by an agent having authority only to "take charge of the land while he was gone, and make it pay the best way he could," is terminable by the land-owner on his return.<sup>4</sup> A lease to a club during its existence "as now organized" will not be terminated by the incorporation of the club.<sup>5</sup> A lease for "the whole time that the lessee may be postmaster" expires with the expiration of the commission held by him at the time of execution of the lease.<sup>6</sup>

§ 2864. **By Merger.**—If a term for years becomes vested in the person who is seised of the freehold, the term merges in the freehold, and becomes extinct.<sup>7</sup> But the rights of lessor and lessee do not merge upon a conveyance by the former to the latter, if the former has already assigned the rents for a specified term, and the rights of his assignee are reserved in the conveyance.<sup>8</sup> The land itself, and the right to the rent, must vest in the same person.<sup>9</sup> Where a lessee after subletting assigns to

not to convey, notice to quit when he fails to comply with the requirements of the contract is unnecessary: *Ascock v. Robards*, 14 Mo. 350; 55 Ill. Dec. 108.

*Kentucky River Nav. Co. v. Commonwealth*, 13 Bush, 435.

*Dunn v. Jaffray*, 36 Kan. 408; *Ela Banks*, 37 Wis. 89.

*Flagg v. Badger*, 58 Me. 258.

<sup>1</sup> *Antoni v. Belknap*, 102 Mass. 193.

<sup>2</sup> *Alexander v. Tolleston Club*, 110 Ill. 65.

<sup>3</sup> *Easton v. Mitchell*, 21 Ill. App. 189.

<sup>4</sup> 4 Kent's Com. 98; *Martin v. Searcy*, 3 Stew. 50; 20 Am. Dec. 64.

<sup>5</sup> *Childs v. Clark*, 3 Barb. Ch. 52; 49 Am. Dec. 164.

<sup>6</sup> *Phillips v. Bonsal*, 2 Binn. 138.

the lessor, who receives from the sublessee the rent served in the sublease, there is no merger.<sup>1</sup>

ILLUSTRATIONS.—A lessee sublet the leased premises; sublessee afterwards, and during the term, took a deed of premises in fee-simple from the owner, and an assignment the lease, and afterwards sued the lessee for rent. *Held*, maintainable: *Liebschutz v. Moore*, 70 Ind. 142; 36 Am. R. 182. A loan was secured by mortgage to be paid in five years interest payable annually; at the same time a lease was made of the same premises by the mortgagor to the mortgagee for the same period, reserving rent. *Held*, that it would be presumed that the mortgage was first executed and that such mortgage did not bar a recovery of the rent due on the lease: *Newall Wright*, 3 Mass. 138; 3 Am. Dec. 98. A purchased land from a lessor, with an agreement for repurchase, and that any lease executed by A, during the period allowed for repurchase, should be recognized as valid by the lessor on repurchase. During said period A executed a new lease to the original lessee before the expiration of his term. *Held*, that the acceptance of the new lease was an extinguishment of the old, notwithstanding the provision in the former that upon repurchase it was to be renewed and void: *Otis v. McMillan*, 70 Ala. 46.

§ 2865. **By Surrender.**—A tenancy for years may be determined by surrender. Surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion.<sup>2</sup> A surrender to a landlord is effected either by words manifesting the intention of the lessee to yield up his estate, or by operation of law, where the parties, without such words, do some act which implies that they both agree to consider the surrender as made. A surrender by operation of law takes place where the owner of a particular estate has been a party to some lease the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist.<sup>4</sup> The surrender must be made to the lessor himself or to the party legally entitled

<sup>1</sup> *Bailey v. Richardson*, 66 Cal. 416.

<sup>2</sup> *Bailey v. Wells*, 8 Wis. 141; 76 Am. Dec. 233; *Grieder's Appeal*, 5 Pa. St. 422.

<sup>3</sup> *Beall v. White*, 94 U. S. 382;

*Nelson v. Thompson*, 23 Minn.

*Mitchell v. Blossom*, 24 Mo. App.

*Witman v. Watry*, 31 Wis. 638; *B.*

*v. Delaplaine*, 1 Sand. 5.

<sup>4</sup> *Smith v. Pendergast*, 26 Minn.

under him.<sup>1</sup> A surrender of a lease requires a mutual agreement between the lessor and original lessee that the lease shall terminate; but it is not necessary that the agreement should be express; it may be inferred from the conduct of the parties.<sup>2</sup> Thus where, by agreement between the lessor and lessee, the latter abandons his possession and the former resumes possession of the premises, there is a surrender by operation of law;<sup>3</sup> or where, by an oral agreement between lessor, lessee, and a third party, a new term is created in the latter, who enters and pays rent.<sup>4</sup> Removal by a tenant, and giving the key to the landlord, before expiration of the term, does not necessarily amount to a surrender of the term.<sup>5</sup> But when a landlord takes the key to premises, and deals with it as if it had become his own, the act is sufficient to authorize a jury to find that the landlord intended to resume possession and to discharge the tenant from his obligation as lessee.<sup>6</sup>

The acceptance of a new lease during an existing lease is a surrender by operation of law.<sup>7</sup> So an absolute parol lease, made during the term of a written lease, by the landlord, to a new tenant, with the consent of the first

<sup>1</sup> *Cornish v. Searell*, 1 Moody & R. 703; 8 Best & S. 471. Two gave a lease for life to a third; and he afterwards conveyed his interest to one of them. Held, not a surrender of the lease: *Sperry v. Sperry*, 8 N. H. 477.

<sup>2</sup> *Bedford v. Terhune*, 30 N. Y. 453; 86 Am. Dec. 394; *Hasseltine v. Scavey*, 16 Mo. 212; *Dayton v. Craik*, 26 Minn. 133.

<sup>3</sup> *Bedford v. Terhune*, 30 N. Y. 453; 86 Am. Dec. 394; *Coe v. Hobby*, 72 N. Y. 141; 28 Am. Rep. 120; *Amory v. Kannoofsky*, 117 Mass. 351; 19 Am. Rep. 416; *Phene v. Popplewell*, 12 Com. B., N. S., 334; *Clemens v. Broomfield*, 19 Mo. 118; *Witman v. Watry*, 31 Wis. 638; *Mackeller v. Sigler*, 47 How. Pr. 20; *Thomas v. Cook*, 2 Barn. & Ald. 119; *Davison v. Gent*, 1 Hurl. & N. 744; *Dodd v. Acklom*, 4 Man. & G. 672; *Beall v. White*, 94 U. S. 382.

<sup>4</sup> *Wallace v. Kennelly*, 47 N. J. L. 242.

<sup>5</sup> *Prentiss v. Warne*, 10 Mo. 601; *Townsend v. Albers*, 3 E. D. Smith, 560; *Lucy v. Wilkins*, 33 Minn. 441; *Morgan v. Smith*, 70 N. Y. 537; *Ladd v. Smith*, 6 Or. 316; *Thomas v. Nelson*, 69 N. Y. 118.

<sup>6</sup> *Dos Santos v. Hollinshead*, 4 Phil. 57; *Hegeman v. McArthur*, 1 E. D. Smith, 147. But it is not conclusive: *Milling v. Becker*, 96 Pa. St. 182. Nor where the landlord continues to claim the rent: *Auer v. Penn*, 99 Pa. St. 370; 44 Am. Rep. 114.

<sup>7</sup> 1 Schouler on Personal Property, sec. 38; *Jungerman v. Bovee*, 19 Cal. 354; *Enyeart v. Davis*, 17 Neb. 228; *Hoag v. Carpenter*, 18 Ill. App. 555; *Van Rensselaer v. Penniman*, 6 Wend. 569; *Livingston v. Potts*, 16 Johns. 28.

lessee, amounts to a surrender of the first lease.<sup>1</sup> The statute of frauds prohibits the surrender of terms of years or other interests in lands, unless by deed, note in writing, or operation of law. Hence a parol surrender is invalid<sup>2</sup> unless the parties act under it, in which case it is a surrender "by act or operation of law," which is excepted from the statute of frauds.<sup>3</sup> But where the lease is for a term which would be good by parol, a parol surrender is good.<sup>4</sup> And the acceptance of a new parol lease, binding within the statute of frauds, would be a surrender in law of an existing sealed lease for a term.<sup>5</sup> But to effect the surrender of an existing lease by operation of law, there must be a new lease valid and effectual in law. Therefore an oral agreement for a term longer than a year will not operate as a surrender of an existing written lease.<sup>6</sup> Mere erasure, cancellation, or destruction of the lease itself is not a sufficient surrender,<sup>7</sup> unless done by the mutual consent of the lessor and lessee for the purpose of making a new one.<sup>8</sup> If the tenant agrees to purchase the premises from the grantee of his landlord, and until conveyance to pay rent, it is held to be a surrender.<sup>9</sup> Rent not due at the time of the surrender is thereby extinguished, and can neither be distrained for nor collected by action.<sup>10</sup> The surrender of leased premises by the administrator of a deceased lessee who has occupied the premises after the death of the lessee, and its acceptance by the lessor without any reservation of or agreement to a right to sue the administrator, or to prove against the insolvent estate of the lessee, terminates all liability

<sup>1</sup> *Whitney v. Meyers*, 1 Duer, 266; *Logan v. Anderson*, 2 Doug. (Mich.) 101; *Clemens v. Broomfield*, 19 Mo. 118.

<sup>2</sup> *Bailey v. Wells*, 8 Wis. 141; 76 Am. Dec. 233; *Jackson v. Gardner*, 8 Johns. 404.

<sup>3</sup> *Vandekar v. Reeves*, 40 Hun, 430.

<sup>4</sup> *Kiester v. Miller*, 25 Pa. St. 481.

<sup>5</sup> *Smith v. Niver*, 2 Barb. 180; *Coe v. Hobby*, 72 N. Y. 141; 28 Am. Rep. 120.

<sup>6</sup> *Coe v. Hobby*, 72 N. Y. 141; 28 Am. Rep. 120.

<sup>7</sup> *Ward v. Lamley*, 5 Hurl. & N. 372; *Roe v. Conway*, 74 N. Y. 201.

<sup>8</sup> *Baker v. Pratt*, 15 Ill. 568.

<sup>9</sup> *Denison v. Wertz*, 7 Serg. & 372.

<sup>10</sup> *Grieder's Appeal*, 5 Pa. St. 479; *Curtis v. Miller*, 17 Barb. 479; *Bailey v. Clark*, 10 Johns. 422.

the administrator or of the estate upon the covenants of the lease.<sup>1</sup> The surrender of a term does not operate to discharge the tenant or his sureties from rent already accrued and become payable,<sup>2</sup> or for any breach of his covenants occurring previous to its date.<sup>3</sup> Where it does not appear that the value of the use of demised premises is impaired by a surrender of a portion of them, the landlord may recover the entire rent reserved, notwithstanding such partial surrender.<sup>4</sup> As a surrender terminates completely the relation of landlord and tenant, it is held at common law that a lessee who has underlet, and afterwards surrenders to the lessor, loses thereupon all right to hold the sublessee to his covenants and to collect the rent which may have accrued, while he, on the other hand, cannot, by his surrender, destroy the estate which the sublessee has already acquired. This anomaly has been changed by statute in some states.<sup>5</sup>

ILLUSTRATIONS.—A tenant, after commencing to cultivate a plot, left the country, telling the landlord to take charge of the plot, finish cultivating it, and pay himself out of the rent, and the landlord re-entered. *Held*, a surrender: *Shahan v. Herzog*, 73 Ala. 59. In an action for rent upon a sealed lease for three years, it was shown that after three years the parties orally agreed to reduce the rent one thousand dollars a year, and that the lessor might terminate the lease by three months' notice. The agreement for reduction was made pending a suit for rent. The agreement for termination was subsequent and independent. *Held*, 1. That the agreement, if valid, was not a new leasing, but a mere modification as to certain terms, and no intention to surrender could be inferred; 2. That the agreement for reduction was void for want of consideration, neither the payment of the costs in the pending action, for which defendant is legally liable, nor the subsequent agreement for termination, constituting a consideration: *Coe v. Hobby*, 72 N. Y. 141; 28 N. Y. Rep. 120. A lease reserved to the landlord the right to re-let, if the premises should become vacant, and apply the

*Deane v. Caldwell*, 127 Mass. 242.  
*McKensie v. Farrell*, 4 Bosw. 192.  
*Roe v. Conway*, 74 N. Y. 201.

*Smith v. Pendergast*, 26 Minn.

<sup>1</sup> 1 Schouler on Personal Property, sec. 38.

<sup>2</sup> 1 Schouler on Personal Property, sec. 38; 1 Stimson's American Statute Law, Lease.

proceeds of the reletting to the rent reserved. A surety, on notice from the tenant that he could not pay the rent, arranged with the landlord's agent that he should let them. The agent put up a bill and agreed to a letting; the original lessee removed, was succeeded by a new tenant, and he entered and paid rent for a short time. *Held*, not a surrender, and that the original tenant and the surety were still liable: *Ogden v. Rowe*, 3 E. 1. Smith, 312. Difficulties arose between the parties to a certain lease, and an arbitration was agreed upon, one of the written stipulations being that the lease should be surrendered, and the arbitrators having, among other things, power to settle the compensation which should be paid for such surrender. The lease accordingly, was delivered up to the arbitrators, who made an award, which was set aside as void, and then one of the arbitrators died. *Held*, that the lease was surrendered, and that no action could be maintained upon its covenants: *Harris v. Hiscock*, 91 N. Y. 340. The plaintiff, having leased certain premises to the defendant, with the right of retaking possession if the rent was not paid when due, notified one in possession under the lessee to pay the rent for a certain quarter or leave the premises, when in fact the defendant had already paid the rent for that quarter; and thereupon the tenant left the premises, and neither he nor the defendant occupied them afterward. *Held*, a surrender and acceptance which released defendant from further liability to pay rent: *Patchin v. Dickerman*, 3 Vt. 666. A lease for a year contained a covenant that the tenant, at the expiration of the lease, should leave the premises in as good repair as at the commencement of the term. *Held*, that an accepted surrender before the end of the year did not extinguish the covenant: *Snowhill v. Reed*, 49 N. J. L. 292; 60 Am. Rep. 615. An agent of the owner leased to defendant by a lease under seal; defendant sublet it to M., and the agent thereupon agreed to look to M. for the rent and to accept a surrender of defendant's lease; defendant gave him the lease and took receipt therefor. *Held*, in an action against defendant for the rent, 1. That the agent had an implied power to accept a surrender; and 2. That the facts amounted to a surrender by the operation of law: *Amory v. Kannoisky*, 117 Mass. 351; 19 Am. Rep. 416. In a surrender by a lessee for one year, it was agreed that he should remain liable for the year's rent, and that the lessor might take all lawful means for the recovery thereof according to the lease. *Held*, that by the surrender the relation of the landlord and tenant ceased, and the landlord could not distrain for the rent, but his remedy was on the special agreement: *Bain v. Clarke*, 10 Johns. 424. A lessor, in consideration of the lessee's assignment to him of under-leases of the demise

ises, accepted a surrender of the original lease "without adice" to the under-leases. *Held*, that he might recover from one of the sublessees accruing after the assignment: *v. Car Co.*, 125 Mass. 157; 28 Am. Rep. 216.

**2866. By Abandonment.**—Where the tenant abandons the premises, the landlord may elect to leave them until, and may, at the end of the term, recover the rent for the entire term.<sup>1</sup> If the landlord enters and takes possession of the premises, he has a right to recover the rent due up to that time, but his right to recover subsequently accruing rent under the lease is at an end.<sup>2</sup> He may, however, enter for the purpose of repairing and taking possession of the house without releasing the rent;<sup>3</sup> and, during possession, repairing, and advertising the house are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay the rent.<sup>4</sup> The landlord is not bound to rent the premises to others for the benefit of the tenant.<sup>5</sup> And even if it is the duty of a landlord whose tenant has abandoned the premises during the term to diminish the rent as much as may be by reletting, this duty does not extend to requiring him to let to a tenant offering, whose business would permanently injure the premises.<sup>6</sup>

**2867. By Forfeiture.**—At common law, the attempt to lease a tenant for years to create a greater estate than he had created as a forfeiture of his estate.<sup>7</sup> But this rule is not observed in this country, such a conveyance simply pass-

<sup>1</sup> *Schuisler v. Ames*, 16 Ala. 73; 50 Dec. 168; *Rice v. Dudley*, 65 Ala. 262; *Keely v. Dunn*, 42 Ala. 262; *Waters v. Larrabee*, 48 Me. 70; *Rollins v. Moody*, 72 Me. 135. The abandonment of the premises by the tenant is a restoration of the occupancy of the landlord: *Krank v. Mills*, 6 Mo. App. 72. An abandonment by the tenant acquiesced in by the landlord dispenses with the duty for notice by the tenant: *Waters v. Robinson*, 20 Mo. App. 199.

<sup>2</sup> *Schuisler v. Ames*, 16 Ala. 73; 50 Am. Dec. 168.

<sup>3</sup> *Livermore v. Eddy*, 33 Mo. 547; *Milling v. Becker*, 96 Pa. St. 182; *In re Orne*, 15 Phila. 489.

<sup>4</sup> *Breuckmann v. Twibill*, 89 Pa. St. 58; *Livermore v. Eddy*, 33 Mo. 547; *Billing v. Smith*, 4 Houst. 113.

<sup>5</sup> *Milling v. Becker*, 96 Pa. St. 182.

<sup>6</sup> *Allen v. Saunders*, 6 Neb. 436.

<sup>7</sup> Co. Lit. 251 b.

ing the title and estate which the tenant possesses.<sup>1</sup> A tenant for years may forfeit his term by a disaffirmance of his landlord's title.<sup>2</sup> But "mere words of denial or disclaimer never worked a forfeiture."<sup>3</sup> A forfeiture occurs where a condition has been broken in a lease which reserves to the lessor the right to re-enter the premises upon and take possession of the premises.<sup>4</sup> A breach of a covenant by the tenant gives the landlord no right to re-enter, unless there is a stipulation in the lease that such breach shall work a forfeiture of the tenant's interest.<sup>5</sup> His remedy is a claim for damages.<sup>6</sup> The acceptance by the landlord of subsequently accruing rent is a waiver of the forfeiture,<sup>7</sup> unless the lessor was ignorant of it at the time.<sup>8</sup> A forfeiture of a lease is not waived in consequence of the lessee's holding over.<sup>9</sup> If the lessee be released from the performance of a part of a condition annexed to the grant, the whole condition is gone, and the estate is held free and discharged of the condition.<sup>10</sup> A lease containing a condition that it shall cease and determine and become null and void upon non-payment of rent or other default by the tenant, whether it be a lease for life or for years, does not become absolutely void upon a default, although void as to the lessee's estate, it is voidable only as to the lessor, and he may waive the forfeiture and continue the lease, and it will still bind the lessee.<sup>11</sup> Under a provision in a lease that, in case of breach of covenants

<sup>1</sup> See *ante*, Title Real Property; *Griffin v. Fellows*, 81 Pa. St. 114.

<sup>2</sup> *Bolton v. Landers*, 27 Cal. 104; *Newman v. Rutter*, 8 Watts, 51; *Jackson v. Vincent*, 4 Wend. 633; *Duke v. Harper*, 6 Yerg. 280; 27 Am. Dec. 462; *Wilson v. Watkins*, 3 Pet. 49; *Wall v. Goodenough*, 16 Ill. 415.

<sup>3</sup> *De Lancey v. Ganong*, 9 N. Y. 27; *Montgomery v. Craig*, 5 Dana, 101.

<sup>4</sup> 1 Schouler on Personal Property, sec. 39.

<sup>5</sup> *Den v. Post*, 25 N. J. L. 285. The failure of a tenant to pay rent will not work a forfeiture of his estate, unless it is so expressed in the lease or agree-

ment: *Brown v. Bragg*, 22 Ind. 404; *Gaskill v. Trainer*, 3 Cal. 334.

<sup>6</sup> *Spear v. Fuller*, 8 N. H. 174; 1 Am. Dec. 391.

<sup>7</sup> *Gomber v. Hackett*, 6 Wis. 323; 1 Am. Dec. 467; *McKildoe v. Darracott*, 13 Gratt. 278; *McGlynn v. Moore*, 22 Cal. 384; *Crouch v. R. R. Co.*, 22 App. 315; *Johnson v. Douglass*, 1 Mo. 168.

<sup>8</sup> *Jackson v. Brownson*, 7 Jo. 227; 5 Am. Dec. 258.

<sup>9</sup> *Calderwood v. Brooks*, 28 Cal. 100; *Dakin v. Williams*, 17 Wend. 100.

<sup>11</sup> *Clark v. Jones*, 1 Denio, 516; 1 Am. Dec. 706.

term shall become void at the lessor's option," a lease will not work a forfeiture without some act on the part of the lessor declaring or claiming it.<sup>1</sup> An actual notice should be made for condition broken, in order to complete the forfeiture and defeat the lease.<sup>2</sup> Forfeiture clauses will be restricted as far as possible.<sup>3</sup> A lessor will not be allowed to enforce a forfeiture for non-payment of rent where the lessee makes speedy application for relief, and paying the amount due.<sup>4</sup>

ILLUSTRATIONS. — A lease contained a condition for re-entry if the lessee should underlet without the written consent of the lessor. The lessor consented to an under-lease for a certain term less than the original term, and the lessee executed an under-lease for such term, but without the lessor's knowledge and a condition that the under-lessee might, at his election, extend a condition of the term until the end of the lessee's original term.

The lessor accepted rent after notice of the condition of the extended term, and up to the end of the authorized term. 1. That the lessor's consent did not cover the condition of the extended term, and that therefore the original lease was subject to forfeiture; 2. That the lessor's right of re-entry accrued at the making of the under-lease containing the condition, not at the beginning of the extension, and that therefore he had waived the forfeiture by the acceptance of rent after notice of the condition for extension: *Collins v. Hasbrouck*, 56 N. Y. 157; 15 Am. Rep. 407. By the terms of a lease, the lessee, if he failed to pay all taxes during his term, was to forfeit the lease and improvements made by him. The lessee failed to pay the taxes until after the expiration of his lease, but the entry of the lessor to enforce the forfeiture. *Held*, the forfeiture was saved: *Planters' Ins. Co. v. Diggs*, 8 Baxt.

§ 2868. **By Notice to Quit—In General.** — The relation of landlord and tenant is terminated by a notice to quit given either by the landlord or the tenant, in a legal manner, and under the proper circumstances. A tenant bound to quit may treat the lease as ended.<sup>5</sup>

<sup>1</sup> *Walker v. Engler*, 30 Mo. 130.

<sup>2</sup> *Smith v. Birch*, 1 Mees. & W. 402;

<sup>3</sup> *Smith v. Carter*, 15 Mees. & W. 718;

<sup>4</sup> *Associates v. Howland*, 11 Met.

<sup>5</sup> *Turner v. Hannah*, 6 Duer, 262.

<sup>1</sup> *Miller v. Havens*, 51 Mich. 482.

<sup>2</sup> *Horton v. New York Cent. etc.*

*R. R. Co.*, 12 Abb. N. C. 30.

<sup>3</sup> *Conkling v. Tuttle*, 52 Mich. 630.

§ 2869. When Notice to Quit Required.—Tenants from year to year are entitled to notice to quit.<sup>1</sup> If notice to quit is necessary to terminate a tenancy from month to month.<sup>2</sup> So a weekly tenancy requires notice to terminate it.<sup>3</sup>

At common law, no notice was necessary to terminate an estate at will; it was at once determined by any act of the landlord inconsistent with the existence of the estate. This doctrine was laid down in many of the earlier cases in this country;<sup>4</sup> and such seems still to be the rule of the courts in Alabama, Illinois, Vermont, and perhaps

<sup>1</sup> *Stedman v. McIntosh*, 4 Ired. 291; 42 Am. Dec. 123; *Sullivan v. Cary*, 17 Cal. 80; *Larkin v. Avery*, 23 Conn. 304; *Herrell v. Sizeland*, 81 Ill. 457; *Jackson v. Hughes*, 1 Blackf. 421; *Miller v. Shackelford*, 4 Dana, 264; *Morehead v. Watkyns*, 5 B. Mon. 228; *Hall v. Myers*, 43 Md. 446; *Ridgely v. Stilwell*, 25 Mo. 570; *Den v. Drake*, 14 N. J. L. 523; *Den v. Blair*, 15 N. J. L. 181; *Den v. Snowhill*, 23 N. J. L. 447; *Jackson v. Salmon*, 4 Wend. 327; *Bradley v. Covel*, 4 Cow. 350; *Jackson v. Miller*, 7 Cow. 747; *Nichols v. Williams*, 8 Cow. 13; *People v. Paulding*, 22 Hun, 91; *Den v. Cox*, 5 Ired. 521; *Garrett v. Clark*, 5 Or. 464; *Lloyd v. Cozens*, 2 Ashm. 131; *Brown v. Vanhorn*, 1 Binn. 334; *Fahnestock v. Faustenauer*, 5 Serg. & R. 174; *Logan v. Herron*, 8 Serg. & R. 459; *Thomas v. Wright*, 9 Serg. & R. 87; *McDowell v. Simpson*, 3 Watts, 129; 27 Am. Dec. 338; *Lesley v. Randolph*, 4 Rawle, 123; *Magaw v. Cannon*, 3 Watts, 139; *Godard v. R. R. Co.*, 2 Rich. 346; *Floyd v. Floyd*, 4 Rich. 23; *Thurber v. Dwyer*, 10 R. I. 355; *Hanchet v. Whitney*, 1 Vt. 311; *Hall v. Wadsworth*, 28 Vt. 410; *Boudette v. Pierce*, 50 Vt. 212.

<sup>2</sup> *Prickett v. Ritter*, 16 Ill. 96; *Seem v. McLees*, 24 Ill. 192; *Dunne v. Schools*, 39 Ill. 568; *Creighton v. Sanders*, 8 Rep., N. S., 650; *Brownell v. Welch*, 91 Ill. 523; *Kinsey v. Minnick*, 43 Md. 112; *Gunn v. Sinclair*, 52 Mo. 327; *Steffens v. Earl*, 40 N. J. L. 128; 29 Am. Rep. 214; 6 Rep., N. S., 402; *Geiger v. Braun*, 6 Daly, 506; *Mathew-*

*son v. Thompson*, 12 R. I. 29; a weekly tenancy, to commence on the first day of a specified month, at a specified monthly rent, is a monthly tenancy. *Steffens v. Earl*, 40 N. J. L. 128; 29 Am. Rep. 214. Where, after a tenancy for one year has expired, a new tenancy is made by the month, the landlord has the right to terminate the tenancy at the end of any month, by giving proper notice: *Brownell v. Welch*, 91 Ill. 523.

<sup>3</sup> *Finlayson v. Bayley*, 5 Car. 106; 67; *Jones v. Mills*, 10 Com. B., 788.

<sup>4</sup> *Dimsdale v. Ives*, 2 Lev. 88; *Dean v. Dean*, 11 Ves. 383; *Turner v. Nett*, 9 Mees. & W. 643; *Pollock v. Brewer*, 7 Com. B., N. S., 371; *Thomas v. Thomas*, 6 Ex. 854.

<sup>5</sup> *Dunne v. Schools*, 39 Ill. 568; *Finlayson v. Enders*, 3 Dana, 66; *Reed v. Smith*, 21 Me. 114; *Davis v. Thompson*, 13 Me. 209; *Moore v. Bond*, 13 Me. 242; *Gordon v. Gilman*, 4 Me. 473; *Withers v. Larrabee*, 48 Me. 473; *Reed v. Reed*, 48 Me. 385; *Ellis v. Baker*, 50 Me. 325; 79 Am. Dec. 169; *Ellis v. Paige*, 1 Pick. 43; *Hildreth v. Conant*, 10 Met. 298; *Benedict v. Morse*, 10 Met. 223; *Kelly v. Vane*, 12 Met. 300; *Cooper v. Adams*, 12 Met. 87; *McFarland v. Chase*, 12 Met. 87; *Gray*, 462; *Curtis v. Galvin*, 12 Met. 215; *Clark v. Wheelock*, 99 Mass. 169; *Jackson v. Bradt*, 2 Cal. 169; *Howell*, 7 Ired. 496; *Chamberlain v. Donahue*, 45 Vt. 50; *Harrison v. Dighton*, 11 Gratt. 527.

cky.<sup>1</sup> But in other cases the courts, regarding a tenancy will as constructively a tenancy from year to year, hold notice essential to determine it;<sup>2</sup> and notice is likewise required by statute now in many of the states.<sup>3</sup>

At common law, a tenant at sufferance is not entitled to notice to quit.<sup>4</sup> As between vendor and vendee, where the vendee has been let into possession of the premises under a contract of purchase, which he has failed to comply with, such vendee is not entitled to notice.<sup>5</sup> But by statute in some states, notice to quit is required to be given to a tenant at sufferance.<sup>6</sup> It has been held that a tenant from year to year holding over after the expira-

*Cook v. Cook*, 28 Ala. 660; *Herrell v. Izeland*, 81 Ill. 457; *Rich v. Bolton*, Vt. 84; 14 Am. Rep. 615; *Sullivan v. Enders*, 3 Dana, 66. *Larkin v. Avery*, 23 Conn. 304; *Ly v. Quarterman*, 12 Ga. 386; *Wires v. Huff*, 3 A. K. Marsh. 17; *Ellips v. Covert*, 7 Johns. 1; *Clark Smith*, 25 Pa. St. 137; *Dillon v. Brown*, 11 Gray, 179; 71 Am. Dec.

of a month's lease, without consent, is not entitled to a notice to quit: *State v. Moore*, 41 N. J. L. 515.

<sup>2</sup> *Den v. Webster*, 18 Tenn. 512; *Den v. Westbrook*, 15 N. J. L. 371; 29 Am. Dec. 692; *Van Valkenburg v. Bank*, 23 N. J. L. 583; *Ross v. Van Aulen*, 42 N. J. L. 49; *Chilton v. Niblett*, 22 Tenn. 404; *Glascock v. Robards*, 14 Mo. 350.

<sup>3</sup> See 1 *Stimson's American Statute* sec. 2051; and see *Semmes v. United States*, 14 Ct. of Cl. 493; *Smith v. Robertson*, 24 Cal. 127; *Fris v. Price*, 27 Cal. 253; *King v. Conly*, 51 Cal. 181; *Bonsall v. McKay*, 10ust. 520; *Cunningham v. Holton*, Me. 33; *Thomas v. Steamship Co.*, Me. 548; *Prescott v. Elm*, 7 Cush. 93; *Sanford v. Harvey*, 11 Cush. 93; *Wia v. Murphy*, 126 Mass. 143; *odrow v. Michael*, 13 Mich. 187; *urray v. Armstrong*, 11 Mo. 209; *ms v. Bryant*, 31 N. Y. 453.

<sup>4</sup> *Reed v. Reed*, 48 Me. 388; *Allen Carpenter*, 15 Mich. 25; *Jackson v. Khurst*, 5 Johns. 128; *Jackson v. lerson*, 12 Johns. 182; *Doe v. sey*, 8 Barn. & C. 767; *Hauxhurst v. obree*, 38 Cal. 563; *Barlow v. Bell*, 1bb, 106; *Howard v. Carpenter*, 22. 10; *Kinsley v. Ames*, 2 Met. 29; *lis v. Pool*, 3 Met. 350; *Kelly v. ite*, 12 Met. 300; *Evans v. Reed*, 5y, 308; *Stedman v. Garrett*, 18 Vt. 1; *Harrison v. Middleton*, 11 Gratt. 1; *McClung v. Echols*, 5W. Va. 204. A ant holding over after the expiration

<sup>5</sup> *One month*, New York, Wisconsin, Maryland, Kentucky, Missouri, Alabama, District of Columbia; three months, New Jersey, Pennsylvania, Delaware, Oregon, Michigan; seven days, New Hampshire; three months, Nevada: See *Stimson's Statute Law*, sec. 2050.

Construing the statute of Michigan, the supreme court say, in one case (*Benfey v. Congdon*, 40 Mich. 283): "We shall not undertake to determine in this case exactly what is meant by the statute above referred to, in giving to tenants at sufferance a right to the same notice to surrender possession as is given to tenants at will; but we do not think a tenant who wrongfully holds over for a short time becomes immediately entitled to such notice, or that any short delay in commencing proceedings against him can confer the right. The statute evidently intends a case of a holding where the occupant has some equities which would render it unjust that he be required to surrender immediate possession; but he cannot acquire such equities by a mere wrongful holding over, which is neither assented to nor acquiesced in."

tion of his term without the permission of the land was not a tenant at sufferance within the statute.<sup>1</sup> B mortgagor holding over after foreclosure is;<sup>2</sup> so is a ten *pur auter vie* holding over in ignorance of the termination of his estate.<sup>3</sup>

§ 2870. **Master and Servant.**—Where the relation master and servant exists between the parties, and the servant occupies a house as an incident to his employment, he is not entitled to notice to quit.<sup>4</sup> Where a farmer employed a laborer for a year at a stipulated price and agreed to furnish him a house at so much per month, the court held that upon ceasing to labor, his tenancy terminated, being nothing more than a tenancy at will, he was not entitled to any notice to quit.<sup>5</sup> So where a workman was employed by the month, and had the use of a house for himself and his family as part of his compensation, the court held that the relation between them was not that of landlord and tenant, but of master and servant, and that no notice to quit was necessary.<sup>6</sup> Where one was employed as a lock-tender, and as a part of his compensation was permitted to occupy one of the dwelling-houses of the company adjoining the lock, the court held he was not entitled to the three months' notice to quit required by statute.<sup>7</sup> So where college-buildings the title of which is in the trustees, are partly occupied for college purposes by the students and teachers of

<sup>1</sup> Rowan v. Lytle, 11 Wend. 617.

<sup>2</sup> Allen v. Carpenter, 15 Mich. 25 (by a divided court).

<sup>3</sup> Livingston v. Tanner, 12 Barb. 481.

<sup>4</sup> Haywood v. Miller, 3 Hill, 90; Doyle v. Gibbs, 6 Lans. 180; Comstock v. Dodge, 43 How. Pr. 97; King v. Storck, 2 Taunt. 339; Grosvenor v. Henry, 27 Iowa, 269; Jackson v. Sample, 1 Johns. Cas. 231; Kerrains v. People, 60 N. Y. 221; 14 Am. Rep. 158; the court saying: "Where the occupation of a house by a servant is connected with the service, or is required by the employer for the neces-

sary or better performance of service, the occupation is as servant, not as tenant, and the possession is that of the master. . . . The relation depends on the nature of the holding, whether it is exclusively independent of, and in no way connected with, the service, or whether it is so connected or is necessary for the performance."

<sup>5</sup> McGee v. Gibson, 1 B. Mon.

<sup>6</sup> McQuade v. Emmons, 38 N. J. 398.

<sup>7</sup> Morris Canal Co. v. Mitchell, N. J. L. 100.

llage, a steward who occupies another part of these  
ildings, without showing a lease, must be considered as  
e mere servant of the proprietors, and liable to be ex-  
elled by force.<sup>1</sup> A Roman Catholic priest, in charge at  
e will of the bishop, and occupying a dwelling-house  
longing to the church, is a servant within this rule,  
d not entitled to notice, his right to occupancy ceasing  
th his service.<sup>2</sup>

§ 2871. **As to Assignees and Subtenants.** — A person  
ming in under a tenant from year to year stands in the  
me relation to the lessor, and is entitled to notice.<sup>3</sup>  
here a railroad company enters by consent on a strip of  
d and builds its road, ejectment will not lie against its  
sees without notice, whether treated as tenants from  
ar to year or at will;<sup>4</sup> and where tenancy is from year  
year, this right to notice is not affected by the original  
see's voluntarily surrendering up his interest to the  
iginal lessor.<sup>5</sup> But where a tenant at will underlets  
d surrenders possession to his under-tenant, and the  
iginal lessor enters into a written lease with a third  
rson, a reasonable notice to the occupant, to enable him  
move his effects, is all that is necessary;<sup>6</sup> and if the  
derletting is for the purpose of illegally selling intoxic-  
ing liquors, ejectment may be maintained without  
tice.<sup>7</sup> When the lessor's term is ended, his sublessee  
comes a tenant by sufferance to the original lessor, and  
tice need not be given.<sup>8</sup> The conventional relation of  
dlord and tenant is essential; it is not sufficient that  
fendant became a tenant by operation of law.<sup>9</sup> No no-  
e to quit is necessary to be given by a purchaser at an

Watson v. McEachin, 2 Jones,

<sup>1</sup> Mellor v. Watkins, L. R. 9 Q. B.  
400.

Chatard v. O'Donovan, 80 Ind. 20;  
Am. Rep. 782.

<sup>2</sup> Clark v. Wheelock, 99 Mass. 14.

Jackson v. Salmon, 4 Wend. 327.

<sup>3</sup> Prescott v. Kyle, 103 Mass. 381.

Chicago etc. R. R. Co. v. Knox  
lege, 34 Ill. 195.

<sup>4</sup> Evans v. Reed, 5 Gray, 308.

<sup>5</sup> Evertson v. Sutton, 5 Wend. 281;  
21 Am. Dec. 217.

execution sale to the execution defendant or his assignee or lessee, as there is no relation of landlord and tenant existing.<sup>1</sup> A tenant from year to year continuing in possession after the death of the lessor is entitled to three months' notice.<sup>2</sup> So, also, if a tenant from year to year dies, his personal representatives have the same interest in the land, and are therefore entitled to the same notice.<sup>3</sup>

**§ 2872. Tenancy for Fixed Term.**—Where the tenancy is for a fixed and certain period, at the expiration of which term it is by the terms of the lease to determine, the tenant is not entitled to notice to quit.<sup>4</sup> So where the tenancy is until the happening of a certain event, upon the happening of the contingency no notice to quit is necessary.<sup>5</sup> If a lease is given for a term co-extensive with a partnership, the lease expires, without a notice to quit, when the partnership terminates.<sup>6</sup> A general hiring of a pasture for one season terminates by its own term, and there need be no notice that the stock-owner will not waive the pasture another year.<sup>7</sup>

**ILLUSTRATIONS.**—S. hired of F. a room with steam-power at a monthly rent, S. to have the power as long as F. should "see fit to let him have it." In an action for taking away the power, *held*, that S. was not entitled to a month's notice before its discontinuance: *Shorey v. Farrell*, 114 Mass. 441. The landlord, at the close of his tenant's term, sent him a writ

<sup>1</sup> *Smith v. Allen*, 1 Blackf. 22; *Cole v. Gill*, 14 Iowa, 527; *Snowden v. McKinney*, 7 B. Mon. 258; *Locke v. Coleman*, 2 T. B. Mon. 12; 15 Am. Dec. 118.

<sup>2</sup> *Den v. Snowhill*, 23 N. J. L. 447.

<sup>3</sup> *Doe v. Porter*, 3 Term Rep. 13; *Parker v. Constable*, 3 Wils. 25; *Guliver v. Burr*, 1 W. Black. 596; *Mackey v. Mackreth*, 4 Doug. 213.

<sup>4</sup> *Stedman v. McIntosh*, 4 Ired. 291; 42 Am. Dec. 122; *Decker v. Adams*, 12 N. J. L. 99; *Allen v. Jaynish*, 21 Wend. 628; *Jackson v. Parkhurst*, 5 Johns. 128; *Logan v. Herron*, 8 Serg. & R. 460; *Bedford v. McElherron*, 2

Serg. & R. 49; *Lesley v. Randolph*, 1 Rawle, 126; *Boggs v. Black*, 1 B. Mon. 335; *Young v. Smith*, 28 Mo. 65; 35 Am. Dec. 109; *Alborn v. Morgan*, 1 Ind. 184; *McClure v. McClure*, 1 Ind. 108; *Stockwell v. Marks*, 17 Ind. 455; 35 Am. Dec. 266; *Engels v. Mitchell*, 30 Minn. 122; *Canning v. Fibush*, 77 Cal. 196. Rent cannot be raised by notice under the statute where the tenancy is for a fixed period: *Canning v. Fibush*, 77 Cal. 196.

<sup>5</sup> *Clark v. Rhoads*, 79 Ind. 342.

<sup>6</sup> *Russell v. McCartney*, 21 Mo. 454.

<sup>7</sup> *Fort v. McGrath*, 7 Ill. App. 3

mit to remain in possession for two years longer, free of charge. The tenant remained without notifying the landlord that he declined the terms. *Held*, that the tenant must be deemed to have accepted them, and could be dispossessed without notice: *Hulett v. Nugent*, 71 Mo. 131.

**2873. Notice by Tenant.** — In tenancies from year to year the giving of notice is mutual, and the tenant cannot quit without giving the same notice of his intention that is required by the landlord to end the tenancy.<sup>1</sup> A tenant at will cannot put an end to his tenancy, even by assignment, without notice to the lessor.<sup>2</sup>

**2874. Who not Entitled to — In General.** — Notice to quit is based on the relation of landlord and tenant, and where that does not exist, no notice to quit is necessary.<sup>3</sup> A mortgagor in possession is not entitled to notice to quit, as he is "at most a tenant at sufferance, and may be treated either as a tenant or trespasser, at the election of the mortgagee."<sup>4</sup> And no notice to quit is necessary where one has taken possession under an adverse claim.<sup>5</sup> So where the tenant going into possession of the premises under the title of the landlord afterwards disclaims, he has no right to a notice to quit.<sup>6</sup> It is not

*Morehead v. Watkyns*, 5 B. Mon.  
*Currier v. Perley*, 24 N. H. 219;  
*Id. v. Wadsworth*, 28 Vt. 410.

*Pinhorn v. Souster*, 8 Ex. 763;  
*Witney v. Gordon*, 1 Cush. 266;  
*Walker v. Furbush*, 11 Cush. 366; 59  
Dec. 148; *Batchelder v. Batch-*  
*elder*, 2 Allen, 105.

*Thackeray v. Cheeseman*, 18 N. J.  
3; *Haley v. Hickman's Heirs*, Lit.  
Cas. 266; *Chamberlin v. Donahue*,  
Vt. 50, 55; *Kilburn v. Ritchie*, 2  
145; 56 Am. Dec. 326; *Den v.*  
*Wester*, 10 Yerg. 512; *Eberwine v.*  
*Id.*, 74 Ind. 377; *Indianapolis Mfg.*  
*v. R. R. Co.*, 45 Ind. 281; *Meeker*  
*Doz.*, 7 Blackf. 169; *Jackson v.*  
*Arch.*, 3 Wend. 337; 20 Am. Dec.

*Den v. Wade*, 20 N. J. L. 291, 294;  
*Id. v. Stockton*, 12 N. J. L. 322;

*Pierce v. Brown*, 24 Vt. 165, 171; *Allen*  
*v. Carpenter*, 15 Mich. 25, 34.

<sup>1</sup> *Williams v. Hensley*, 1 A. K. Marsh.  
181; *Williams v. Cash*, 27 Ga. 507; 73  
Am. Dec. 759; *Steinhauser v. Cook*,  
50 Mich. 367.

<sup>2</sup> *Bates v. Austin*, 2 A. K. Marsh.  
270; 12 Am. Dec. 395; *Ross v. Garri-*  
*son*, 1 Dana, 36; *Tuttle v. Reynolds*, 1  
Vt. 80; *Clapp v. Beardsley*, 1 Vt. 151;  
*Chamberlin v. Donahue*, 45 Vt. 50;  
*Bolton v. Landers*, 27 Cal. 104; *Smith*  
*v. Shaw*, 16 Cal. 88; *Woodward v.*  
*Brown*, 13 Pet. 1; *Willison v. Wat-*  
*kins*, 3 Pet. 43, 48; *Stephens v. Brown*,  
56 Mo. 23; *Kunzie v. Wixom*, 30 Mich.  
384; *Fuller v. Sweet*, 30 Mich. 237; 18  
Am. Rep. 122; *Miller v. Shackelford*,  
4 Dana, 278; *Emerick v. Tavener*, 9  
Gratt. 220; *Harrison v. Middleton*, 11  
Gratt. 527; *Allen v. Paul*, 24 Gratt.

necessary to give notice to quit to a trespasser,<sup>1</sup> or where the defendant is a mere intruder,<sup>2</sup> or where the entry is wrongful in its inception.<sup>3</sup> Where a stranger to the owner, on his behalf, and in his name, makes a lease of his property, and the lessee has entered into possession under it, such lessee is not entitled to any notice to quit from the owner of the premises.<sup>4</sup> And where no rent had been paid for twenty years before action brought, it was held that the jury had a right to presume that the relation of landlord and tenant had ceased, and that no notice to quit was necessary.<sup>5</sup> Where the tenant held over for two years, but without recognition from his landlord, he was held not to be entitled to notice to quit.<sup>6</sup> In Kentucky it was held that if a suit for the possession of land was dismissed for the want of notice, in a subsequent action for the same premises, the former suit will be regarded as dispensing with the necessity of notice to terminate the tenancy, which was a tenancy from year to year.<sup>7</sup> Where a landlord sent to his tenant, already in possession of the premises, written permission to remain two years longer, free of rent, and the tenant continued in possession, without informing the landlord that he declined the terms offered, it was held that he would be deemed to have accepted them, and that upon the expiration of the term he could be dispossessed without notice to quit.<sup>8</sup> Where a lease depends upon the performance of certain conditions, or is to be terminated on the happening of a contingency, the

332; *Harrison v. Marshall*, 4 Bibb, 524; *Den v. Blair*, 15 N. J. L. 181; *McClane v. White*, 5 Minn. 178; *Chilton v. Niblett*, 22 Tenn. 404; *Lane v. Osment*, 9 Yerg. 86; *Smith v. Shaw*, 16 Cal. 88; *Jackson v. French*, 3 Wend. 337; 20 Am. Dec. 699; *Meraman v. Caldwell*, 8 B. Mon. 32; 46 Am. Dec. 537; *Sims v. Cooper*, 106 Ind. 87.

<sup>1</sup> *Meeker v. Doe*, 7 Blackf. 169; *Gladwin v. Stebbins*, 2 Cal. 103.

<sup>3</sup> *Worthington v. Etcheson*, 5 Cranch C. C. 302; *Lewis v. Ringo*, 3 A. K. Marsh. 247; *Doe v. Bell*, 8 Jones, 294.

<sup>2</sup> *Chicago etc. R. R. Co. v. Knox College*, 34 Ill. 195.

<sup>4</sup> *Yellow Jacket Silver Mining Co. v. Stevenson*, 5 Nev. 224.

<sup>5</sup> *Crowther v. Lloyd*, 31 N. J. L. 395.

<sup>6</sup> *Den v. Snowhill*, 23 N. J. L. 448.

<sup>7</sup> *Cornellison v. Cornellison*, 1 Bush, 153.

<sup>8</sup> *Hulett v. Nugent*, 71 Mo. 132. "The writing," the court said, "could be construed as a notice to quit after the expiration of the two years."

non-performance of the conditions or the happening of the contingent event determines the tenancy, and ejectment will lie without further notice to quit.<sup>1</sup>

§ 2875. **Length of Notice.**—At common law, in tenancies from year to year, the notice was required to be one half of the term; hence six months' notice is essential.<sup>2</sup> In the case of tenancies for periods running less than a year, a different rule was adopted. By analogy the rule requiring a six months' notice in tenancies from year to year would only make necessary a half-month's or a half-week's notice in the case of monthly or weekly tenancies. But this analogy was not observed. Monthly and weekly tenancies were so brief that it was considered unwise to require merely a half-month's notice or a half-week's. Therefore, in the case of tenancies running for periods of less than a year, the notice was regulated by the letting, and was equivalent to the period. Where the letting was for a quarter, it was necessary to give a quarter's notice,<sup>3</sup> and in the case of monthly lettings, a monthly notice,<sup>4</sup> while in the case of weekly tenancies a week's notice was essential.<sup>5</sup> The notice must terminate with the current period of the year, month, or week of the tenancy as the case may be.<sup>6</sup> Where a term properly ends at midnight of

<sup>1</sup> *Doe v. Miles*, 1 Stark. 181; *Doe v. Black*, 8 Car. & P. 464; *Hollis v. Pool*, 3 Met. 350; *Creech v. Crockett*, 5 Cush. 133; *Elliott v. Stone*, 1 Gray, 571; 12 Cush. 174; *Ashley v. Warner*, 11 Gray, 43; *Davis v. Murphy*, 126 Mass. 143; *Horne v. Leeds*, 25 N. J. L. 106; *Allen v. Jaquiah*, 21 Wend. 628; *People v. Shackno*, 48 Barb. 551; *Garner v. Hannah*, 6 Duer, 262; *Olcott v. Dunklee*, 16 Vt. 478; *Harrison v. Middleton*, 11 Gratt. 527.

<sup>2</sup> *Kitchen v. Pridgen*, 3 Jones, 49; 64 Am. Dec. 593; *Stedman v. McIntosh*, 4 Ired. 291; 42 Am. Dec. 122; *Right v. Darby*, 1 Term Rep. 59; *Johnston v. Huddleston*, 4 Barn. & C. 922; *Parker v. Constable*, 3 Wils. 25; *Gulivar v. Burr*, 1 W. Black. 596; *Jack-*

*son v. Hughes*, 1 Blackf. 421, 427; *Hanchett v. Whitney*, 2 Aiken, 241; 1 Vt. 311; *Barlow v. Wainwright*, 22 Vt. 88; 52 Am. Dec. 79; *Hall v. Wadsworth*, 28 Vt. 410; *Silsby v. Allen*, 43 Vt. 172; *Hall v. Myers*, 43 Md. 449; *Ross v. Garrison*, 1 Dana, 36; *Morehead v. Watkyns*, 5 B. Mon. 229; *Currier v. Perley*, 24 N. H. 219, 224.

<sup>3</sup> *Kemp v. Derrett*, 3 Camp. 510.

<sup>4</sup> *Parry v. Hazel*, 1 Esp. 94; *Peacock v. Raffan*, 6 Esp. 4; *Doe v. Scott*, 6 Bing. 364; *Currier v. Perley*, 24 N. H. 219, 224.

<sup>5</sup> *Peacock v. Raffan*, 6 Esp. 4; *Campbell v. Scott*, 6 Bing. 362.

<sup>6</sup> *Right v. Darby*, 1 Term Rep. 156; *Doe v. Bell*, 5 Term Rep. 471; *Roe v. Ward*, 1 H. Black. 97; *Doe v. Dunno-*

April 30th, a notice to quit on May 1st is good.<sup>1</sup> But by agreement of the parties the length of time required for the notice may be varied, and may be limited to end on a particular day or time.<sup>2</sup> The day on which the notice is given must be excluded in the computation.<sup>3</sup> To terminate a tenancy from month to month, the required notice must be given at or before the termination of the current month.<sup>4</sup> Notice to quit within three days "after" service thereof gives three whole days before suit.<sup>5</sup> The length of notice is now generally regulated by statute. In tenancies from year to year, three months' notice is required in most of the states. In tenancies at will, three months is required in some, thirty days in others, and even less in others. The statutes of some states require from one to three months' notice in the case of tenancies by sufferance.<sup>6</sup>

**§ 2876. Requisites of Notice.**—The notice must truly state the day on which the tenancy is to terminate.<sup>7</sup> A notice to quit is good, though it contains an option to the tenant to remain on payment of an advanced rent.<sup>8</sup> A notice to quit is sufficient if substantially accurate,<sup>9</sup> or if it fairly shows the tenant what premises are demanded;<sup>10</sup>

van, 1 Taunt. 555; *Usher v. Moss*, 50 Miss. 208; *Anderson v. Critcher*, 11 Gill & J. 450; 37 Am. Dec. 72; *Prescott v. Elm*, 7 Cush. 346; *Waters v. Young*, 11 R. I. 1; 23 Am. Rep. 409.

<sup>1</sup> *Detroit Savings Bank v. Bellamy*, 49 Mich. 317.

<sup>2</sup> *Tyler v. Seed*, Skin. 649; *Doe v. Bell*, 5 Term Rep. 471; *Doe v. Charnock*, Peake Ad. Cas. 4; *Currier v. Perley*, 24 N. H. 219, 226.

<sup>3</sup> *Aiken v. Appleby*, 1 Morris, 8; *Johnson v. Douglass*, 73 Mo. 168.

<sup>4</sup> *Gunn v. Sinclair*, 52 Mo. 327; *People v. Goelet*, 64 Barb. 477; *Hart v. Lindley*, 50 Mich. 20; *Pelsch v. Biggs*, 31 Minn. 392.

<sup>5</sup> *Dale v. Doddridge*, 9 Neb. 138.

<sup>6</sup> See 1 Stimson's American Statute Law, secs. 2050-2052.

<sup>7</sup> *Waters v. Young*, 11 R. I. 1; 23 Am. Rep. 409; *Sanford v. Harvey*, 11 Cush. 93, the court saying: "If a per-

son designate in his notice a day for the termination of his tenancy, which is not the day on which the rent is payable, or a day on which the tenancy can be legally made to expire by a notice, the notice is unavailing, and the tenancy may still continue. No one is obliged to regard a notice which fixes a day for the termination of a lease different from that on which a lease can be by law made to terminate; such a notice, being one that neither party had a right to give, is treated as a nullity. . . . It is by no means necessary to name the precise day and date on which a tenancy is to expire, in a notice to quit, but it may be designated in general terms, if stated correctly."

<sup>8</sup> *Ahearn v. Bellman*, 27 Week Rep. 928.

<sup>9</sup> *Dimmett v. Appleton*, 20 Neb. 208.

<sup>10</sup> *Whipple v. Shewalter*, 91 Ind. 114.

as a notice describing the premises as "the dwelling-house situate, . . . now held of me by you as tenant."<sup>1</sup> A statutory notice must strictly follow the statute.<sup>2</sup> A notice to surrender possession "as soon as practicable" is insufficient.<sup>3</sup> A notice is not invalidated by a mistake in the christian name of the tenant, if his family, on receiving it, understand it to be intended for him.<sup>4</sup> Where a statute providing for notice to quit for non-payment of rent required that it "be served on the tenant, or if he cannot be found, by delivering the same to some person of proper age and discretion residing on the premises, having first made known to such person the contents thereof," it was held that this requirement was not answered by simply reading the notice to the tenant.<sup>5</sup>

§ 2877. **Waiver of Notice.**—The notice being for the tenant's benefit, he may waive it, either by an express agreement to that effect in his lease, or otherwise.<sup>6</sup> The statutes requiring notice of a certain period do not prevent a stipulation between the landlord and tenant for a shorter notice.<sup>7</sup> Issuing a distress-warrant is a waiver of the notice.<sup>8</sup> So is the receipt of subsequently accruing rent.<sup>9</sup> So the landlord may waive a notice already given. Thus where a tenant had received from his landlord the notice to quit required by an existing lease, and on application to the landlord he was told, "If you want to stay, you can stay," the notice was held withdrawn.<sup>10</sup>

§ 2878. **Eviction.**—Eviction is the taking from a tenant of the whole or any part of the demised premises of which he has been in possession, or of something which he was

<sup>1</sup> *Epstein v. Greer*, 78 Ind. 348.

<sup>2</sup> *Douglass v. Whitaker*, 32 Kan. 381.

<sup>3</sup> *People v. Gedney*, 15 Hun, 475.

<sup>4</sup> *Clark v. Keliber*, 107 Mass. 406.

<sup>5</sup> *Jenkins v. Jenkins*, 63 Ind. 415; 30 Am. Rep. 229.

<sup>6</sup> *Hutchinson v. Potter*, 11 Pa. St. 472; *Young v. Smith*, 28 Mo. 65; 75 Am. Dec. 109.

<sup>7</sup> *Waggeman v. Bartlett*, 2 Mackey, 450.

<sup>8</sup> But not where it is done by the landlord's agent without his authority: *Lucas v. Brooks*, 18 Wall. 436.

<sup>9</sup> *Prindle v. Anderson*, 19 Wend. 391; 23 Wend. 616.

<sup>10</sup> *Supplee v. Timothy*, 124 Pa. St. 375.

entitled to enjoy in connection therewith.<sup>1</sup> It is a breach of the express or implied covenant for quiet enjoyment.<sup>2</sup> If the wrongful acts of a lessor upon the demised premises are such as to permanently deprive the lessee of the beneficial enjoyment of them, and the lessee, in consequence thereof, abandons them, it is an eviction, and the intent to evict is conclusively presumed.<sup>3</sup> An eviction terminates the tenancy, and the tenant may abandon the premises;<sup>4</sup> and it authorizes the tenant to remove improvements, where the lease provides that he may at the end of the term.<sup>5</sup> The eviction may be constructive as well as actual,<sup>6</sup> as where there has been an interference with or disturbance of a tenant's beneficial enjoyment of the demised premises intentionally committed by the landlord, and injurious in its character, although there has been no physical eviction or expulsion.<sup>7</sup> An eviction by the landlord is not a mere trespass, but something of a grave and permanent character, done by him with the intention of depriving the tenant of the leased premises; the question of eviction or not depending on the facts, and being a matter for the decision of the jury.<sup>8</sup> Where a tenant relies on an ouster without judgment, he has the burden of proving the validity of the elder title, the actual entry under it, and that he acted in good faith, and without collusion with the party entering.<sup>9</sup> Where a tenant holds a lease which is to expire upon the sale of the leased premises, and the new owner, under a sale of the land, offers to continue him as tenant under the lease, the tenant cannot recover damages for an eviction by the grantee, where the eviction is in consequence of the non-payment

<sup>1</sup> *Etheridge v. Osborn*, 12 Wend. 529.

<sup>2</sup> *Gear on Landlord and Tenant*, sec. 92.

<sup>3</sup> *Skally v. Shute*, 132 Mass. 367.

<sup>4</sup> *Crommelin v. Thiess*, 31 Ala. 412; 70 Am. Dec. 499; *Wheelock v. Warschauer*, 34 Cal. 265; *Gore v. Stevens*, 1 Dana, 201; 25 Am. Dec. 141; *Wood*

*v. Partridge*, 11 Mass. 488; *Randall v. Rich*, 11 Mass. 494.

<sup>5</sup> *Wright v. Lattin*, 38 Ill. 293.

<sup>6</sup> *Gear on Landlord and Tenant*, sec. 92.

<sup>7</sup> *Cohen v. Dupont*, 1 Sand. 260.

<sup>8</sup> *Rice v. Dudley*, 65 Ala. 68.

<sup>9</sup> *Morse v. Goddard*, 13 Met. 177; 46 Am. Dec. 728.

of rent under the lease.<sup>1</sup> One may maintain an action against his lessor for an eviction, although after the eviction he has assigned his term, the lease providing that it might be avoided by the lessor in case of assignment.<sup>2</sup> A lessor entering according to an agreement in the lease, and evicting the tenant of the lessee for a covenant broken, determines the lessee's estate, and cannot sue for rent, as such, accruing subsequently, but only for an amount equal to the rent lost to him by such breach, as damages.<sup>3</sup>

The eviction of the tenant from the demised premises, either by the landlord or by title paramount, is a bar to the recovery of the rent reserved.<sup>4</sup> But it must take place before the rent falls due.<sup>5</sup> The rent already accrued and overdue is not forfeited by the eviction; but in an action for such rent, the tenant may set off the damages caused by it.<sup>6</sup> When rent is payable quarterly in advance, an eviction for non-payment during the quarter is no bar to an action for the rent, but the tenant must pay rent for so much of the quarter as had elapsed at the time of eviction.<sup>7</sup> Where a lessee under a lease reserving annual rent is evicted before the day of payment by one holding a title paramount to that of the lessor, payment on the day the rent became due to the person holding such paramount title is a good defense to an action on the lease for covenant broken. But if, before any rent is paid, such paramount title is defeated by the lessor, he may maintain an action for the rent that fell due during the eviction.<sup>8</sup> The tenant cannot withhold rents or moneys due

<sup>1</sup> *Allenspach v. Wagner*, 9 Col. 127.

<sup>2</sup> *Lanigan v. Kille*, 13 Phila. 49.

<sup>3</sup> *Hall v. Gould*, 13 N. Y. 127.

<sup>4</sup> *Fillebrown v. Hoar*, 124 Mass. 583; *Morse v. Goddard*, 13 Met. 177; 46 Am. Dec. 728; *Smith v. Shepard*, 15 Pick. 147; 25 Am. Dec. 432; *George v. Putney*, 4 Cush. 351; 50 Am. Dec. 788; *Halligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108; *Wright v. Lattin*, 38 Ill. 293; *Fitchburg Corp. v. Melvin*, 15 Mass. 268; *Leishman v. White*,

1 Allen, 489; *Day v. Watson*, 8 Mich. 535; *Carter v. Burr*, 39 Barb. 59; *Blair v. Carton*, 18 N. Y. 529; *Moffat v. Strong*, 9 Bosw. 57; *Hegeman v. McArthur*, 1 E. D. Smith, 147; *Hulsmann v. Griffiths*, 10 Phila. 350.

<sup>5</sup> *Giles v. Comstock*, 4 N. Y. 270; 53 Am. Dec. 374.

<sup>6</sup> *Tiley v. Meyers*, 43 Pa. St. 404; *Gosbel v. Hough*, 26 Minn. 252.

<sup>7</sup> *Whitney v. Meyers*, 1 Duer, 268.

<sup>8</sup> *Russell v. Fabyan*, 28 N. H. 543; 61 Am. Dec. 629.

on account of an apprehended eviction;<sup>1</sup> nor can he, after eviction, recover rent paid in advance.<sup>2</sup>

The right to claim an eviction may be waived by the lessee by his continuing in possession.<sup>3</sup> So after a constructive and temporary eviction, if the tenant returns and occupies the premises, the right to the rent once suspended is restored.<sup>4</sup> That a tenant is ousted from lawful possession of property is not alone sufficient to make the landlord responsible; it must further appear that the tenant dissented.<sup>5</sup>

Any of the following acts will constitute an eviction, viz.: Preventing the tenant from occupying the premises by any act of the lessor or those claiming under him, or by one having paramount title;<sup>6</sup> a recovery in trespass by a prior lessee;<sup>7</sup> the lessor putting a subsequent lessee or grantee in possession;<sup>8</sup> an assignment of dower in rents and profits;<sup>9</sup> recovery of judgment in ejectment by the owner of a paramount title;<sup>10</sup> a sheriff's sale and conveyance under a paramount encumbrance;<sup>11</sup> an injunction by the lessor against the use of the premises;<sup>12</sup> a judgment of

<sup>1</sup> *Pickett v. Ferguson*, 45 Ark. 177.

<sup>2</sup> *Beck v. Birdsell*, 19 Kan. 550.

<sup>3</sup> *Crommelin v. Theiss*, 31 Ala. 412; 70 Am. Dec. 497; *Gear on Landlord and Tenant*, sec. 92; *Edgerton v. Page*, 1 Hilt. 320; 20 N. Y. 284; *Ogden v. Saunderson*, 3 E. D. Smith, 166; *Thomas v. Nelson*, 69 N. Y. 118; *Chicago Legal New Co. v. Browne*, 103 Ill. 317.

<sup>4</sup> *Martin v. Martin*, 7 Md. 368; 61 Am. Dec. 365.

<sup>5</sup> *Perry v. Wall*, 68 Ga. 70.

<sup>6</sup> *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446; *Gazzolo v. Chambers*, 73 Ill. 75; *Day v. Watson*, 8 Mich. 535; *Williams v. Cleaver*, 4 Houst. 453; *Fritz v. Pusey*, 31 Minn. 368; *Moffat v. Strong*, 9 Bosw. 57; *Lawrence v. Mead*, 5 Hun, 179; *St. John v. Palmer*, 5 Hill, 599; *Hamilton v. Cutts*, 4 Mass. 349; 3 Am. Dec. 222; *Williams v. Weatherbee*, 2 Aiken, 329; *Peters v. Grubb*, 21 Pa. St. 453; *Mc-*

*Clurg v. Price*, 59 Pa. St. 420; 98 Am. Dec. 356; *Lanigan v. Kille*, 13 Phila. 49; *Maverick v. Lewis*, 3 McCord, 211; *Garfield v. Williams*, 2 Vt. 327.

<sup>7</sup> *McAlester v. Landers*, 70 Cal. 79.

<sup>8</sup> *Gear on Landlord and Tenant*, sec. 92; *Matthews v. Toebner*, 39 Mo. 115; *Briggs v. Thompson*, 9 Pa. St. 338.

<sup>9</sup> *McAlpin v. Woodruff*, 11 Ohio St. 120.

<sup>10</sup> *Gear on Landlord and Tenant*, sec. 92. An actual physical ouster is not indispensably necessary to constitute an eviction. If a final decree of a competent court establishing title in a third person is shown, the loss of the land will be considered certain: *De St. Romes v. New Orleans*, 34 La. Ann. 1201.

<sup>11</sup> *George v. Putney*, 4 Cush. 354; 50 Am. Dec. 788; *Brown v. Dickerson*, 12 Pa. St. 372; *Simers v. Salts*, 3 Denio, 214.

<sup>12</sup> *Pfund v. Herlinger*, 10 Phila. 13; *Madox v. Humphries*, 24 Tex. 195.

eviction in his favor;<sup>1</sup> the agent of the landlord forbidding an under-tenant of the lessee to pay rent to him;<sup>2</sup> the landlord taking possession of the ruins of the premises destroyed by fire, for the purpose of rebuilding, without the consent of his tenant;<sup>3</sup> a default of a landlord to drain his cellar adjoining the leased premises, whereby the latter becomes untenable;<sup>4</sup> the landlord's permitting a railroad to take possession of part of premises leased;<sup>5</sup> the landlord's leasing reserved portions of the premises demised for the carrying on of pursuits which render the demised premises useless for the purpose for which they are rented, whether such pursuits are lawful or unlawful.<sup>6</sup> Where the lessee, to prevent being actually expelled from the demised premises, yields the possession thereof, and attorns in good faith to one having a paramount title to his lessor, and a right to immediate possession, it is equivalent to an actual ouster.<sup>7</sup>

By mere acts of trespass, though repeated, an eviction will not be constituted;<sup>8</sup> nor by a temporary occupation by the lessor in the absence of the tenant, without intent to evict him;<sup>9</sup> nor by mere negligence of the lessor,<sup>10</sup> if not creating a nuisance;<sup>11</sup> nor by indecent

<sup>1</sup> *Gore v. Stephens*, 1 Dana, 201; 25 Am. Dec. 141; *Rice v. Bliss*, 66 How. Pr. 186.

<sup>2</sup> *Leadbeater v. Roth*, 25 Ill. 587.

<sup>3</sup> *Magaw v. Lambert*, 3 Pa. St. 444.

<sup>4</sup> *Alger v. Kennedy*, 49 Vt. 109; 24 Am. Rep. 117.

<sup>5</sup> *Halligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108.

<sup>6</sup> *Halligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108.

<sup>7</sup> *Morse v. Goddard*, 13 Met. 177; 46 Am. Dec. 728.

<sup>8</sup> *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446; *Rice v. Dudley*, 65 Ala. 68; *Hayner v. Smith*, 63 Ill. 430; 14 Am. Rep. 124; *Handschy v. Sutton*, 28 Ind. 159; *Avery v. Dougherty*, 102 Ind. 443; 52 Am. Rep. 680; *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *McFadden v. Ripley*, 8 Mo. 738; *Elliott v. Aiken*, 45 N. H. 30; *Levy v. Bend*, 1 E. D. Smith, 169; *Edgerton*

*v. Paige*, 20 N. Y. 281; *Walter v. Fowler*, 17 N. Y. Week. Dig. 225; *Loundsbury v. Snyder*, 31 N. Y. 514; *Lawrence v. French*, 25 Wend. 443, 445; *Bennet v. Bittle*, 4 Rawle, 339. As, for example, a lessor's repeated entries upon the premises, — carrying away crops, cutting down a fruit-tree, and removing a cook-stove from the house: *Bartlett v. Farrington*, 120 Mass. 284.

<sup>9</sup> *Billany v. Smith*, 4 Houst. 113; *State v. McClay*, 1 Harr. (Del.) 520; *Way v. Myers*, 64 Ga. 760; *Destrehan v. Scudder*, 11 Mo. 484.

<sup>10</sup> *De Witt v. Pierson*, 112 Mass. 8; 17 Am. Rep. 58; *Coddington v. Dunham*, 35 N. Y. Sup. Ct. 412; *Truesdell v. Booth*, 6 Thomp. & C. (N. Y.) 379; 4 Hun, 100; *Sheary v. Adams*, 18 Hun, 181.

<sup>11</sup> *Truesdell v. Booth*, 6 Thomp. & C. (N. Y.) 379; 4 Hun, 100; *Sutphen v. Seebass*, 14 Abb. N. C. 67.

exposure and disparaging remarks;<sup>1</sup> nor by a personal assault;<sup>2</sup> nor by an interference with the person of a tenant by the landlord, although on the demised premises;<sup>3</sup> nor by a breach of the lessor's covenant not necessarily taking away possession;<sup>4</sup> nor by his lawful use of adjoining premises, though cutting off light and air;<sup>5</sup> nor by the lessor's preventing an illegal use of the premises;<sup>6</sup> nor by his attachment of personal property of the tenant;<sup>7</sup> nor by want of quiet or continued possession, if attributable to the acts of the lessee,<sup>8</sup> or to his voluntary surrender,<sup>9</sup> or voluntary or unjustifiable abandonment of the premises,<sup>10</sup> though ordered to quit by the lessor;<sup>11</sup> nor by surrender to a sheriff, who is erroneously directed to rent the premises by a decree to which the tenant is no party;<sup>12</sup> or a rightful removal of party-stairs;<sup>13</sup> nor by a lawful entry to terminate the lease as provided for,<sup>14</sup> or to take possession of goods under a chattel mortgage, or to make required repairs or alterations,<sup>15</sup> or to rebuild after termination of the lease by destruction of a building;<sup>16</sup> nor by a conveyance by the lessor of a right of way;<sup>17</sup>

<sup>1</sup> *Edwards v. Candy*, 14 Hun, 596.

<sup>2</sup> *Vatel v. Herner*, 1 Hilt. 149; *Penn v. Glover*, Cro. Eliz. 421.

<sup>3</sup> *Vatel v. Herner*, 1 Hilt. 149.

<sup>4</sup> *Sheary v. Adams*, 18 Hun, 181; *Etheridge v. Osborn*, 12 Wend. 529.

<sup>5</sup> *Palmer v. Wetmore*, 2 Sand. 316; *Myers v. Gemmel*, 10 Barb. 537; *Hazlett v. Powell*, 30 Pa. St. 293; *Hilliard v. N. Y. & C. Gas Coal Co.*, 41 Ohio St. 662; 52 Am. Rep. 99.

<sup>6</sup> *Newley v. Sharpe*, L. R. 8 Ch. Div. 39.

<sup>7</sup> *Daniels v. Logan*, 47 Iowa, 395; *Thomas v. Dandas*, 31 La. Ann. 184.

<sup>8</sup> *Smith v. Thurston*, 19 Mo. App. 48.

<sup>9</sup> *Lettick v. Honnold*, 63 Ill. 335; *Westlake v. De Graw*, 25 Wend. 669; *Peck v. Knickerbocker Ice Co.*, 18 Hun, 183; *Ogden v. Sanderson*, 3 E. D. Smith, 166; *Yates v. Bachley*, 33 Wis. 185.

<sup>10</sup> *Truesdell v. Booth*, 6 Thomp. & C. (N. Y.) 379; 4 Hun, 100; *Tallman v. Gashweiler*, 13 Daly, 555; 1 N. Y. State

Rep. 270; *Heintze v. Erlacher*, 1 N. Y. City Ct. 465; *Graves v. Cameron*, 9 Daly, 152; *Sutphen v. Seebass*, 14 Abb. N. C. 67; *Gillhooley v. Washington*, 4 N. Y. 217; *Lockrow v. Horgan*, 58 N. Y. 635; *Sheary v. Adams*, 18 Hun, 181; *Thomas v. Nelson*, 69 N. Y. 118; *Hilliard v. N. Y. & C. Gas Coal Co.*, 41 Ohio St. 662; 52 Am. Rep. 99; *Marseilles v. Kerr*, 6 Whart. 500; *Furus v. Grundy*, 22 Gratt. 109.

<sup>11</sup> *Smith v. Haas*, 36 La. Ann. 413.

<sup>12</sup> *Murray v. Pennington*, 3 Gratt. 87.

<sup>13</sup> *Manville v. Gay*, 1 Wis. 250; 60 Am. Dec. 379.

<sup>14</sup> *O'Connor v. Daily*, 109 Mass. 235.

<sup>15</sup> *Patterson v. Edmondson*, 5 Harr. (Del.) 378; *Morris v. Tillson*, 81 Ill. 607; *Caffin v. Redon*, 6 La. Ann. 487; *Gallup v. R. R. Co.*, 65 N. Y. 1; *Matthews v. Meyberg*, 4 Hun, 78; 63 N. Y. 656.

<sup>16</sup> *Alexander v. Dorsey*, 12 Ga. 12; 56 Am. Dec. 443.

<sup>17</sup> *Blythe v. Pratt*, 62 Miss. 707.

nor by his consent to condemnation proceedings which do not bind the tenant;<sup>1</sup> nor by a lawful exercise by public authorities of the right of eminent domain;<sup>2</sup> nor by any acts of city authorities;<sup>3</sup> nor by the acts of a wrong-doer;<sup>4</sup> nor by the omission of a landlord to perform his covenants;<sup>5</sup> nor by the interruption by a landlord of his tenant's occupation, without evicting him;<sup>6</sup> nor by unnecessary and tortious delay and negligence of a landlord in making repairs on the demised premises during the term, to the injury of the tenant;<sup>7</sup> nor his failure to furnish material for repairs;<sup>8</sup> nor by his attempt to rent the premises to outside parties, unless the lessees are in some way thereby disturbed in their possession;<sup>9</sup> nor by the fact that adjoining premises leased by the same landlord to another tenant are used for a business incompatible with the convenient occupation of the premises leased by him;<sup>10</sup> nor by his non-supply of water, caused by a leak in a pipe outside of the demised premises (which the landlord, after notice and requests, neglects or refuses to remedy), whereby a water-closet and wash-basin on the demised premises became useless;<sup>11</sup> nor by the fact that the rooms beneath a tenant are occupied by a woman, also a tenant of the same landlord, of notoriously bad character, who keeps in her apartments lewd women as lodgers, uses the rooms for purposes of prostitution, and receives there the visits of drunken men, although the noise and riot proceeding from the rooms attract crowds of boys around the spot, and the singing of bawdy songs by and the loud talking of the women and their visitors, and the frequent ringing of the door-bell, disturb the ten-

<sup>1</sup> *Sullivan v. Beardsley*, 55 Cal. 608.

<sup>2</sup> *Ellis v. Welch*, 6 Mass. 246; 4 Am. Dec. 122; *Folts v. Huntley*, 7 Wend. 210; *Frost v. Earnest*, 4 Whart. 86.

<sup>3</sup> *McLarren v. Spalding*, 2 Cal. 510; *Conner v. Bernheimer*, 6 Daly, 295.

<sup>4</sup> *Schilling v. Holmes*, 23 Cal. 227.

<sup>5</sup> *Etheridge v. Osborn*, 12 Wend. 529.

<sup>6</sup> *Fuller v. Ruby*, 10 Gray, 285; *Van-*

*derford v. Smith*, 1 Daly, 311; *Way v. Myers*, 64 Ga. 760.

<sup>7</sup> *Cram v. Dresser*, 2 Sand. 120.

<sup>8</sup> *McFarlane v. Pierson*, 21 Ill. App. 566.

<sup>9</sup> *Mills v. Sampsel*, 53 Mo. 360.

<sup>10</sup> *Gray v. Gaff*, 8 Mo. App. 329.

<sup>11</sup> *Coddington v. Dunham*, 35 N. Y. Sup. Ct. 412.

ant and his wife, and although the tenant notifies the landlord of this state of affairs, and he promises to attend to it, but does nothing.<sup>1</sup>

ILLUSTRATIONS. — A landlord, having leased the upper stories of a building, neglected to repair a drain in the cellar, whereby the whole building was rendered unhealthy. *Held*, an eviction: *Alger v. Kennedy*, 49 Vt. 109; 24 Am. Rep. 117. A landlord erected, without the tenant's consent, a new building in the back yard against the demised house, whereby two of the rooms previously used as a kitchen and bedroom were made unfit for those purposes, and were, by reason of that unfitness, abandoned by the tenant. *Held*, an eviction: *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322. D. leased to P. "Stand No. 46, in Broadway Market." D., who was proprietor of the building, afterwards discontinued its use as a market, and induced the other tenants to surrender their stands. *Held*, an eviction: *Denison v. Ford*, 7 Daly, 384. A landlord owned but three walls of a house leased, and the owner of the fourth wall raised the adjoining building, of which the wall was a part, and thereby necessarily disturbed the lessee in his possession, and obliged him to abandon the premises. *Held*, an eviction: *Bentley v. Sill*, 35 Ill. 414. A mortgagor in possession leased the premises, the lessee covenanting expressly to pay the rent in advance. The mortgagee afterwards entered for condition broken, and threatened to expel the lessee unless he would agree to pay the rent in future to him. The lessee then paid the rent to the mortgagee. *Held*, that the acts of the mortgagee constituted an actual eviction of the lessee, by title paramount; and that an action of covenant could not be maintained by the mortgagor, for the rent, against the lessee: *Smith v. Shepard*, 15 Pick. 147; 25 Am. Dec. 432. D. hired a house from P., agreeing in the lease to make necessary repairs, and there was no covenant, on the part of the landlord, to repair. The roof of the house leaked, and the walls were so damp as to create sickness in defendant's family, causing him to abandon the premises. *Held*, not an eviction: *Truesdell v. Booth*, 6 Thomp. & C. 379; 4 Hun, 100. The lessee of an old building agreed "to do all the repairs which may be required in and upon said premises at his own cost and expense." The weight of his goods caused the floors to settle, and a snow-storm afterwards caused the floors and roof to settle still more. At the lessee's request, the lessor had the roof made secure, and in so doing removed a portion of the flooring, the material whereof was unfit to be relaid. In an action by the lessor for rent, his refusal to relay the floor, *held*,

<sup>1</sup> *Dewitt v. Pierson*, 112 Mass. 8; 17 Am. Rep. 53.

no eviction: *McMann v. Autenreith*, 17 Hun, 163. At the time of the execution of a lease of premises and appurtenances from A to B, an action was pending against A for the condemnation of a water right in a stream running through the premises. On the day following the execution of the lease, A consented to the entry of a decree in favor of the plaintiff in the action. In a suit by B against A for damages for partial eviction, *held*, not an eviction: *Sullivan v. Beardsley*, 55 Cal. 608. A leased to B a store in the city of Sacramento, and certain stands for the sale of goods erected on the sidewalk of a public street. Shortly after the lease, these stands were removed by the city authorities. *Held*, that such removal was not an eviction: *McLarren v. Spalding*, 2 Cal. 510. A lessor, with the knowledge of the lessee, inadvertently put up a fence so as to cut off from the land demised about 332 square feet; but, when the mistake was discovered, offered to remove the fence, but was forbidden to do so by the lessee. *Held*, not an eviction: *Mirick v. Hoppin*, 118 Mass. 582.

§ 2879. **Partial Eviction.**—An eviction by the landlord from a part of the premises suspends the entire rent while the eviction continues.<sup>1</sup> Where certain buildings and the machinery in them were leased, and the lessee was evicted from the buildings, it was held that the lessee was not liable for rent for the use of the machinery, it being appurtenant to the buildings.<sup>2</sup> Where a tenant is evicted from a material portion of the premises, he may treat it as an eviction from the whole, and may abandon his lease, and he is not responsible for rent; nor if he retains possession of the remainder can the lessor recover the rent.<sup>3</sup> An eviction by title paramount from a part of the premises is a bar *pro tanto* only, the rent being apportionable.<sup>4</sup>

<sup>1</sup> *Fillebrown v. Hoar*, 124 Mass. 583; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Colburn v. Morrill*, 117 Mass. 262; 19 Am. Rep. 415; *Leishman v. White*, 1 Allen, 489; *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446; *Hayner v. Smith*, 63 Ill. 430; 14 Am. Rep. 124; *Briggs v. Hall*, 4 Leigh, 484; 26 Am. Dec. 326; *Lurton v. Hart*, 25 Pa. St. 193; 64 Am. Dec. 691; *Haligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108; *Briggs v. Hall*, 4 Leigh, 484.

<sup>2</sup> *Fitchburg Corp. v. Melvin*, 15 Mass. 268.

<sup>3</sup> *Sherman v. Williams*, 113 Mass. 481; 18 Am. Rep. 522.

<sup>4</sup> *Fillebrown v. Hoar*, 124 Mass. 583; *Fitchburg Cotton Co. v. Melvin*, 15 Mass. 268; *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446; *Poston v. Jones*, 2 Ired. Eq. 350; 38 Am. Dec. 683.

§ 2880. **Damages — Measure of.** — The measure of damages for not giving a lease is the actual value of the bargain plaintiff has made, and is not confined to the difference between the rent agreed to be paid and the actual value of the rent.<sup>1</sup> And special damages arising from breaking up an establishment, and moving with family and furniture to premises which the defendant had agreed to lease to plaintiff, may, though not specially alleged, be recovered in an action for refusing to deliver possession and make the lease.<sup>2</sup> Where the landlord unlawfully enters upon the demised premises and expels the family of the tenant, he is bound to make full compensation, including not only payment for injury to property, but for the wrong inflicted on the feelings of the plaintiff. But the plaintiff is not entitled to recover for any injury to his health resulting from exposure from journeying from the premises.<sup>3</sup> So compensation for improvements on eviction is allowed, where they have been made in good faith, because though in law they belong to the owner of the estate, in equity and conscience they belong to him who made them.<sup>4</sup> Where a lessee's term is extinguished by a foreclosure of a mortgage, the presumption is, that the lessee sustains no damage, the rent being an equivalent for the use. If the lessee claims damage, he must show it.<sup>5</sup>

The measure of damages for a breach of a covenant in a lease is the actual loss suffered by the plaintiff which flows naturally and proximately from the breach.<sup>6</sup> The measure of damages recoverable by a lessee against his lessor for not putting him into possession is the value of what the lessee might have made by the use of

<sup>1</sup> *Driggs v. Dwight*, 17 Wend. 71; 31 Am. Dec. 283. But see *Newbrough v. Walker*, 8 Gratt. 16; 56 Am. Dec. 127.

<sup>2</sup> *Driggs v. Dwight*, 17 Wend. 71; 31 Am. Dec. 283.

<sup>3</sup> *Fillebrown v. Hoar*, 124 Mass.

580. See *Shaw v. Hoffman*, 25 Mich. 162.

<sup>4</sup> *Pugh v. Bell*, 2 T. B. Mon. 125; 15 Am. Dec. 142.

<sup>5</sup> *Larkin v. Misland*, 100 N. Y. 212.

<sup>6</sup> *Gear on Landlord and Tenant*, sec. 88.

the leased property during the term of the lease.<sup>1</sup> For breach of a covenant against encumbrances, the measure of damage is the amount lawfully paid to discharge it,<sup>2</sup> not exceeding the value of the estate;<sup>3</sup> but nominal damages only are recoverable for the mere existence of an undischarged encumbrance,<sup>4</sup> unless there is an eviction under it,<sup>5</sup> or actual damage results therefrom.<sup>6</sup> For breach of the covenant to insure, the cost of insurance may be recovered,<sup>7</sup> or the whole actual loss.<sup>8</sup> For breach of the covenant to repair, the measure of damages is the reasonable cost of the repairs required,<sup>9</sup> or all proximate damage actually incurred.<sup>10</sup> For breach of a covenant to pay a deficiency of rent, if the landlord should re-enter for non-payment, the measure of damages consists only

<sup>1</sup> *Rice v. Whitmore*, 74 Cal. 619; 5 Am. St. Rep. 479.

<sup>2</sup> *Prescott v. Trueman*, 4 Mass. 627; 3 Am. Dec. 249; *Comings v. Little*, 24 Pick. 266; *Brooks v. Moody*, 20 Pick. 474; *Delavergne v. Norris*, 7 Johns. 358; 5 Am. Dec. 281; *Stannard v. Eldridge*, 16 Johns. 254; *Hall v. Dean*, 13 Johns. 105; *Eaton v. Lyman*, 30 Wis. 41.

<sup>3</sup> *Norton v. Babcock*, 2 Met. 510; *Dimmick v. Lockwood*, 10 Wend. 142; *Eaton v. Lyman*, 30 Wis. 41.

<sup>4</sup> *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Delavergne v. Norris*, 7 Johns. 358; 5 Am. Dec. 281.

<sup>5</sup> *Waldo v. Johnson*, 7 Johns. 173; *Giles v. Dugro*, 1 Duer. 335; *Prescott v. Trueman*, 4 Mass. 627; 3 Am. Dec. 249.

<sup>6</sup> *Jenkins v. Hopkins*, 8 Pick. 346; *Giles v. Dugro*, 1 Duer. 331.

<sup>7</sup> *Hey v. Wyche*, 12 L. J. Q. B. 83.

<sup>8</sup> *Rhone v. Gale*, 12 Minn. 54; *Charles v. Allin*, 15 Com. B. 46, 65; *Ex parte Bateman*, 20 Jur. 265.

<sup>9</sup> *Varner v. Rice*, 39 Ark. 344; *Sparks v. Bassett*, 49 N. Y. Sup. Ct. 270; *Mayor v. R. R. Co.*, 102 N. Y. 572; *Chadwick v. Woodward*, 13 Abb. N. C. 441; *Ward v. Kelsey*, 42 Barb. 582; *Moses v. O. D. I. etc. Co.*, 75 Va. 95; *Yates v. Dunster*, 11 Ex. 15; *Vivian v. Champion*, 2 Ld. Raym.

1125; *Nixon v. Denham*, 1 Ir. L. R. 100; *Penley v. Watts*, 7 Mees. & W. 601; *Williams v. Williams*, L. R. 9 Com. P. 659; *Morgan v. Hardy*, L. R. 17 Q. B. D. 770. The measure of damages for breach of a covenant to heat rooms leased is the difference in value of their use, not exceeding the reasonable cost of supplying the heat agreed to be furnished; *McCormick v. Stowell*, 138 Mass. 431.

<sup>10</sup> *Culver v. Hill*, 68 Ala. 66; 44 Am. Rep. 134; *Vandegrift v. Abbott*, 75 Ala. 487; *Dempsey v. Hertzfield*, 30 Ga. 866; *Middlekauff v. Smith*, 1 Md. 329; *Fisher v. Goebel*, 40 Mo. 475; *Cook v. Soule*, 56 N. Y. 420; *Hexter v. Knox*, 63 N. Y. 561; *Myers v. Burns*, 35 N. Y. 269, 272, 273; *Benkard v. Babcock*, 2 Rob. (N. Y.) 175; *Walker v. Swayzee*, 3 Abb. Pr. 136; *Keyes v. State Co.*, 34 Vt. 87; *Davis v. Underwood*, 2 Hurl. & N. 570; *Clow v. Brogden*, 2 Man. & G. 39; *Burdett v. Withers*, 7 Ad. & E. 136; *Mantz v. Goring*, 4 Bing. N. C. 451; *McNamara v. Vincent*, 2 I. R. C. L. 481. A tenant of a hotel may recover damages sustained by reason of the lessor's neglect to keep it in repair as agreed. He may show that persons refused to come there, and that the house had the reputation of being untenable: *Stewart v. Lanier House Co.*, 75 Ga. 582.

of such deficiency, and nothing is recoverable for repairs whereby an increased rent was secured.<sup>1</sup> For breach of the tenant's covenant to build, the measure of damages is the value the building would have had if erected at the time when title thereto would have accrued to the lessor under the lease by limitation or forfeiture of the term;<sup>2</sup> and for breach of a covenant to allow removal of a building, the measure is its value at the time of the breach, with interest.<sup>3</sup>

**§ 2881. Ejectment—Between Landlord and Tenant—When Action Lies—Who Liable and Who not.**—Ejectment will lie for the recovery of anything tangible of which possession can be delivered; hence it will lie against a lessee of lands or buildings, or even rooms.<sup>4</sup> Ejectment will not lie against a tenant out of possession who has sold his interest;<sup>5</sup> nor against a tenant who has left the premises, and cannot be found;<sup>6</sup> nor against a mere boarder or lodger;<sup>7</sup> nor against a tenant who holds a title by prescription,<sup>8</sup> or who is in possession under a valid license,<sup>9</sup> though an invalid parol license is no defense.<sup>10</sup> The action will lie against the tenant of the administrator of a vendee who has forfeited the contract of sale.<sup>11</sup> Payment of ground-rent reserved upon a conveyance in fee cannot be enforced by ejectment,<sup>12</sup> and neither the executors nor devisees of a lessor in fee who has reserved a right of re-entry for non-payment of rent can have ejectment for

<sup>1</sup> Hackett v. Richards, 13 N. Y. 138.

<sup>2</sup> Shelton v. Durham, 7 Mo. App. 585; 76 Mo. 434. The tenant cannot show, in mitigation of damages, the erection of the building after the term; but part performance during the term is an answer to damages *pro tanto*. Dowd v. Faucett, 4 Dev. 12.

<sup>3</sup> Neiswanger v. Squier, 73 Mo. 192.

<sup>4</sup> White v. White, 16 N. J. L. 204; Rowan v. Kelsey, 18 Barb. 484; Jackson v. Buel, 9 Johns. 298; Jackson v. May, 16 Johns. 184.

<sup>5</sup> Phillips v. Post, 55 Vt. 568.

<sup>6</sup> Stratton v. Lord, 22 Wend. 611.

<sup>7</sup> Jones v. Weber, 1 Chip. D. 215.

<sup>8</sup> Lawrence v. Webster, 44 Cal. 385; Horton v. R. R. Co., 12 Abb. N. C. 30.

<sup>9</sup> Carpenter v. Small, 35 Cal. 346; Baker v. R. R. Co., 57 Mo. 263; Hornbeck v. R. R. Co., 20 Ohio St. 81.

<sup>10</sup> Eggleston v. R. R. Co., 35 Barb. 162; Richma v. Baldwin, 21 N. J. L. 395, 414.

<sup>11</sup> Kearns v. McKean, 65 Cal. 411.

<sup>12</sup> Kenegre v. Elliot, 9 Watts, 258.

rent due at the lessor's death,<sup>1</sup> though an assignee of the rent may have a remedy of ejectment given by statute to the original grantor.<sup>2</sup> The landlord may recover against a tenant who holds without right, upon mere proof of the tenancy,<sup>3</sup> or of his bare prior possession;<sup>4</sup> but if he claims by estoppel of the tenant, he can take judgment only for possession,<sup>5</sup> and not for the value of the premises,<sup>6</sup> and should leave the tenant free to assert title in another action.<sup>7</sup> Previous demand of possession or notice to quit is essential before ejectment will lie against a tenant who holds by permission;<sup>8</sup> but not against one who holds unlawfully, or without consent.<sup>9</sup> The tenant cannot enjoin an ejectment suit by the lessor,<sup>10</sup> unless it appears that he has an equitable defense which he has no absolute right to assert in the action.<sup>11</sup>

§ 2882. **Who may Bring Action — Who may not.** — The action may be brought by a tenant of a term of years,<sup>12</sup> though the interest demised be incorporeal,<sup>13</sup> or though the lease expires before the suit is tried, if brought against an intruder without title,<sup>14</sup> or though he declares upon a title in fee.<sup>15</sup> The tenant cannot recover in an action of ejectment brought against the lessor in hostility to the lease.<sup>16</sup> A mere licensee<sup>17</sup> or tenant at will cannot maintain ejectment.<sup>18</sup> A lessor or his grantee cannot maintain ejectment during the continuance of the tenancy,<sup>19</sup> unless

<sup>1</sup> *Van Rensselaer v. Hayes*, 5 Denio, 477.

<sup>2</sup> *Van Rensselaer v. Slingerland*, 26 N. Y. 580.

<sup>3</sup> *Gear on Landlord and Tenant*, secs. 165, 197.

<sup>4</sup> *Clarke v. Clarke*, 51 Ala. 498.

<sup>5</sup> *Benton v. Benton*, 95 N. C. 559.

<sup>6</sup> *Bertram v. Cook*, 44 Mich. 396.

<sup>7</sup> *Benton v. Benton*, 95 N. C. 559.

<sup>8</sup> *Gear on Landlord and Tenant*, secs. 191, 197.

<sup>9</sup> *Gear on Landlord and Tenant*, secs. 191, 197.

<sup>10</sup> *Beckham v. Newton*, 21 Ga. 189.

<sup>11</sup> *Giles v. Austin*, 62 N. Y. 486.

<sup>12</sup> *Gear on Landlord and Tenant*, sec. 197.

<sup>13</sup> *Karns v. Tanner*, 66 Pa. St. 297.

<sup>14</sup> *Kirah v. Brigard*, 63 Cal. 319; *Sutton v. Cassellegi*, 5 Mo. App. 111.

<sup>15</sup> *Chapin v. Scott*, 1 Chip. D. 41; *Rood v. Willard*, Brayt. 67. *Contra*, *Hunt v. Campbell*, 83 Ind. 48.

<sup>16</sup> *Bradt v. Church*, 39 Hun. 262.

<sup>17</sup> *Boone v. Stover*, 66 Mo. 430.

<sup>18</sup> *Sallabah v. Marah*, 34 La. Ann. 1053. *Contra*, *Buntin v. Doe*, 1 Black, 26.

<sup>19</sup> *Gear on Landlord and Tenant*, sec. 197.

the lessee failed to enter into possession,<sup>1</sup> or the part of the premises sued for was not accepted by the lessee,<sup>2</sup> or was reserved in the lease;<sup>3</sup> but he may maintain ejectment against the tenant if he repudiates the tenancy,<sup>4</sup> or forfeits his term,<sup>5</sup> or holds over without right.<sup>6</sup> An heir cannot maintain ejectment against a lessee who holds under a lease from the executor made by order of court;<sup>7</sup> nor those deriving title from his widow, against a tenant by curtesy.<sup>8</sup>

§ 2883. **Ejectment—By Third Person.**—Ejectment will lie by a third person claiming the property against the tenant in possession, and he is the proper and necessary party to sue in such cases.<sup>9</sup> By statute the landlord may be joined as a party,<sup>10</sup> or may come in and defend on his own motion;<sup>11</sup> but the tenant is still a party, and entitled to defend.<sup>12</sup> The tenant is not concluded by ejectment brought against the lessor, if not made a party,<sup>13</sup> and cannot in such case be ejected under the writ;<sup>14</sup> nor is judgment against the tenant conclusive upon the landlord, if not made a party,<sup>15</sup> or notified of the action;<sup>16</sup> but if he appears and defends the action, he is bound by the recovery;<sup>17</sup> though he is not bound by a collusive judgment obtained by an appearance in his name without authority.<sup>18</sup> If the tenant omits to notify the landlord of the suit, judgment will be set aside on motion of the lessor upon a

<sup>1</sup> Sennett v. Bucher, 3 Penr. & W. 392.

<sup>2</sup> Carmarillo v. Fenlon, 49 Cal. 203.

<sup>3</sup> Stofft v. Troxell, 8 Watts & S. 340; Penn v. Divellin, 2 Yeates, 309.

<sup>4</sup> Gear on Landlord and Tenant, sec. 197.

<sup>5</sup> Penn v. Divellin, 2 Yeates, 309.

<sup>6</sup> Gear on Landlord and Tenant, sec. 197.

<sup>7</sup> Eoff v. Thompkins, 66 Mo. 225.

<sup>8</sup> Miller v. Bledsoe, 61 Mo. 96.

<sup>9</sup> Gear on Landlord and Tenant, sec. 198.

<sup>10</sup> Gear on Landlord and Tenant, sec. 198.

<sup>11</sup> Gear on Landlord and Tenant, sec. 198.

<sup>12</sup> Emlen v. Hoops, 3 Serg. & R. 130; Ex parte Turner, 3 Wall. Jr. 258; Huff v. Lake, 9 Humph. 138.

<sup>13</sup> Satterlee v. Bliss, 36 Cal. 517; Young v. Chamberlain, 14 La. Ann. 687.

<sup>14</sup> Smith v. Gayle, 58 Ala. 600.

<sup>15</sup> Smith v. Gayle, 58 Ill. 600.

<sup>16</sup> Calderwood v. Brooks, 28 Cal. 152; Chaut v. Reynolds, 49 Cal. 213; Lowe v. Emerson, 43 Ill. 160.

<sup>17</sup> Gear on Landlord and Tenant, sec. 198.

<sup>18</sup> Rider v. Alexander, 1 Chip. D. 267.

proper showing;<sup>1</sup> but after judgment against the tenant has been executed, the lessor's only remedy is by a new suit for restitution of possession.<sup>2</sup> The defense of a landlord is confined to that which the tenant would be allowed to make,<sup>3</sup> unless the statute permits other defenses.<sup>4</sup>

§ 2884. **Recovery of Mesne Profits.**—The mesne profits may be recovered by the plaintiff in the ejectment action if sued for,<sup>5</sup> or he may recover them in a subsequent action,<sup>6</sup> in which second action the first judgment is conclusive as to the right to recover on the title shown.<sup>7</sup> The action for mesne profits will not lie against a lessee who holds under one put in possession by order of court.<sup>8</sup> The action for mesne profits is an equitable one, in which every defense may be made under the general issue.<sup>9</sup> If

<sup>1</sup> *Roland v. Kreyenhagen*, 18 Cal. 455; *Barrett v. Graham*, 19 Cal. 632; *Reed v. Calderwood*, 22 Cal. 464; *Dimick v. Deringer*, 32 Cal. 488; *Williams v. Brunton*, 3 Gilm. 600; *Wharton v. Botham*, 3 Watts & S. 158; *Hough v. Hammond*, 36 Tex. 657.

<sup>2</sup> *Edwards v. Phillips*, 91 N. C. 355. The landlord is not entitled to stay a writ of restitution properly issued against the tenant: *Dimick v. Deringer*, 32 Cal. 488. *Contra*, *People v. Grant*, 45 Cal. 97.

<sup>3</sup> *Crockett v. Lashbrook*, 5 T. B. Mon. 530; 17 Am. Dec. 98; *Belfour v. Davis*, 4 Dev. & B. 300; *Sinclair v. Wortley*, 1 Winst. 114; 84 Am. Dec. 357; *Whissenhunt v. Jones*, 80 N. C. 348; *Goude-lock v. Massey*, 2 Strob. 188. A landlord allowed to come in and defend cannot object that no notice to quit was given to the tenant: *Whissenhunt v. Jones*, 78 N. C. 361. The court, on admitting the landlord to become a party, may limit his defense to a portion of land claimed: *Ege v. Medlar*, 82 Pa. St. 86. A landlord brought in after suit commenced can only plead prescription to commencement of the action: *Gardner v. Granniss*, 57 Ga. 540.

<sup>4</sup> *Isler v. Foy*, 66 N. C. 547; *Mad-drey v. Long*, 86 N. C. 383.

<sup>5</sup> *Shumake v. Nelms's Adm'r*, 25 Ala. 126; *Keane v. Cannovan*, 21 Cal.

293; 82 Am. Dec. 738; *Winings v. Wood*, 53 Ind. 187; *Woodruff v. Garner*, 27 Ind. 4; *Wolcott v. Townsend*, 49 Iowa, 456; *Larrabee v. Lambert*, 36 Me. 440; *Pierce v. Strickland*, 25 Me. 440; *Lord v. Dearing*, 24 Minn. 110; *Armstrong v. Hinds*, 8 Minn. 254; *Hughes v. Carson*, 90 Mo. 399; *Duff v. Hutson*, 2 Bail. 215.

<sup>6</sup> *Winings v. Wood*, 53 Ind. 187; *Van Alstine v. McCarty*, 51 Barb. 326; *Dewey v. Osborn*, 4 Cow. 329; *Duppa v. Mayo*, 1 Wms. Saund. 277 a. Amendment will not be allowed to change an action for rent into an action for mesne profits: *Ramirez v. Murray*, 5 Cal. 222. Only trespass, and not *assumpsit*, will lie for mesne profits accruing after the date of the demise laid in the ejectment suit: *Sinnard v. McBride*, 3 Ohio, 264; *Birch v. Wright*, 1 Term Rep. 378, 387. But see *Pulteney v. Warren*, 6 Ves. 73.

<sup>7</sup> *Shumake v. Nelms's Adm'r*, 25 Ala. 126; *Doe v. Dupey*, 4 J. J. Marsh. 328; *Shipley v. Alexander*, 3 Har. & J. 84; 5 Am. Dec. 421; *Dewey v. Osborn*, 4 Cow. 329; *Jackson v. Combs*, 7 Cow. 36.

<sup>8</sup> *Wallis v. Condray*, 2 Yerg. 171.

<sup>9</sup> *Davis v. Doe*, 2 Ind. 599; *Jackson v. Randall*, 11 Johns. 405; *Jackson v. Combs*, 7 Cow. 36; *Langendyck v. Burhans*, 11 Johns. 461; *Doe v. Huddart*, 2 Crompt. M. & R. 315; *Aslin v. Parkin*, 2 Burr. 668.

the tenant is compelled to repay rent as mesne profits, he may recover back what was paid to his lessor.<sup>1</sup> The tenant is not jointly liable with the landlord for mesne profits accruing before the tenant's entry,<sup>2</sup> and there can be no recovery of substantial damages against a landlord joined as co-defendant with tenants of separate parcels,<sup>3</sup> unless a joint defense is made, when the landlord who defends for all the tenants cannot object to a general judgment for the rents of the whole premises.<sup>4</sup> The plaintiff recovering generally will take the growing crops;<sup>5</sup> but not if he has recovered rent of that year as mesne profits.<sup>6</sup> Whatever would be rent as between landlord and tenant may be recovered as mesne profits,<sup>7</sup> and the rental value may be proved to determine the damages.<sup>8</sup> Judgment for mesne profits against the tenant is no bar to a subsequent suit against the landlord if the tenant is insolvent.<sup>9</sup> A landlord who puts another in possession as his tenant renders himself liable for mesne profits to the true owner,<sup>10</sup> but he is not subject to judgment for more than the rents actually received, if not personally occupying the premises.<sup>11</sup>

**§ 2885. Summary Proceedings to Recover Possession—In General.** — By statute, in most of the states, summary proceedings are provided for the recovery of the possession of premises unlawfully detained. Such proceedings are purely possessory in their nature; the question is as to the right of possession, the merits of the title being irrelevant.<sup>12</sup> The courts in which such summary proceed-

<sup>1</sup> Keane v. Cannovan, 21 Cal. 293; 82 Am. Dec. 738.

<sup>2</sup> Edgerton v. Clark, 20 Vt. 264.

<sup>3</sup> Sutton v. Casseleggi, 5 Mo. App. 111; 77 Mo. 397.

<sup>4</sup> McCaskle v. Amarina, 12 Ala. 17; Wires v. Nelson, 28 Vt. 13.

<sup>5</sup> Gear on Landlord and Tenant, secs. 179, 199.

<sup>6</sup> Gardner v. Kersey, 39 Ga. 664; 99 Am. Dec. 484.

<sup>7</sup> Morris v. Tinker, 60 Ga. 472.

<sup>8</sup> Cooper v. Robertson, 87 Ind. 222; Reed v. Ward, 51 Ind. 215; Dungan v. Von Phul, 8 Iowa, 263.

<sup>9</sup> Hughes v. Carson, 90 Mo. 399.

<sup>10</sup> Williamson v. Heyser, 74 Ga. 271; Winings v. Wood, 53 Ind. 187; Van Alstine v. McCarty, 51 Barb. 326; Storch v. Carr, 28 Pa. St. 135; Chirac v. Reinicker, 11 Wheat. 280.

<sup>11</sup> Dobbins v. Baker, 80 Ind. 52.

<sup>12</sup> See 1 Gear on Landlord and Tenant, sec. 199.

ings are had have usually no jurisdiction to try title.<sup>1</sup> A mere denial of the plaintiff's title will not oust the jurisdiction until it is made clear that a question of title is involved,<sup>2</sup> in which case the jurisdiction is ousted,<sup>3</sup> or removed, as the statute may provide.<sup>4</sup> The jurisdiction is not ousted by the intervention of a third party asserting paramount title;<sup>5</sup> nor can the tenant set up title subsequently acquired by a third person,<sup>6</sup> unless he has attorned to a purchaser from the lessor.<sup>7</sup> But the defendant, to oust the jurisdiction, may set up title to the reversion obtained by himself after the lease was given,<sup>8</sup> which the burden is upon him to prove,<sup>9</sup> by showing a deed executed,<sup>10</sup> or an equitable right to specific performance.<sup>11</sup> The only questions to be tried are, whether a tenancy exists,<sup>12</sup> whether the tenant wrongfully holds over,<sup>13</sup> and whether proper notice has been given.<sup>14</sup> Wrongful possession of the tenant is of the gist of the action;<sup>15</sup> and if the judgment is reversed as to some defendants, it cannot stand as to any.<sup>16</sup> The summary remedy is not intended as a substitute for the action of ejectment,<sup>17</sup> and cannot be used to enforce a forfeiture for breach of condition, when

<sup>1</sup> See 1 Gear on Landlord and Tenant, sec. 199.

<sup>2</sup> Pettit v. Black, 13 Neb. 142; Smith v. Kaiser, 17 Neb. 184; De Coursey v. R. R. Co., 81 Pa. St. 217; Bergman v. Roberts, 61 Pa. St. 497; Essler v. Johnson, 5 Pa. St. 350.

<sup>3</sup> Mohan v. Butler, 112 Pa. St. 591; Allen v. Ash, 6 Phila. 312; Forsythe v. Bullock, 74 N. C. 135.

<sup>4</sup> Keller v. Klopfer, 3 Col. 132; Menmoyer v. Andreas, 57 Pa. St. 446.

<sup>5</sup> Davis v. Davis, 83 N. C. 71; Daly v. Barrett, 4 Phila. 350.

<sup>6</sup> White v. Bailey, 14 Conn. 271; Werner v. Footman, 54 Ga. 128.

<sup>7</sup> Kingman v. Abington, 56 Mo. 46; Thornlike v. Norris, 24 N. H. 454.

<sup>8</sup> Rodgers v. Palmer, 33 Conn. 156; Lane v. Morton, 78 N. C. 7; Bergman v. Roberts, 61 Pa. St. 497; Clark v. Everly, 8 Watts & S. 226.

<sup>9</sup> Menmoyer v. Andreas, 57 Pa. St.

446; Hoffner v. Hoeckley, 3 Brewst. 253.

<sup>10</sup> De Bozear v. Butler, 2 Grant Cas. 417.

<sup>11</sup> Gelston v. Sigmund, 27 Md. 334.

<sup>12</sup> Barnes v. Nicholson, 2 N. J. L. 326; Snedeker v. Quick, 12 N. J. L. 129, 130; Foster v. Penry, 77 N. C. 160; O'Neale v. Fickling, 10 S. C., N. S., 303; Newton v. Leary, 64 Wis. 190.

<sup>13</sup> Snedeker v. Quick, 12 N. J. L. 129, 130; Barnes v. Nicholson, 2 N. J. L. 326; Newton v. Leary, 64 Wis. 190.

<sup>14</sup> Newton v. Leary, 64 Wis. 190.

<sup>15</sup> Murphy v. Droyer, 11 Ill. App. 246; Goldard v. Lieberman, 18 Ill. App. 366.

<sup>16</sup> Goldard v. Lieberman, 18 Ill. App. 366; Hiltbrand v. Linninger, 15 N. J. L. 38; Snedeker v. Quick, 12 N. J. L. 129.

<sup>17</sup> Steele v. Bond, 23 Minn. 267.

not expressly provided by statute;<sup>1</sup> and consent in the lease to summary proceedings cannot give jurisdiction not given by statute.<sup>2</sup> Equity will not, as a rule, restrain summary proceedings under the statutes on any ground which may be taken advantage of in the proceedings, or where the party has a remedy at law.<sup>3</sup>

§ 2886. **When Maintainable, and by Whom.**—The statutory summary proceedings to recover possession lie for non-payment of rent,<sup>4</sup> or for an unlawful holding over after the agreed right of possession has terminated,<sup>5</sup> or after notice to quit,<sup>6</sup> or for a renunciation of the landlord's title,<sup>7</sup> or for an illegal use of the premises, when so provided by statute,<sup>8</sup> or where the lease is determined by forfeiture for breach of its provisions.<sup>9</sup> They may be maintained, as a general rule, by any one entitled to the possession.<sup>10</sup> Only the tenant can sue for an unlawful detainer of the premises from him during the term.<sup>11</sup> The remainderman or reversioner may summarily dispossess the lessee of a life tenant who holds over.<sup>12</sup> Joint lessors may maintain a joint complaint, though owning

<sup>1</sup> *Du Bouchet v. Wharton*, 12 Conn. 533; *Fifty Associates v. Howland*, 11 Met. 99; *Wakeman v. Johnson*, 3 N. J. L. 84; *Wilson v. Swayze*, 15 Abb. Pr. 432; *Oakley v. Schoonmaker*, 15 Wend. 226; *Beach v. Nixon*, 9 N. Y. 35; *Penoyer v. Brown*, 13 Abb. N. C. 82.

<sup>2</sup> *Beach v. Nixon*, 9 N. Y. 35; *McCloud v. Jagers*, 3 Phila. 304. See *Woodward v. Cone*, 73 Ill. 241.

<sup>3</sup> *Gear on Landlord and Tenant*, sec. 204.

<sup>4</sup> *Gear on Landlord and Tenant*, secs. 195, 201.

<sup>5</sup> *Gear on Landlord and Tenant*, sec. 201.

<sup>6</sup> *Brockway v. Thomas*, 36 Ark. 518; *Johnson v. Stewart*, 77 Mass. 182; *Kimball v. Rowland*, 6 Gray, 224; *Walker v. Sharpe*, 96 Mass. 43; *Clapp v. Paine*, 18 Me. 264; *Wheeler v. Cowan*, 25 Me. 283; *Sawyer v. Van Housen*, 39 Mich. 89; *Townley v. Rutan*, 21 N. J. L. 674; *Stanley v. Horner*, 24

N. J. L. 511; *Webb v. Seekins*, 62 Wis. 26.

<sup>7</sup> *Bucker v. Warren*, 41 Ark. 532; *Fortier v. Ballance*, 5 Gilm. 41; *Hoskins v. Helms*, 4 Litt. 309; 14 Am. Dec. 133; *Bates v. Austin*, 2 A. K. Marsh. 270; 12 Am. Dec. 395; *McCartney v. Aner*, 50 Mo. 395; *Wilson v. James*, 79 N. C. 349; *Vincent v. Corbin*, 85 N. C. 108; *Rabe v. Fyler*, 10 Smedes & M. 440; 48 Am. Dec. 763.

<sup>8</sup> *Prescott v. Kyle*, 103 Mass. 381; *Justice v. Lowe*, 26 Ohio St. 370; *McGarney v. Puckett*, 27 Ohio St. 669.

<sup>9</sup> *Gear on Landlord and Tenant*, sec. 201.

<sup>10</sup> *Gear on Landlord and Tenant*, sec. 201.

<sup>11</sup> *Gear on Landlord and Tenant*, sec. 01.

<sup>12</sup> *Peck v. Peck*, 35 Conn. 390; *Kennedy v. Sweeney*, 14 R. I. 581. *Contra*, *Wolfe v. Angevine*, 57 Miss. 767; *May v. Kendall*, 8 Phila. 244.

in severalty.<sup>1</sup> Proceedings by one partner to recover premises leased by the firm will be considered as in favor of the firm, if no objection is taken.<sup>2</sup> Proceedings may be maintained by a married woman respecting her separate estate,<sup>3</sup> or against one who contracts in her own name.<sup>4</sup> A widow may sue in her own right and as guardian of minor heirs.<sup>5</sup> A ward, after his majority, may maintain the action on the lease given by his guardian.<sup>6</sup> The action may be maintained against the tenant,<sup>7</sup> or an assignee of the lease,<sup>8</sup> or a subtenant,<sup>9</sup> or any one put in possession by or under the tenant,<sup>10</sup> or taking possession from him as hostile landlord,<sup>11</sup> or moving in after his removal from the premises.<sup>12</sup> Every person in possession under the tenant may be joined with him as defendant.<sup>13</sup> A lessee may maintain summary proceedings for possession against a former tenant who holds over,<sup>14</sup> or against another tenant wrongfully put in possession by the landlord,<sup>15</sup> or against his subtenants.<sup>16</sup>

**§ 2887. When not Maintainable.**—The statutory summary proceeding for the recovery of the possession of

<sup>1</sup> *Oakes v. Munroe*, 8 Cush. 282. But not tenants in common who have leased by separate contracts: *Ware v. Warwick*, 48 Ala. 295.

<sup>2</sup> *Nemetty v. Naylor*, 100 N. Y. 562.

<sup>3</sup> *Hurst v. Thompson*, 68 Ala. 560.

<sup>4</sup> *Fiske v. McIntosh*, 101 Mass. 66.

<sup>5</sup> *Moody v. Seaman*, 46 Mich. 74.

<sup>6</sup> *People v. Ingersoll*, 20 Hun, 316.

<sup>7</sup> *Marley v. Rodgers*, 5 Yerg. 217.

<sup>8</sup> *People v. Dudley*, 58 N. Y. 323.

<sup>9</sup> *Snoddy v. Watt*, 9 Ala. 609; *Pardee v. Gray*, 66 Cal. 524; *McBurney v. McIntyre*, 38 Ga. 261; *Patchell v. Johnston*, 64 Ill. 305; *Reed v. Hawley*, 45 Ill. 40; *Cox v. Cunningham*, 77 Ill. 545; *Marley v. Rodgers*, 5 Yerg. 217.

<sup>10</sup> *Snoddy v. Watt*, 9 Ala. 609; *Dumas v. Hunter*, 25 Ala. 711; *McCartney v. Hunt*, 16 Ill. 76; *Fortier v. Ballance*, 5 Gilm. 41; *Hardisty v. Glenn*, 32 Ill. 62; *Wilder v. House*, 48 Ill. 279; *Elms v. Randall*, 2 Dana, 100; *Willi v. Peters*, 11 Mo. 395; *Shepherd v. Martin*, 31 Mo. 492; *Kingman v. Abington*, 56 Mo.

46; *Allen v. Smith*, 12 N. J. L. 199; *People v. McAdam*, 84 N. Y. 287; *Birdsall v. Phillips*, 17 Wend. 464; *O'Donnell v. McIntyre*, 41 Hun, 100.

<sup>11</sup> *McCartney v. Hunt*, 16 Ill. 76; *Cox v. Cunningham*, 77 Ill. 545; *Krank v. Nicholls*, 8 Mo. App. 72.

<sup>12</sup> *Porter v. Murray*, 12 Pac. Rep. 425.

<sup>13</sup> *Richardson v. Harvey*, 37 Ga. 224; *Fortier v. Ballance*, 5 Gilm. 41; *Judd v. Arnold*, 31 Minn. 430; *Emerick v. Tavener*, 9 Gratt. 220; 58 Am. Dec. 217.

<sup>14</sup> *Gazzolo v. Chambers*, 73 Ill. 75; *Hooton v. Holt*, 139 Mass. 54; *Walker v. Sharpe*, 96 Mass. 43; *Pratt v. Farrar*, 92 Mass. 519; *Grundy v. Martin*, 143 Mass. 279; *Casey v. King*, 98 Mass. 503; *Alexander v. Carew*, 95 Mass. 70; *Hildreth v. Conant*, 10 Met. 298; *Burton v. Rohrbeck*, 30 Minn. 393; *Power v. Tazewells*, 25 Gratt. 786.

<sup>15</sup> *Chancey v. Smith*, 25 W. Va. 404; 52 Am. Rep. 217.

<sup>16</sup> *People v. Shorb*, 14 Hun, 112; *Coburn v. Palmer*, 8 Cush. 124.

premises has been held not to lie in the following cases, viz.: Where the tenancy has not expired;<sup>1</sup> where it has been renewed or continued by consent, express or implied;<sup>2</sup> where the action of ejectment would not lie;<sup>3</sup> where there has been no lawful demand or notice to quit<sup>4</sup> before the expiration of the time allowed for notice;<sup>5</sup> where the lessor's right of possession has terminated;<sup>6</sup> where the tenant has lawfully attorned to the holder of a paramount title;<sup>7</sup> for non-payment of rent, while a partial eviction by the lessor continues;<sup>8</sup> for taxes;<sup>9</sup> against an executor for default in payment of rent;<sup>10</sup> for rent long due, which has become a general indebtedness;<sup>11</sup> for a stipulated sum in addition to rent;<sup>12</sup> for buildings erected on the land of another;<sup>13</sup> by a grantee of a separate parcel of the reversion;<sup>14</sup> by the owner of a tax lease;<sup>15</sup> by one person to the use of another;<sup>16</sup> by the lessor against a third person, who detains possession from the lessee;<sup>17</sup> by a tenant against one who subleases for the entire term,<sup>18</sup> or to obtain possession under the lease;<sup>19</sup> by a lessor who is in partnership with the tenant;<sup>20</sup> by the wife's lessee against the husband;<sup>21</sup> by a

<sup>1</sup> Gear on Landlord and Tenant, sec. 202.

<sup>2</sup> Sullivan v. Cary, 17 Cal. 80; Uri-dias v. Morrell, 25 Cal. 31; Judd v. Arnold, 31 Minn. 430; McAdoo v. Callum, 86 N. C. 419; Ish v. Chilton, 26 Mo. 256.

<sup>3</sup> Buck v. Binnering, 3 Barb. 391; Barnes v. Tenney, 52 Vt. 557; Hadley v. Havens, 24 Vt. 520.

<sup>4</sup> Gear on Landlord and Tenant, secs. 191, 200, 202.

<sup>5</sup> King v. Connolly, 51 Cal. 181; Martin v. Splivalo, 56 Cal. 128; Decker v. McMannus, 101 Miss. 63; Young v. Ingle, 14 Mo. 426; Johnson v. Douglass, 73 Mo. 168; Dale v. Doddridge, 9 Neb. 138.

<sup>6</sup> Gear on Landlord and Tenant, sec. 202.

<sup>7</sup> Wheelock v. Warschauer, 34 Cal. 265; Steinback v. Krone, 36 Cal. 303; Foss v. Van Driele, 47 Mich. 201. See Elms v. Randall, 4 Dana, 519; Elliott v. Ackla, 9 Pa. St. 42.

<sup>8</sup> Skaggs v. Emerson, 50 Cal. 3; People v. Gedney, 10 Hun, 151.

<sup>9</sup> Wilson v. Swayze, 15 Abb. Pr. 432.

<sup>10</sup> Martell v. Meehan, 63 Cal. 47.

<sup>11</sup> Wolf v. Shinkle, 4 Mo. App. 197.

<sup>12</sup> People v. Cushman, 1 Hun, 73.

<sup>13</sup> Field v. Higgins, 35 Me. 339; Kasing v. Keohane, 4 Ill. App. 460.

<sup>14</sup> Abeel v. Hubbell, 52 Mich. 37.

<sup>15</sup> Sperling v. Isaacs, 13 Daly, 275.

<sup>16</sup> Kennedy v. Hitchcock, 4 Port. 230; Ferguson v. Lewis, 27 Mo. 249.

<sup>17</sup> McKeen v. Nelms, 9 Ala. 507; Treat v. Stuart, 5 Cal. 113; Mitchell v. Davis, 20 Cal. 47; Polack v. Schafer, 46 Cal. 270; Hammel v. Zobelein, 51 Cal. 532; Yoders's Heirs v. Early, 2 Dana, 245; L'Hussier v. Talce, 24 Mo. 13.

<sup>18</sup> Blumenberg v. Myers, 32 Cal. 93; 91 Am. Dec. 560.

<sup>19</sup> Krumweide v. Schroeder, 56 Iowa, 160.

<sup>20</sup> Pico v. Cuyas, 48 Cal. 639.

<sup>21</sup> Whitney v. Dart, 117 Mass. 153. Nor in favor of the wife against the tenant of the husband: Luthrell v. Caruthers, 5 Ill. App. 544.

mortgagee, or his lessee, against the mortgagor;<sup>1</sup> by a purchaser under trustee's sale against the original owner;<sup>2</sup> by an execution purchaser against one not claiming under the execution debtor;<sup>3</sup> by a grantee against a grantor;<sup>4</sup> by a vendor against a purchaser in possession, who has broken an executory contract;<sup>5</sup> against a tenant who has contracted to purchase;<sup>6</sup> against one who holds as an intruder or adverse claimant;<sup>7</sup> against a tenant who enters without consent, after surrendering possession;<sup>8</sup> and, in general, where the conventional relation of landlord and tenant does not exist.<sup>9</sup>

§ 2888. **Procedure.**—The statutes generally require a written notice to be served on the tenant to deliver possession before the action is brought. The time for this notice varies in the different states.<sup>10</sup> An affidavit of the landlord or his agent, stating facts bringing the case within the statute is likewise usually required.

<sup>1</sup> *Clement v. Bennett*, 70 Me. 207; *Hastings v. Pratt*, 8 Cush. 121; *Larned v. Clark*, 8 Cush. 29; *Greer v. Wilbar*, 72 N. C. 592; *Davis v. Hemenway*, 27 Vt. 589. Nor in favor of a purchaser at foreclosure sale against the mortgagor who holds over: *McMillan v. Love*, 72 N. C. 18.

<sup>2</sup> *Burford v. Nolan*, 30 Miss. 427; *Kuhn v. Feiser*, 3 Head, 83. Bargainor in deed of trust containing stipulation for retention of possession of land conveyed until sold under terms of trust who holds possession after sale of premises by trustee is not such tenant as comes within purview of landlord and tenant act: *McCombs v. Wallace*, 66 N. C. 481.

<sup>3</sup> *Royce v. Bradburn*, 2 Doug. (Mich.) 377; *Cummings v. Kilpatrick*, 23 Miss. 106. Nor against a tenant of the execution defendant: *Leach v. Koenig*, 55 Mo. 451.

<sup>4</sup> *Sims v. Humphrey*, 4 Denio, 185.

<sup>5</sup> *Dakin v. Allen*, 8 Cush. 33; *Hughes v. Mason*, 84 N. C. 472; *People v. Bigelow*, 11 How. Pr. 83; *Johnson v. Hauser*, 82 N. C. 375; *Riley v. Jordan*, 75 N. C. 180. Unless the contract of

purchase is unconditionally surrendered, and a contract of lease substituted: *Riley v. Jordan*, 75 N. C. 180.

<sup>6</sup> *Gear on Landlord and Tenant*, sec. 199; *Brown v. Beatty*, 76 Ala. 250; *Bennett v. Scribner*, 16 Barb. 621; *Klopfer v. Keller*, 1 Col. 410; *Keller v. Klopfer*, 3 Col. 132; *Capet v. Parker*, 3 Sand. 662; *Mohan v. Butler*, 112 Pa. St. 591.

<sup>7</sup> *Stinson v. Gossett*, 4 Ala. 170; *Moungar v. Burks*, 17 Ala. 48; *Russell v. Deplous*, 25 Ala. 514; 29 Ala. 308; *McCracken v. Woodfork*, 3 A. K. Marsh. 524; *Farmer v. Hunter*, 45 Mich. 337; *Hovey v. Blanchard*, 13 N. H. 145; *Morrison v. Tenney*, 15 N. H. 126; *Leavitt v. Wallace*, 12 N. H. 489; *People v. Hovey*, 4 Lans. 86; *Carlisle v. McCall*, 1 Hilt. 399; *Harrington v. Watson*, 11 Or. 143; 50 Am. Rep. 465; *Saunders v. Doake*, 3 Tex. 143.

<sup>8</sup> *Walls v. Preston*, 28 Cal. 225.

<sup>9</sup> *Gear on Landlord and Tenant*, sec. 201.

<sup>10</sup> See *Gear on Landlord and Tenant*, sec. 200.

§ 2889. **Dispossession — Restitution.** — Under the warrant of dispossession, the only person that can be removed is the defendant, or his servants, or family;<sup>1</sup> and the officer will be liable as a trespasser if he turns out of possession one who is not bound by the judgment,<sup>2</sup> or if he dispossesses the tenant before expiration of a notice to quit, which is required by law to be given.<sup>3</sup> The officer is not bound to remove the tenant's goods, and may permit the tenant to remove them;<sup>4</sup> but he is not bound to delay their removal on account of a storm,<sup>5</sup> and must invest the plaintiff with full and complete possession.<sup>6</sup> If the judgment is reversed, the tenant is entitled to a restitution of possession;<sup>7</sup> but not if his term or right of possession has ceased;<sup>8</sup> nor where the reversal was for mere irregularities, and it appears that the landlord should prevail in a regular proceeding.<sup>9</sup> Where more land is taken by the warrant of dispossession than was recovered in the action, the court will compel restitution.<sup>10</sup> Under a statute giving a right of action for damages for dispossession upon reversal of the judgment, the grounds of reversal are immaterial,<sup>11</sup> and the tenant may recover damages for the withholding of possession and for loss of money taken and destroyed.<sup>12</sup>

<sup>1</sup> *Colt v. Eves*, 12 Conn. 259; *Bagley v. Sternberg*, 34 Minn. 470; *De Graw v. Prior*, 68 Mo. 158.

<sup>2</sup> *Bagley v. Steinberg*, 34 Minn. 470; *Croft v. King*, 8 Daly, 265.

<sup>3</sup> *Pausch v. Guerrard*, 67 Ga. 318.

<sup>4</sup> *Union v. Bayliss*, 40 N. J. L. 60.

<sup>5</sup> *Higenbotham v. Lowenbein*, 3 Robt. 22.

<sup>6</sup> *Union v. Bayliss*, 40 N. J. L. 60.

<sup>7</sup> *Du Buchet v. Wharton*, 12 Conn.

533; *Wolcott v. Schenck*, 16 How. Pr. 449; *Meronay v. Wright*, 84 N. C. 336;

*Shaw v. Fleming*, 5 Houst. 155; *Com. v. Bigelow*, 3 Pick. 31.

<sup>8</sup> *McQuade v. Emmons*, 38 N. J. L. 397; *People v. Gidney*, 15 Hun, 475; *Chretien v. Doney*, 1 N. Y. 419.

<sup>9</sup> *Livermore v. Hamilton*, 15 Abb. Pr. 328.

<sup>10</sup> *Emerick v. Tavener*, 9 Gratt. 220; 58 Am. Dec. 217.

<sup>11</sup> *Hayden v. Florence S. M. Co.*, 54 N. Y. 221.

<sup>12</sup> *Eten v. Lyster*, 37 N. Y. Sup. Ct. 486; 60 N. Y. 252.

**TITLE XXIX.**  
**FIXTURES.**



# TITLE XXIX.

## FIXTURES.

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### CHAPTER CXXXIII.

#### FIXTURES.

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§ 2890. **Fixtures Defined — The Different Tests.** — Fixtures are personal chattels which have been so fixed and annexed to the freehold as to become a part of it.<sup>1</sup> By the term “fixture,” in its legal sense, it is said in a recent case, is meant something so attached to the realty as to become, for the time being, a part of the freehold,

<sup>1</sup> Rapalje and Lawrence's Law Dict. On the other hand, in an English case, it is said: “The term ‘fixtures’ has now acquired the peculiar meaning of personal chattels, which have been annexed to the freehold, but which are removable at the will of the person who has annexed them”: Parke, B., in *Hallen v. Runder*, 1 Crompt. M. & R. 266.

as contradistinguished from a mere chattel.<sup>1</sup> All buildings or other personal chattels standing on or affixed to land belong to the owner of the land on which they stand as part of the realty; and the burden of proof is upon those who claim that they are personal property to show that they retain that character.<sup>2</sup> A structure erected on the land of another becomes his property, although built with a view of enforcing an adverse right in the land.<sup>3</sup> The owner of the materials loses his property, because he is presumed to have voluntarily parted with it, or to have intended it as a gift to the owner of the soil.<sup>4</sup> But this presumption as to the intention of the party making the annexation is not in all cases a conclusive one, and may be rebutted by circumstances showing a contrary intention.<sup>5</sup> To determine the irremovable character of a fixture, several tests are, by the modern authorities, applied, viz.: 1. Actual annexation to the realty or something appurtenant thereto, it being so firmly fixed to the real estate that it cannot be removed without injury to the freehold from the act of removal, and apart from the substraction of the thing removed; 2. Application to the use or pur-

<sup>1</sup> *Carlin v. Ritter*, 68 Md. 478; 6 Am. St. Rep. 467.

<sup>2</sup> *Howard v. Fessenden*, 14 Allen, 128; *Madigan v. McCarthy*, 108 Mass. 307; *Fisher v. Saffer*, 1 E. D. Smith, 611; *Smith v. Benson*, 1 Hill, 176; *Chatterton v. Saul*, 16 Ill. 148; *Dooley v. Crist*, 25 Ill. 551; *Meyers v. Schemp*, 67 Ill. 469; *Goff v. O'Conner*, 16 Ill. 421; *Curtiss v. Hoyt*, 19 Conn. 165; *Holland v. Hodgson*, L. R. 7 Com. P. 328; *Brown v. Bridges*, 31 Iowa, 146; *Miller v. Plumb*, 6 Cow. 665; 16 Am. Dec. 456; *Rives v. Dudley*, 3 Jones Eq. 126; 67 Am. Dec. 231. But see, *contra*, *Rogers v. Woodbury*, 15 Pick. 156.

<sup>3</sup> *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 889.

<sup>4</sup> *Ferard on Fixtures*, 12; *Madigan v. McCarthy*, 108 Mass. 376; *Huebschmann v. McHenry*, 29 Wis. 655; *Mitchell v. Billingsley*, 17 Ala. 391; *Crest v. Jack*, 3 Watts, 238; 27 Am. Dec.

353; *Murphy v. Marland*, 8 Cush. 575; *Richtmyer v. Morse*, 3 Keyes, 349; *Beers v. St. John*, 16 Conn. 322; *Sparks v. Spicer*, 1 Ld. Raym. 738; *Stillman v. Hamer*, 8 Miss. 421; *First Parish in Sudbury v. Jones*, 8 Cush. 189; *Childress v. Wright*, 2 Cold. 350; *Thayer v. Wright*, 4 Den. 180; *Goddard v. Bolster*, 6 Me. 427; *Treadway v. Sharon*, 7 Nev. 37; *Coombs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236.

<sup>5</sup> Thus it has been held that a building erected by an individual, on piles driven into the bed of a navigable river below water-mark, the interest of the soil belonging to the public, and the builder having no right thereto, is, as between individuals, personal property, the presumption that the builder intended to make a gift to the public not being one to be raised; *Marcy v. Darling*, 8 Pick. 283.

pose to which that part of the realty with which it is connected is appropriated; and 3. The intention of the parties making the annexation to make a permanent accession to the freehold.<sup>1</sup> In a Pennsylvania case it is said that the question whether a structure of doubtful character is to be deemed a fixture or not does not depend on the mere question whether it is set upon a foundation let into the ground, but upon the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act.<sup>2</sup> But it will be seen in the subsequent sections that the courts do not all unite on the whole of these tests. In some, the question of intention controls; in others, the manner of annexation; in others, again, the question of application or adaptation. What are fixtures is always a mixed question of law and fact.<sup>3</sup>

And again, the *status* of the parties contesting occasions a difference of decision. Where the question is between the heir and the executor (the cases show), the matter is construed in favor of the heir; between the executor of the tenant and the remainderman, more favorably for the executor; between the landlord and tenant, with the greatest latitude toward the tenant, with an increased liberality concerning fixtures erected for purposes of trade or manufacture.<sup>4</sup> But as between vendor and vendee, the law is more liberal in favor of the vendee than of any one else.<sup>5</sup>

**§ 2891. Bona Fide Holder could not Recover at Common Law for Permanent Improvements — "Betterment" Laws.** — So rigid is the rule as to things attached to the

<sup>1</sup> Ewell on Fixtures, 21; Tyler on Fixtures, 114; Teaff v. Hewitt, 1 Ohio St. 511; 59 Am. Dec. 634; Hutchins v. Masterson, 46 Tex. 551; 26 Am. Rep. 286; McRea v. Bank, 66 N. Y. 489; Voorhees v. McGinnis, 48 N. Y. 278; Sword v. Low, 122 Ill. 487.

<sup>2</sup> Meigs's Appeal, 62 Pa. St. 28; 1 Am. Rep. 372.

<sup>3</sup> Campbell v. O'Neill, 64 Pa. St. 290.

<sup>4</sup> 2 Kent's Com. 345.

<sup>5</sup> Walker v. Sherman, 20 Wend. 636. See post, § 2900.

soil that at common law one making improvements on land *bona fide*, and believing himself to be the owner (it afterwards turning out that his title was bad, and the legal owner recovering the land in an action of ejectment), could recover nothing for their value,—they passed with the land as a part of it;<sup>1</sup> and if the annexation was made without the consent of the owner of the land, it was not material that it was made by mistake.<sup>2</sup> A building erected by one entering upon the land under a claim of right adverse to the true owner is a fixture, notwithstanding the trespasser's intention to remove it.<sup>3</sup> But in an action for the mesne profits, the value of permanent and valuable improvements, made in good faith by the *bona fide* possessor, may be recouped to the extent of the rents and profits claimed by the plaintiff. And a court of equity, in a bill for rents and profits, after a recovery at law against a *bona fide* possessor for a valuable consideration, will deduct from the amount to be paid the value of beneficial improvements.<sup>4</sup> A court of equity will in some other cases allow compensation for improvements made by a *bona fide* possessor, on the ground that it would be a fraud for the owner of the land to avail himself thereof without making compensation.<sup>5</sup> The subject is now, in most of the states, regulated by statutes denominated “betterment,” “improvement,” and “occupying claimant” laws, enacted for the purpose of remedying in some respects the harshness of the common-law rule.

<sup>1</sup> 2 Kent's Com. 334; Blackwell on Tax Titles, 587; Frear v. Hardenbergh, 5 Johns. 272; 4 Am. Dec. 356; Kutter v. Smith, 2 Wall. 491.

<sup>2</sup> Burleson v. Temple, 2 G. Greene, 542; Blair v. Worley, 1 Scam. 178; Seymour v. Watson, 5 Blackf. 555; 36 Am. Dec. 556. *Contra*, Lowenberg v. Bernd, 47 Mo. 297.

<sup>3</sup> Huebschmann v. McHenry, 29 W. 655.

<sup>4</sup> Murray v. Gouverneur, 2 Johns. Cas. 442; 1 Am. Dec. 177; 2 Kent's

Com. 335; Coulter's Case, 5 Co. 30 b; Green v. Biddle, 8 Wheat. 81; Hylton v. Brown, 2 Wash. C. C. 165; Jackson v. Loomis, 4 Cow. 168; 15 Am. Dec. 347; Dowd v. Fawcett, 4 Dev. 95; Bright v. Boyd, 1 Story, 478, 495; Herring v. Pollard, 4 Humph. 362; 40 Am. Dec. 653; Mathews v. Davis, 6 Humph. 324; 1 Story's Eq. Jur., sec. 388; 2 Story's Eq. Jur., sec. 1237; Blackwell on Tax Titles, 587.

<sup>5</sup> Pulliam v. Jennings, 5 Bush, 433.

ILLUSTRATIONS. — A saw-mill was built upon government land, on the faith of the right of pre-emption of the land on which it stood, but the land was afterwards lost by laches, failing to secure the title. *Held*, that the occupant had no right to remove the mill: *Treadway v. Sharon*, 7 Nev. 37. Upon a contract with the husband, the plaintiff placed a gas-manufacturing machine in the house of a married woman, supposing the house to belong to her. The machine was a fixture. *Held*, in an action of trover against the wife, that the plaintiff could not recover therefor from her: *Morrison v. Berry*, 42 Mich. 389; 36 Am. Rep. 446. A entered on the land of B with intent to hold adverse possession, and erected a building to be occupied in connection with such adverse possession. The building was of wood, resting on posts, and kept in place by its weight alone. B ejected A. *Held*, that the building was a part of the realty, and the property of B: *Doscher v. Blackiston*, 7 Or. 143. A was in possession of land under a contract of purchase, having paid in full and made improvements. B, with full knowledge of A's rights, forcibly entered, overcoming A's resistance, and made improvements which, without much injury to the land, could be severed therefrom. On a bill for specific performance brought by A against his vendor and B, *held*, that equity would not authorize B, he being a trespasser, to remove his improvements, although his conduct was based on a belief that A's claim was invalid: *Honzik v. Delaglise*, 65 Wis. 494; 56 Am. Rep. 634.

§ 2892. **Annexation as the Test.** — The annexation to the freehold is the test in some of the decisions, the intent being held to be immaterial.<sup>1</sup> It is well settled that some kind of actual annexation is necessary to constitute a fixture.<sup>2</sup> Thus a stone brought within a door-yard, to be placed as a door-step, unless actually already so placed, is not a fixture.<sup>3</sup> But though the things are temporarily

<sup>1</sup> *State v. Marshall*, 4 Mo. App. 29.

<sup>2</sup> *Shoemaker v. Simpson*, 16 Kan. 43; *Baldwin v. Breed*, 16 Conn. 60; *Capen v. Peckham*, 35 Conn. 88; *Stockwell v. Campbell*, 39 Conn. 362; 12 Am. Rep. 393; *Teaff v. Hewitt*, 1 Ohio St. 511; 59 Am. Dec. 634; *Quimby v. Manhattan Cloth Co.*, 24 N. J. Eq. 260; *Potts v. New Jersey Arms Co.*, 17 N. J. Eq. 395; *Lafin v. Griffiths*, 35 Barb. 58, 62; *Potter v. Cromwell*, 40 N. Y. 287, 295; 100 Am. Dec. 485; *Voorhees v. McGinnis*, 48 N. Y. 278, 282; *Hoyle v. R. R. Co.*, 64 N. Y. 314, 323; 13

Am. Rep. 595; *Vanderpool v. Van Allen*, 10 Barb. 157, 162; *Stevens v. R. R. Co.*, 31 Barb. 590; *Beardsley v. Ontario Bank*, 31 Barb. 619, 634; *Noyes v. Terry*, 1 Laus. 219, 220; *Tairis v. Walker*, 1 Bail. 540; *Lothrop v. Blake*, 23 N. H. 46, 66; *Despatch Line of Packets v. Bellamy etc. Co.*, 12 N. H. 205, 234; 37 Am. Dec. 203; *Brown v. Lillie*, 6 Nev. 244; *Merritt v. Judd*, 14 Cal. 59, 64; *Pennybacker v. McDougal*, 48 Cal. 160; *Sagar v. Eckhert*, 3 Ill. App. 412.

<sup>3</sup> *Woodman v. Pease*, 17 N. H. 282.

separated from the realty for convenience in making repairs, or otherwise, they still remain a part of the realty notwithstanding the severance.<sup>1</sup>

**§ 2893. Removability without Injury to Premises as the Test.**—It is laid down in some cases that, to remain chattels, the articles must be capable of being detached without material injury to the articles themselves or the freehold or premises.<sup>2</sup> Thus a steam-engine which is used in a building in process of manufacture, and which cannot be removed therefrom without tearing down a portion of the building to afford it egress, is constructively annexed thereto so as to become a fixture, though it is not fastened in any way.<sup>3</sup> But personal property affixed to the wall of a building by nails in such a manner that it can be removed without injury to the property or the building does not become a fixture.<sup>4</sup>

**§ 2894. Application or Adaptability to the Use as the Test.**—By many of the decisions if the article is constructed or fitted with especial reference to the realty, and essential to its beneficial enjoyment for the purpose to which it is devoted, then the article attached becomes realty,<sup>5</sup> and this, regardless of the intention of the parties.<sup>6</sup> In this view, neither the intention of the party who placed the structure there, nor the manner in which it is placed, is controlling; but it depends upon its object and use. The most important consideration is the fact that the building and fixture were adapted for each other, and the

<sup>1</sup> *Wadleigh v. Janvrin*, 41 N. H. 311; *Amba v. Hill*, 10 Mo. App. 503; 77 Am. Dec. 780; *Williamson v. R. R. Co.*, 29 N. J. Eq. 311; *Congregational Soc. v. Fleming*, 11 Iowa, 533; 79 Am. Dec. 511.

<sup>2</sup> *Tyler on Fixtures*, 673; *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537; *Hunt v. Mullanphy*, 1 Mo. 508; 14 Am. Dec. 300; *Stockwell v. Marks*, 17 Me. 455; 35 Am. Dec. 266; *Prov. Gas Co. v. Thurber*, 2 R. I. 15; 55 Am. Dec. 621; *Wade v. Johnston*, 25 Ga.

311; *Amba v. Hill*, 10 Mo. App. 108.

<sup>3</sup> *Despatch Line v. Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203.

<sup>4</sup> *Cross v. Marston*, 17 Vt. 533; 44 Am. Dec. 353.

<sup>5</sup> *Lipsky v. Borgmann*, 52 Wis. 256; 38 Am. Rep. 735; *Stillman v. Flenniken*, 58 Iowa, 450; 43 Am. Rep. 120; *Farrar v. Stackpole*, 6 Me. 154; 19 Am. Dec. 201.

<sup>6</sup> *Lyle v. Palmer*, 42 Mich. 314.

removal of the fixture would render the building useless.<sup>1</sup> If the article, whether fast or loose, be indispensable in carrying on the specific business, it becomes a part of the realty.<sup>2</sup> And an article not made expressly for use in the building in which it is placed, but which is capable of beneficial use if removed or set up in some other building, is personalty or realty, according to the intent or understanding fairly deducible from the circumstances.<sup>3</sup> Whatever is placed in a building by a mortgagor to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes part of the realty, though not so fastened that it cannot be removed without serious injury either to itself or to the building. On the other hand, articles which were put in merely as furniture are removable, though more or less substantially fastened to the building. So, too, machines not essential to the enjoyment and use of a building occupied as a manufactory, nor specially adapted to be used in it, are removable, though fastened to the building, when it is clear that the purpose of fastening them is to steady them for use, and not to make them a permanent part of or adjunct to the building.<sup>4</sup> Machinery of any kind placed in a shop or manufactory, though not attached, are fixtures, if they are a necessary part of the carrying on of the business.<sup>5</sup>

§ 2895. *Intention as the Test.*—A large number of cases hold the intention of the parties to be the controlling element, even where the removal would injure the premises.<sup>6</sup> "Of all the tests," says a recent writer, "the

<sup>1</sup> *State Bank v. Kercheval*, 65 Mo. 682; 27 Am. Rep. 310; *Green v. Phillips*, 26 Gratt. 752; 21 Am. Rep. 323; *McConnell v. Blood*, 123 Mass. 47; 25 Am. Rep. 12.

<sup>2</sup> *Morris's Appeal*, 88 Pa. St. 368.

<sup>3</sup> *Robertson v. Corsett*, 39 Mich. 777.

<sup>4</sup> *McConnell v. Blood*, 123 Mass. 47; 25 Am. Rep. 12.

<sup>5</sup> *Christian v. Dupps*, 28 Pa. St. 271; *Shelton v. Ficklin*, 32 Gratt. 737; *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612; *Voorhis v. Freeman*, 2 Watts & S. 116; 37 Am. Dec. 490; *Pyle v. Pennock*, 2 Watts & S. 390; 37 Am. Dec. 517.

<sup>6</sup> *Taylor v. Collins*, 51 Wis. 123; *Morrison v. Berry*, 42 Mich. 389; 36 Am. Rep. 446; *Kelly v. Austin*, 46 Ill.

clear tendency of modern authority seems to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention."<sup>1</sup> The question of intention has been held to govern, even where there had been no annexation at all. Thus where a "draft-tube" was ordered and furnished with the intent that it should be attached to the realty with the other machinery in a mill, but was not in fact so attached at the time of filing a petition for a lien, in which its value was included, it was held that it should be treated as a fixture as between the material-man and mill-owners, and a lien for its value allowed.<sup>2</sup> So where an engine and boiler had been bought by the owner of a mill, and hauled upon his grounds into the mill-yard with the *bona fide* intention of attaching them to the mill, although not yet actually attached thereto, and they were necessary for the purposes for which they were to be used, they were regarded as a part of the realty, and not liable to the levy of an execution as personal property.<sup>3</sup> As to the character of evidence required to show that the chattel shall retain its character of personal property after its annexation to the freehold, the adjudged cases are at variance. In some it is held that the execution and record of a chattel mortgage will, of itself, without any special agreement that the chattel shall retain its personal character, be sufficient to prevent the article from attaching as a permanent fixture.<sup>4</sup> But presumptively, a hotel attached to the land is realty, and as between third persons, it is not shown to be per-

156; 92 Am. Dec. 243; *Sword v. Low*, 122 Ill. 487; *Shoemaker v. Simpson*, 16 Kan. 43; *Henkle v. Dillon*, 15 Or. 610; *De Lacy v. Tallman*, 83 Ala. 155. See *Watson v. Mfg. Co.*, 30 N. J. Eq. 483.

<sup>1</sup> *Ewell on Fixtures*, 22; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57; 24 Am. Rep. 719; *Foot v. Gooche*, 96 N. C. 265; 60 Am. Rep. 411; *Funk v. Brigaldi*, 4 Daly, 359; *McRae v.*

*Bank*, 50 How. Pr. 51; *Wheeler v. Bedell*, 40 Mich. 693; *Jones v. Ramsay*, 3 Ill. App. 303; *Pope v. Shinkle*, 45 N. J. L. 39.

<sup>2</sup> *Spruhen v. Stout*, 52 Wis. 517.

<sup>3</sup> *Patton v. Moore*, 16 W. Va. 428; 37 Am. Rep. 789.

<sup>4</sup> *Ford v. Cobb*, 20 N. Y. 344; *Eaves v. Estes*, 10 Kan. 314; 15 Am. Rep. 345; *Carpenter v. Allen*, Mass., 1890.

sonalty by the fact that the lessee gave a chattel mortgage on it.<sup>1</sup> The fact that a mill and fixtures are excepted from the operation of a mortgage of the land on which they stand does not deprive them of their character of realty.<sup>2</sup>

**ILLUSTRATIONS.**—The defendants were a corporation and the owners of a flouring-mill. A agreed, for a certain consideration, to repair the mill and put in new machinery. The plaintiffs sent a machine to A, consigned to themselves, and in the care of another, to have it tested. The machine was attached to the floor with screws, and to the main shafting of the mill with belts and pulleys. Defendants had notice of the ownership, and never paid anything for the property. Plaintiffs never sold or contracted to sell it to any one, and demanded of defendants its return, which was refused. *Held*, that, as between the owner and purchaser, the machine did not become a fixture: *Walker v. Grand Rapids Mill Co.*, 70 Wis. 92.

**§ 2896. Act of Wrong-doer — Property of Third Person.**—A wrong-doer may lose his property by attaching it to real estate; so may one not a wrong-doer, by so doing, or by allowing others to do so.<sup>3</sup> But an owner cannot be deprived of his property by the unauthorized act of another in so doing, when it can be separated from the realty without great inconvenience, and without substantial injury to the latter.<sup>4</sup> Where erections or additions

<sup>1</sup> *Docking v. Frazell*, 34 Kan. 29.

<sup>2</sup> *Davis v. Eastham*, 81 Ky. 116.

<sup>3</sup> *Goddard v. Bolster*, 6 Greenl. 427; 20 Am. Dec. 320; *Shoemaker v. Simpson*, 16 Kan. 43, the court saying: "Even a trespasser may place his personal property on the soil of another, where no connection exists, without it becoming real estate, or without it becoming the property of the owner of the soil. While, on the other hand, the owner of the soil might even steal the personal property of another, and so incorporate it into his real estate that it would become a part thereof, and could never be reclaimed by the owner."

<sup>4</sup> *Cochran v. Flint*, 57 N. H. 514; *Shoemaker v. Simpson*, 16 Kan. 43, the court saying: "A wrong-doer may

lose his personal property by voluntarily attaching it to the land of another. A person not a wrong-doer may, by his own consent, lose his personal property by attaching it or allowing it to be attached, to the land of another. A person may even lose his personal property by wholly abandoning it to any person who may pick it up, although it may never be attached to any person's real estate. And an innocent person may sometimes, against his consent, lose his personal property by its being incorporated into the real estate of some other person, so that it cannot be separated without great inconvenience and loss. But we do not think that any innocent person can be deprived of the title to his personal property,

are made with the materials of a third person, so long as the identity of the original materials can be proved the right of the original owner in the property is preserved, and is not gained by another by accession. The owner may pursue his property wherever he can trace it. But when the property has lost its identity, it ceases to have a legal existence as a chattel, and may not be retaken.<sup>1</sup> Where a bar or pole was tortiously taken and used in making a staging to shingle a barn, being simply secured in its place by a nail, it was held that it was not lost to the owner, who might recapture it without notice to the taker, doing no more damage to the staging than was necessary to repossess it.<sup>2</sup>

**§ 2897. Contract or Consent of Owner of Land.**—The parties, by their agreement, may give to buildings on the land the character of personalty or of realty, if the rights of third persons are not affected.<sup>3</sup> The owner of the land may by agreement reimpress the character of personalty on chattels which have become fixtures according to the ordinary rules of law, if they have not become so incorporated into the realty as to lose their identity, and the reconversion does not prejudice the right of creditors or third persons.<sup>4</sup> In some states such an agreement is equally effective against prior mortgagees, and against subsequent purchasers or encumbrancers having notice

against his consent, by having it attached without his consent to the real estate of another by a third person, where such personal property can be removed without any great inconvenience, and without any substantial injury to the real estate.<sup>5</sup>

<sup>1</sup> *Cross v. Marston*, 17 Vt. 533; 44 Am. Dec. 353; *White v. Twitchell*, 25 Vt. 620; 60 Am. Dec. 294. See *ante*, Title Personal Property—Accession.

<sup>2</sup> *White v. Twitchell*, 25 Vt. 620; 60 Am. Dec. 294.

<sup>3</sup> *Myrick v. Biel*, 3 Dak. 294; *Priestley v. Johnson*, 67 Mo. 632; *Higgins v. Riddell*, 12 Wis. 587; *Rus-*

*sell v. Richards*, 10 Me. 429; 25 Am. Dec. 254; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; *Southard v. Hill*, 44 Me. 92; 69 Am. Dec. 85. And the agreement may be enforced, notwithstanding a change of ownership in the chattels and freehold: *Sullivan v. Jones*, 14 S. C. 362. The owner of the freehold may agree that a fixture shall be severed from the freehold and belong to another; and after such agreement the fixture is deemed personal property: *Foster v. Mabe*, 4 Ala. 402; 37 Am. Dec. 749.

<sup>4</sup> *Tyson v. Post*, 108 N. Y. 217; 2 Am. St. Rep. 409.

thereof.<sup>1</sup> If, by agreement with the owner of the realty, it is to remain the property of the party putting it there, it will continue to be personalty.<sup>2</sup> And such an agreement, being one relating to personal property, is good by parol.<sup>3</sup> It need not be express; it may be implied from the circumstances of the case, from the relations of the parties, or from usage and custom.<sup>4</sup> An agreement for the right of removal, or that the article annexed shall remain as the personal property of the party annexing it to the land of another, may be implied from the fact that it was annexed with a previous consent or license of the owner of the land, when a different intention of the parties is not indicated by express agreement, the interest of the party making the erection, or his relation to the title of the land.<sup>5</sup> It may also be shown by inference from the subsequent recognition by the owner of the land of rights which can result only from its existence, as by recognizing and treating the property as the personal property of the one who placed it upon the land.<sup>6</sup> Where a crop has been sown upon the land of another under a parol license and agreement that it should belong to him who sowed it, and he is afterwards expelled from the land, and the crop harvested by the owner of the land, he may maintain an action therefor.<sup>7</sup> The owner of machinery or other things in the nature of fixtures which may be easily severed

<sup>1</sup> *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 889.

<sup>2</sup> *Matson v. Calhoun*, 44 Mo. 368; *Walton v. Wray*, 54 Iowa, 531; *Howard v. Fessenden*, 14 Allen, 124; *First Parish of Sudbury v. Jones*, 8 Cush. 184; *Curtis v. Riddle*, 7 Allen, 187; *Doty v. Gorham*, 5 Pick. 487; 16 Am. Dec. 417; *Wells v. Banister*, 4 Mass. 514; *Taft v. Stetson*, 117 Mass. 471; *Hartwell v. Kelly*, 117 Mass. 257; *Feimster v. Johnson*, 64 N. C. 239; *Aldrich v. Parsons*, 6 N. H. 555; *Harris v. Gillingham*, 6 N. H. 9; 23 Am. Dec. 701; *Coleman v. Lewis*, 27 Pa. St. 291; *Hunt v. Bay State Iron Co.*, 99 Mass. 279; *Smith v. Benson*, 1 Hill, 176; *Godard v. Gould*, 14 Barb. 662;

*Bartholomew v. Hamilton*, 105 Mass. 239; *Myrick v. Bill*, 3 Dak. 264; *Curtiss v. Hoyt*, 19 Conn. 154; 48 Am. Dec. 149.

<sup>3</sup> *Curtis v. Riddle*, 7 Allen, 185.

<sup>4</sup> *First Parish v. Jones*, 8 Cush. 184; *Howard v. Fessenden*, 14 Allen, 128.

<sup>5</sup> *Hinckley v. Baxter*, 13 Allen, 139; *Howard v. Fessenden*, 14 Allen, 124; *Doty v. Gorham*, 5 Pick. 487; 16 Am. Dec. 417; *Weathersby v. Sleeper*, 42 Miss. 732; *Northern Central R. R. Co. v. Canton Co.*, 30 Md. 347.

<sup>6</sup> *Morris v. French*, 106 Mass. 326; *Howard v. Fessenden*, 14 Allen, 129; *Shell v. Hayward*, 16 Pa. St. 523.

<sup>7</sup> *Harris v. Fink*, 49 N. Y. 24; 10 Am. Rep. 315.

from the realty may treat them as chattels, and, by the execution of a chattel mortgage on them, estop himself from asserting, as against the mortgagee, that they are part of the real estate; and the mortgagee may put the mortgage in evidence to show his right to the possession of the articles mortgaged, without thereby putting in issue the title to real property.<sup>1</sup>

Where a lessee, by the terms of the lease, is to be deemed the owner of the buildings erected by himself on the leased premises, he may sell or remove said buildings from the leased premises during the continuance of the lease; and a provision in the lease that the lessee may remove said buildings at the expiration of the lease does not prevent him from removing them during the continuance thereof.<sup>2</sup> Gas-pipes belonging to a gas company, laid in the streets of a city by permission of the corporate authorities, do not become the property of the city as a part of the realty, but remain the personal property of the company.<sup>3</sup> An elevator built on land owned by a railroad company, under a license allowing the owner to operate it for the mutual benefit of himself and the company, and with a right to remove it, though the removal might injure the structure, is personal property, and a mortgage thereon a chattel mortgage.<sup>4</sup> Where annexations are made by a partnership to land belonging to one of the partners, with an understanding that the chattel annexed might be removed by the owners when deemed proper, the interest of the individual partner, to whose land the chattel is annexed, in such chattel, is personalty, and not realty.<sup>5</sup> In some cases it is held that whether an agreement shall preserve the character of personalty in things so affixed to the freehold, as that but

<sup>1</sup> *Corcoran v. Webster*, 50 Wis. 125.

<sup>2</sup> *Alexander v. Touhy*, 13 Kan. 64.

<sup>3</sup> *Memphis Gas Light Co. v. State*, 6 Cold. 310; 98 Am. Dec. 452. *Contra*, *Providence Gas Co. v. Thurber*, 2 R. I. 15; 55 Am. Dec. 621.

<sup>4</sup> *Deering v. Ladd*, 22 Fed. Rep. 575.

<sup>5</sup> *McDavid v. Wood*, 5 Heisk. 95; *Saunders v. Stallings*, 8 Heisk. 65; *Trappes v. Harter*, 3 Tyrw. 603; *Ex parte Lloyd*, 3 Deac. & Chit. 765.

for such agreement they would become part of the realty, depends upon their essential character, and the mode in which they are annexed, e. g., whether they can be removed without serious damage to the freehold, or substantially destroying their own qualities and value.<sup>1</sup> In Connecticut a distinction is made between buildings and other annexations upon the soil of another, the rule being "that a fixed and permanent building erected upon another's land, even by his license, became his property; but if in its nature and structure it was capable of being removed, and a removal was contemplated by the parties, it was personal estate in the builder; and where the license was improperly revoked, resort must be had to a court of chancery."<sup>2</sup> The consent, express or implied, must have been in effect prior to the annexation; and (certainly when the thing was annexed by a stranger) without a previous consent or license it cannot afterwards become personal property by the owner's mere oral assent.<sup>3</sup>

A person under a legal disability to contract, as an infant or a married woman, cannot give a legal consent to the erection of a structure upon their land, and hence

<sup>1</sup> *Footman v. Goepper*, 14 Ohio St. 558, 564; *Ford v. Cobb*, 20 N. Y. 344; *Sheldon v. Edwards*, 35 N. Y. 283; *Voorhees v. McGinnis*, 48 N. Y. 278; *Eaves v. Estis*, 10 Kan. 314; 15 Am. Rep. 345; *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537. Regarding this distinction, Mr. Ewell, in his work on fixtures, says: "Where the rights of third parties intervene, the propriety and necessity of such a limitation will be very readily conceded; but, as between the immediate parties to the agreement, the limitation seems, to say the least, sufficiently strict; and where, as in the case of a house, the materials might be of value after severance, no more reason is perceived why such an agreement should not be effectual as between the parties than in the case of a fixture that might be removed uninjured."

<sup>2</sup> *Benedict v. Benedict*, 5 Day, 464;

*Prince v. Case*, 10 Conn. 375; *Baldwin v. Breed*, 16 Conn. 60.

<sup>3</sup> *Gibbs v. Estey*, 15 Gray, 587; *Burk v. Hollis*, 98 Mass. 55; *Madigan v. McCarthy*, 108 Mass. 376; 11 Am. Rep. 371; *Ex parte Ames*, 1 Low. 567; the court saying: "It is argued on behalf of the assignees that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty; and for this some remarks of Dewey, J., delivering the opinion of the court in *Gibbs v. Estey*, 15 Gray, 587, are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such parol agreement or license cannot change real into personal estate after its character has been once established." But see *Fuller v. Tabor*, 39 Me. 519; *Hines v. Ament*, 43 Mo. 298.

their agreement is no protection.<sup>1</sup> But although the wife, by reason of her disabilities arising from the marriage, is not competent to restrict or enlarge the husband's rights over her property, or to contract with him in reference to it, and cannot therefore consent to his erecting buildings, or making improvements upon her property, yet as he is in his own right a tenant by marital right of her lands during their joint lives, he is regarded as making improvements as a tenant for life in his own right, irrespective of any contract with his wife;<sup>2</sup> and therefore, where the annexation comes within the rule as to trade fixtures, existing between the representatives of the tenant for life and the remainderman, it may be removed by his personal representatives.<sup>3</sup> The right to remove fixtures cannot be inferred from permission given to the tenant to make improvements.<sup>4</sup>

ILLUSTRATIONS. — A purchaser in possession of land under an oral contract of sale built a frame house thereon. The vendor afterwards repudiated the contract and took possession of the house. *Held*, that the purchaser could maintain replevin for it: *Waters v. Reuber*, 16 Neb. 99; 49 Am. Rep. 710. A placed upon the land of B a steam-engine and boiler set in brick laid with mortar, under an agreement by which they were to continue to belong to A, with the right of removal whenever he saw fit. B afterwards mortgaged the land to A, who subsequently took possession for breach of condition, and afterwards removed and sold the engine and boiler. On a bill to redeem from the mortgage, *held*, that the engine and boiler were the personal property of A, and did not pass by and were not included in the mortgage, and that A was not accountable to B for their value: *Taft v. Stetson*, 117 Mass. 471. A town-house was erected on the land of the town, under a contract with the builder that the town should occupy a part of it at a specified rent, and should have a right to purchase it at an appraised value. *Held*, that the house was the personal property of the builder, and subject to attachment for his debts: *Ashmun v. Wil-*

<sup>1</sup> *Washburn v. Sproat*, 16 Mass. 449; *re Hinds*, 5 Whart. 138; 34 Am. Dec. 542.

*Howard v. Fessenden*, 14 Allen, 128;

*Marable v. Jordan*, 5 Humph. 417; 42

*Am. Dec.* 441; *Copley v. O'Neil*, 1

*Lans.* 214.

<sup>2</sup> *In re Hinds*, 5 Whart. 138; 34 Am. Dec. 542.

<sup>3</sup> *Stockwell v. Marks*, 17 Me. 455;

<sup>4</sup> *Doak v. Wiswell*, 38 Me. 569; *In* 35 Am. Dec. 266.

*liams*, 8 Pick. 402. The owner of an elevator purchased from the plaintiff an engine and boiler to place therein, and to secure a part of the purchase-money gave his promissory note, secured by chattel mortgage upon the property, wherein it was stipulated that the engine and boiler should be and remain personal property until the note was paid. They were placed upon a foundation outside of the elevator, and a house built over them. *Held*, that the engine and boiler continued personal property until the note was paid, as against a prior mortgagee of the realty: *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537. Plaintiffs built a steam-engine for a mill, and before it left their shop took a chattel mortgage upon it, with a stipulation that they might take possession of and remove it, whether attached to realty, or otherwise. The engine was set up in the mill, which had been previously mortgaged, and which was subsequently sold to defendant on foreclosure of the mortgage. *Held*, that the engine continued personal property, and that plaintiffs were entitled to it: *Eaves v. Estes*, 10 Kan. 314; 15 Am. Rep. 345. L. was in possession of land under a contract to purchase from defendant, the contract providing that if L. failed to perform its terms, then all tools and machinery put upon the land by L. should be the property of the defendant. The plaintiff leased an engine and boiler to L., with the privilege of purchase. The plaintiff knew that the chattels were to be affixed to the land, but did not know the terms of the contract. L. affixed the chattels to the realty so that they could not be removed without destroying the masonry and wall to which the chattels were affixed. L. failed to complete his purchase of the land, and forfeited the lease of the chattels. *Held*, as against the defendant, that the chattels remained the personal property of the plaintiff: *Hendy v. Dinkerhoff*, 57 Cal. 3; 40 Am. Rep. 107. H. contracted with S. to put boilers in his mill in place of worn-out, old ones, to be paid four dollars per month for their use, and to have the right to remove them whenever he pleased, and they could be removed without other injury than taking down the boiler-wall, built of brick, and standing under a shed outside the mill. *Held*, not fixtures: *Hill v. Sewald*, 53 Pa. St. 271; 91 Am. Dec. 209. A grain-elevator was built upon the right of way of a railroad, under a license given by the company with the understanding that it was not to be a permanent structure, and which was operated by shafting from a steam-mill. *Held*, that it was personal property: *Walton v. Wray*, 54 Iowa, 531. A owned a frame building sixteen by twenty feet, and one story high, used for county offices. A moved this building to the new county seat, upon B's land, upon an understanding that B should obtain a patent for the land, and should convey it to

the county, the building to become also the property of the county. B obtained his patent, but refused to convey the land. *Held*, that the building remained personalty, and could be removed: *Rush County Comm'rs v. Stubbs*, 25 Kan. 322. A tenant at will removed a substantially constructed house from another place onto the land of which he was tenant, put it upon a stone foundation, with a cellar under it, without the land-owner's consent, or any contract that the tenant should hold it as personal property. *Held*, that it could not become a chattel by the mere assent of the land-owner, without an actual severance from the land: *Madigan v. McCarthy*, 108 Mass. 376; 11 Am. Rep. 371.

§ 2898. **Heir and Executor.** — The right to retain property as annexed to the soil is strongly construed in favor of the heir of the party making the annexation, as against the executor.<sup>1</sup>

§ 2899. **Landlord and Tenant.** — As between landlord and tenant, the right to remove fixtures is liberally construed in favor of the tenant.<sup>2</sup> Whatever a tenant affixes to leased premises may, as a general rule, be removed by him during the term, provided the removal may be made without material injury to the freehold.<sup>3</sup> A tenant may, in general, remove articles erected for ornament or domestic use, where the removal will not cause injury to the freehold.<sup>4</sup> Thus a tenant has been permitted to remove coal-bins, stairways and banisters, closets and shelves.<sup>5</sup> A tenant may remove a cider mill and press which he has

<sup>1</sup> *Fisher v. Dixon*, 12 Clark & F. 312; *Buckley v. Buckley*, 11 Barb. 43.

<sup>2</sup> *Elwes v. Maw*, 3 East, 38; *Foley v. Addenbrooke*, 13 Mees. & W. 197; *Gaffield v. Hapgood*, 17 Pick. 192; 28 Am. Dec. 290; *Dubois v. Kelly*, 10 Barb. 496; *Torrey v. Burnett*, 38 N. J. L. 457; 20 Am. Rep. 421; *Stokoe v. Upton*, 40 Mich. 581; 29 Am. Rep. 560; *Van Ness v. Pacard*, 2 Pet. 137; *Oves v. Oglesby*, 7 Watts, 106; *Forbes v. Shattuck*, 22 Barb. 558; *Burnside v. Marcua*, 17 U. C. C. P. 430; *O'Donnell*

*v. Hitchcock*, 118 Mass. 401; *Seeger v. Pettit*, 77 Pa. St. 437; 18 Am. Rep. 452; *Pennybecker v. McDougal*, 48 Cal. 160.

<sup>3</sup> See cases *supra*.

<sup>4</sup> *Seeger v. Pettit*, 77 Pa. St. 437; 18 Am. Rep. 452; *Birch v. Dawson*, 2 Ad. & E. 37; *Coombs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236; *Gaffield v. Hapgood*, 17 Pick. 192; 28 Am. Dec. 290; *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 64.

<sup>5</sup> *Seeger v. Pettit*, 77 Pa. St. 437; 18 Am. Rep. 452.

erected to make cider on his farm;<sup>1</sup> or a fire-frame fixed in a fireplace with bricks on the sides.<sup>2</sup>

A tenant is allowed generally to remove fixtures erected by him for the purposes of trade;<sup>3</sup> as a building erected for the purpose of trade or business,<sup>4</sup> or a steam saw-mill, erected on land for the purposes of manufacturing;<sup>5</sup> or a frame-work counting-room, fastened by a tenant on three sides to the floor with nails, and on a fourth with cleats nailed into the joints of a brick wall;<sup>6</sup> or a ball-room, erected by the lessee of an inn, resting upon stone posts slightly imbedded in the soil, and removable without injury to the inheritance;<sup>7</sup> or a brick chimney which was sunk three feet into the ground for a foundation, and pierced the roof, and could not be removed without being taken down together with machinery, which were erected and put into the building by the tenant for the purpose of trade;<sup>8</sup> or an iron boiler placed in a building by a tenant at will, upon a foundation of brick-work and cement, the edges of the brick-work being cemented before the boiler was placed thereon to keep it in place, and an iron tank similarly placed;<sup>9</sup> or a pump placed in a well;<sup>10</sup> or a water-tank and sinks fastened to a building by nails or fitted to the floor by cutting away flooring;<sup>11</sup> or gas and water pipes extending through a building, and

<sup>1</sup> *Holmes v. Tremper*, 20 Johns. 29; 11 Am. Dec. 239.

<sup>2</sup> *Gaffield v. Hapgood*, 17 Pick. 192; 28 Am. Dec. 290.

<sup>3</sup> *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 64; *Coombs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236; *Oves v. Oglesby*, 7 Watts, 106; *Perkins v. Swank*, 43 Miss. 349; *Ford v. Cobb*, 20 N. Y. 344; *Van Ness v. Pacard*, 2 Pet. 137; *Holbrook v. Chamberlin*, 116 Mass. 155; 17 Am. Rep. 146; *Torrey v. Burnett*, 38 N. J. L. 457; 20 Am. Rep. 421; *Watriss v. First Nat. Bank*, 124 Mass. 571; 26 Am. Rep. 694; *Turner v. Conover*, L. R. 5 Q. B. 306; *Hellawell v. Eastwood*, 6 Ex. 295; *In re Hinds*, 5 Whart. 138; 34 Am.

Dec. 542; *Beers v. St. John*, 16 Conn. 322; *Cram v. Brigham*, 11 N. J. Eq. 29; *Raymond v. White*, 7 Cow. 369; *Lemar v. Miles*, 4 Watts, 330; *Thomas v. Crout*, 5 Bush, 37; *Weathersby v. Sleeper*, 42 Miss. 732.

<sup>4</sup> *Richtmyer v. Morss*, 4 Abb. App. 55. But see *Deane v. Hutchinson*, 40 N. J. Eq. 83.

<sup>5</sup> *Saunders v. Stallings*, 5 Heisk. 65; *McDavid v. Wood*, 5 Heisk. 95.

<sup>6</sup> *Brown v. Wallis*, 115 Mass. 156.

<sup>7</sup> *Ombony v. Jones*, 19 N. Y. 234.

<sup>8</sup> *Moore v. Wood*, 12 Abb. Pr. 393.

<sup>9</sup> *Cooper v. Johnson*, 143 Mass. 108.

<sup>10</sup> *McCracken v. Hall*, 7 Ind. 30.

<sup>11</sup> *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 65.

passing through holes in floors, ceilings, and partitions cut for the purpose, and kept in place by hooks and metal bands;<sup>1</sup> or counter-shafting, pulleys, hangers, and belts fastened to the building with bolts, also a portable boiler and steam-pipes supported by hooks screwed to the building;<sup>2</sup> or shelving-cases and drawers in a store;<sup>3</sup> or a bowling-alley ways and racks, attached by a tenant to a building;<sup>4</sup> or a glass-case, a stand of drawers, and a large mirror, bought by the tenant of a restaurant to use in his business, and screwed or nailed to the ceiling;<sup>5</sup> or engines and boilers erected by the tenant on brick foundations, bolted to the ground and walled in, and cheap dwellings, erected for miners, on posts or dry stone walls, intended as merely accessory to the mining operations, and capable of removal without material disturbance of the land;<sup>6</sup> or a steam-engine, machinery, and fixtures attached to the soil, for the purpose of hoisting coal from mines situated thereon, including all boxes and other necessary appliances connected therewith;<sup>7</sup> or a hydraulic press let into the ground, and walled up with solid masonry, and wooden parts of it nailed to the building, necessary to the business for which the tenant occupies the building.<sup>8</sup>

In the United States, erections for agricultural purposes put upon the land by a tenant receive the same protection in favor of the tenant that was extended by the common law of England to fixtures made for the purposes of trade.<sup>9</sup>

But while the tenant may remove domestic or trade fixtures prior to or at the end of his term, he cannot

<sup>1</sup> Wall v. Hinds, 4 Gray, 256; 64 Am. Dec. 65.

<sup>2</sup> Holbrook v. Chamberlin, 116 Mass. 155; 17 Am. Rep. 146.

<sup>3</sup> Stout v. Stoppel, 30 Minn. 56; Kimball v. Grand Lodge, 131 Mass. 59.

<sup>4</sup> Haurahan v. O'Reilly, 102 Mass. 201.

<sup>5</sup> Guthrie v. Jones, 108 Mass. 191.

<sup>6</sup> Conrad v. Saginaw Mining Co., 54 Mich. 249; 52 Am. Rep. 817.

<sup>7</sup> Dobschuetz v. Holliday, 82 Ill. 371.

<sup>8</sup> Finney v. Watkins, 13 Mo. 291.

<sup>9</sup> Harkness v. Sears, 26 Ala. 493; 62 Am. Dec. 743.

subsequently exercise the right.<sup>1</sup> This rule always applies where the term is of a certain duration, as under a lease for a term of years which contains no special provisions in regard to fixtures. But where the term is uncertain, or depends upon a contingency, as where a party is in as tenant for life or at will, fixtures may be removed within a reasonable time after the tenancy is determined.<sup>2</sup> Where a lease was given by an agent without authority, during the absence of the owner, and was terminated by the owner on his return from abroad, it was held that the lessees became tenants at sufferance, and could remove their fixtures within a reasonable time after such termination.<sup>3</sup> And it seems that even after the lease has come to an end, if the tenant still remains in possession, he may remove the fixtures.<sup>4</sup> A tenant who remains in possession after the expiration of his term, but under a new lease, containing no provision for the removal of fixtures, is treated as having abandoned the right of removal.<sup>5</sup> But the tenant's right may be extended by agreement. Thus where a landlord agreed to sell a trade fixture for the benefit of the tenant, but failed to do so, it

<sup>1</sup> *Darrah v. Baird*, 101 Pa. St. 265; *Dostat v. McCaddon*, 35 Iowa, 318; *Beers v. St. John*, 16 Conn. 322; *Youngblood v. Harris*, 68 Ga. 630; *Poole's Case*, 1 Salk. 368; *Gaffield v. Hapgood*, 17 Pick. 192; 28 Am. Dec. 290; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306, 311; 38 Am. Dec. 368; *Shepard v. Spaulding*, 4 Met. 416; *Bliss v. Whitney*, 9 Allen, 114, 115; 85 Am. Dec. 745; *Talbot v. Whipple*, 14 Allen, 177; *Lyde v. Russell*, 1 Barn. & Adol. 394; *Minshall v. Lloyd*, 2 Mees. & W. 450; *Josslyn v. McCabe*, 46 Wis. 591; *Beckwith v. Boyce*, 9 Mo. 560; *Overton v. Williston*, 31 Pa. St. 155; *Reynolds v. Shuler*, 5 Cow. 323; *McCracken v. Hall*, 7 Ind. 30; *Stockwell v. Marks*, 17 Me. 455; 35 Am. Dec. 266; *Dingley v. Buffum*, 57 Me. 381; *Carlin v. Ritter*, 68 Md. 478; 6 Am. St. Rep. 467.

<sup>2</sup> *Ellis v. Page*, 1 Pick. 43, 49; *Doty v. Gorham*, 5 Pick. 487, 490; 16 Am.

Dec. 417; *Martin v. Roe*, 7 El. & B. 237; *Watriss v. First Nat. Bank*, 124 Mass. 571; 26 Am. Rep. 696. Six weeks after the expiration of a lease is an unreasonable time for a tenant to wait before beginning to remove a house built by him upon the leased land; *Burk v. Hollis*, 98 Mass. 55. So is five months; *Smith v. Park*, 31 Minn. 70.

<sup>3</sup> *Antoni v. Belknap*, 102 Mass. 193.

<sup>4</sup> *Penton v. Robart*, 2 East, 88; *Watriss v. First Nat. Bank*, 124 Mass. 571; 26 Am. Rep. 694; *Mackintosh v. Trotter*, 3 Mees. & W. 184; *Weston v. Woodcock*, 7 Mees. & W. 14.

<sup>5</sup> *Hedderich v. Smith*, 103 Ind. 203; 53 Am. Rep. 509; *Loughran v. Ross*, 45 N. Y. 792; 6 Am. Rep. 173; *Marks v. Ryan*, 63 Cal. 107; *McIver v. Estabrook*, 134 Mass. 550; *Watriss v. First Nat. Bank*, 124 Mass. 571; 26 Am. Rep. 696.

was held that the tenant had a reasonable time to remove such fixture, although his term was ended and possession surrendered.<sup>1</sup> But the fact that lessees, before surrendering the possession, asked the lessor if they might leave the fixtures in the room rented, which was a store, and that the lessor replied he was willing they should be left, as they might help him to rent the store, does not imply a license to the lessees to re-enter and remove such fixtures.<sup>2</sup> A tenant cannot remove erections made by him after forfeiture or re-entry for condition broken.<sup>3</sup> One who is ejected from premises leased by him, after due notice to quit for non-payment of rent, loses his right to remove fixtures.<sup>4</sup> A contract between a landlord and tenant, authorizing the latter to put up additional sheds and other temporary buildings for warehouses, and to remove them when his term expired, will not authorize the removal of erections so connected with the building already upon the leased premises that they cannot be separated without material injury to the property.<sup>5</sup> But a stipulation in a lease that he shall make no "alterations or repairs" without the landlord's consent, and shall not remove "any repairs, improvements, additions, or fixtures," does not apply to trade fixtures.<sup>6</sup> The tenant has no right to compensation for fixtures, except by express contract.<sup>7</sup>

ILLUSTRATIONS.—A tenant put a gang-edger in a saw-mill, but failed to remove it during his term. Afterwards the landlord detached it, but left it on the premises. *Held*, that the severance did not revert the tenant's right to remove it: *Stokoe v. Upton*, 40 Mich. 581; 29 Am. Rep. 560. Lessees of a mill covenanted "to deliver up the premises and all future erections and additions to or upon the same" at the end of the term, "in as good order and condition as the same now are, or may be put into by the lessor." The lease was for a term of years, to begin at a future day. When the lease was made, glass in some of

<sup>1</sup> *Torrey v. Burnett*, 38 N. J. L. 457; 20 Am. Rep. 421.

<sup>2</sup> *Joselyn v. McCabe*, 46 Wis. 591.

<sup>3</sup> *Whipley v. Dewey*, 8 Cal. 36.

<sup>4</sup> *Erickson v. Jones*, 37 Minn. 459.

<sup>5</sup> *Powell v. McCashan*, 28 Mo. 70.

<sup>6</sup> *Cubbins v. Ayrea*, 4 Lea, 329.

<sup>7</sup> *Gardner v. Watson*, 18 Ill. App. 386.

the windows was broken. New glass was put in by the lessees before the term began, in consideration of being allowed by the lessor to occupy part of the premises in the mean time. *Held*, that the lessees were bound to pay for glass which was broken during the term of the lease. *Held*, also, that the lessees were entitled to remove all machinery in the nature of trade fixtures or personal property put in during the term of the lease: *Holbrook v. Chamberlin*, 116 Mass. 115; 17 Am. Rep. 146. After a railroad company had disclaimed title to and had abandoned certain land which, under the conveyance to it, had reverted to the grantor, it entered on the land and demolished and removed a depot-building. *Held*, that the company was liable in damages to the grantor's heirs, and this, even though the building was originally a trade fixture: *Carr v. R. R. Co.*, 74 Ga. 73. The wife of a tenant, after the expiration of his tenancy, sued the owner of the land for an alleged conversion of a house situated thereon. At the trial she showed that she had purchased the house from a former tenant, after his tenancy had expired. *Held*, insufficient to establish her title as against the owner of the land, who had no knowledge of such purchase, and there being no privity of contract between her and such owner: *Griffin v. Ransdell*, 71 Ind. 440. A landlord enjoined his tenant from removing certain fixtures, and while the injunction was pending the tenancy was determined. *Held*, that the tenant was allowed a reasonable time to remove the fixtures after the injunction was dissolved. But *held*, that the suing out of the injunction was no conversion, and a judgment giving the value of the fixtures in damages was set aside: *Bircher v. Parker*, 40 Mo. 118. A lessee of a lot for a term of years covenanted that he would not remove from the lot any building which he might put thereon, until the rents were paid. A building put thereon by him was removed by a third person, by his consent, the rent being unpaid. *Held*, that such third person was liable to the lessor in damages: *Forbes v. Williams*, 1 Jones, 393. The rent reserved in a lease for a year clearly was not based on the value of trade fixtures put in by the lessee afterwards during the term. The lessor recognized the tenant's right to the fixtures. The purchaser of the reversion, knowing the facts, gave a new lease for a year on the expiration of the old one. This new lease did not in terms cover the fixtures or refer to them. *Held*, that the lessee, by accepting this lease, did not lose his right to the fixtures: *Beloit Bank v. O. E. Merrill Co.*, 69 Wis. 501.

§ 2900. **Vendor and Vendee.** — The rule as to fixtures which applies as between heir and executor applies equally as between vendor and vendee, and mortgagor

and mortgagee.<sup>1</sup> As between vendor and vendee, the right is construed strongly against the vendor.<sup>2</sup> A sale of land carries with it everything thereon, or necessary to its enjoyment, unless specially reserved.<sup>3</sup> Chattels affixed to the realty are deemed a part of it.<sup>4</sup> All articles which, at the time of the conveyance of a house, have become a part thereof pass as fixtures.<sup>5</sup> Shelves and drawers in standards fastened to the walls, and tables nailed to the floor, used as counters in a grocery-store, pass by a sale as part of the freehold.<sup>6</sup> So does machinery in the buildings,<sup>7</sup> and fences.<sup>8</sup> A deed of a hotel carries with it as an appurtenance, unless expressly reserved, the hotel sign and post, though set seven feet in front of the hotel lot.<sup>9</sup> Hewed timbers, posts, and round logs, lying loosely upon land, though originally intended to be put into a building upon the land, are not fixtures, and do not pass by a deed of the realty.<sup>10</sup> A trustee's sale of real estate wherefrom the improvements had been burned down does not pass fixtures that have been removed during the fire.<sup>11</sup> A deed of land, "with the buildings thereon," and of certain "property connected with or situated in or about the premises," which mentioned specific fixtures and personal property, and allowed the grantor thirty days to remove "all property not specifically con-

<sup>1</sup> *Weathersby v. Sleeper*, 42 Miss. 732.

<sup>2</sup> *English v. Foote*, 8 Smedes & M. 444; *Keeve v. Paxton*, 26 N. J. Eq. 107; *Adams v. Beadle*, 47 Iowa, 439; 29 Am. Rep. 487; *Martin v. Cope*, 28 N. Y. 180; *Arnold v. Crowder*, 81 Ill. 56; 25 Am. Rep. 260; *In re Richards*, L. R. 4 Ch. 630; *Meux v. Jacobs*, L. R. 7 H. L. 481; *Holland v. Hodgson*, L. R. 7 Com. P. 328; *Longbottom v. Berry*, L. R. 5 Q. B. 123; *McConnell v. Blood*, 123 Mass. 47; 25 Am. Rep. 12.

<sup>3</sup> *Terhune v. Elbertson*, 3 N. J. L. 533; *Faris v. Walker*, 1 Bail. 540; *Laudou v. Platt*, 34 Conn. 517.

<sup>4</sup> *Wilson v. Steel*, 13 Phila. 153; *Mil-*

*ler v. Plumb*, 6 Cow. 665; 16 Am. Dec. 456; *Preston v. Briggs*, 16 Vt. 124; *De Graffenreid v. Scruggs*, 4 Humph. 451; 40 Am. Dec. 658; *Wadleigh v. Janvrin*, 41 N. H. 503; 77 Am. Dec. 780; *McLaughlin v. Johnson*, 46 Ill. 163.

<sup>5</sup> *Connor v. Squiers*, 50 Vt. 680.

<sup>6</sup> *Tabor v. Robinson*, 36 Barb. 483.

<sup>7</sup> *McGreary v. Osborne*, 9 Cal. 119; *Pea v. Pea*, 35 Ind. 387; *Shelton v. Ficklin*, 32 Gratt. 727.

<sup>8</sup> *Climer v. Wallace*, 28 Mo. 556; 75 Am. Dec. 135.

<sup>9</sup> *Redlon v. Barker*, 4 Kan. 382; 96 Am. Dec. 180.

<sup>10</sup> *Cook v. Whiting*, 16 Ill. 480.

<sup>11</sup> *Curry v. Schmidt*, 54 Mo. 515.

vayed" thereby, does not convey trade fixtures not specified.<sup>1</sup>

A purchaser who enters into possession under a bond for title, and brings in trade fixtures, does not stand in the relation of tenant to the vendor in such sense as to have a tenant's right to remove them if a conveyance is not consummated. If, by his own default, he fails to obtain the title, he has not the right of removal.<sup>2</sup> Under a sale conditioned not to pass title till payment, the goods, even if placed permanently on the purchaser's land, may be taken by the vendor.<sup>3</sup>

ILLUSTRATIONS. — A erected a fence on B's land under a parol agreement that he might remove it whenever he desired. By successive conveyances making no reservation of the fence, B's land passed to plaintiff, who knew nothing of the parol agreement. *Held*, that the fence could not be removed by A without plaintiff's consent: *Rowand v. Anderson*, 33 Kan. 264; 52 Am. Rep. 529.

§ 2901. **Rights of Mortgagee of Land.** — As a general rule, all fixtures put upon the land, whether before or after the execution of a mortgage upon it, become subject to the lien thereof.<sup>4</sup> Machinery erected in a mill after the execution of a mortgage, to supply the place of old and worn-out articles, becomes a part of the realty, and subject to the lien of the mortgage.<sup>5</sup> Where an owner of a machine-shop gave a mortgage on machinery he expected to set up therein, it was held that a later mortgage on the realty covered the machinery as realty.<sup>6</sup> A distinction is

<sup>1</sup> *Kirch v. Davies*, 55 Wis. 287.

<sup>2</sup> *Moore v. Vallentine*, 77 N. C. 188.

<sup>3</sup> *Watertown Steam-Engine Co. v. Davis*, 5 Del. 192.

<sup>4</sup> *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537; *Wright v. Gray*, 73 Me. 277; *Winslow v. Ins. Co.*, 4 Met. 306; 38 Am. Dec. 368; *Butler v. Page*, 7 Met. 40; 39 Am. Dec. 757; *Coleman v. Steam Mfg. Co.*, 38 Mich. 30; *Bass Foundry Works v. Gallentine*, 99 Ind. 525. But see *Randolph v. Gwynne*, 7 N. J. Eq. 88; 51 Am. Dec. 265.

<sup>5</sup> *Gardner v. Finley*, 19 Barb. 317;

*Snedeker v. Warring*, 12 N. Y. 170;

*Johnston v. Morrow*, 60 Mo. 339;

*Southworth v. Isham*, 3 Sand. 448;

*Pierce v. George*, 108 Mass. 78; 11

Am. Rep. 310; *Globe etc. Co. v.*

*Quinn*, 76 N. Y. 23; 32 Am. Rep. 259;

*Jones v. Detroit Chair Co.*, 38 Mich.

92; 31 Am. Rep. 314; *Foote v. Gooch*,

96 N. C. 265; 60 Am. Rep. 411.

<sup>6</sup> *Pierce v. George*, 108 Mass. 78; 11

Am. Rep. 310.

made between machinery placed in the mill before, and that annexed after, the execution of the mortgage upon the land, and it is held that, as to the machinery which was in the yard, but had not been placed in the mill at the time of the execution of the mortgage upon the land, but was annexed afterwards, as to which the mortgagee of the land was not misled, and advanced nothing on the faith of it, the right of the conditional vendor of such machinery is paramount to the mortgagee of the land.<sup>1</sup> Neither a prior nor subsequent mortgagee of land can claim, as subject to the lien of his mortgage, chattels brought upon and affixed to the lands under an agreement between the owner of the fee and the owner of the chattels that the character of the latter as a personal chattel is not to be changed.<sup>2</sup> Where a house or machinery is bought by a conditional sale and put upon land, it does not become attached to the land in such a sense as to affect the seller's rights as against a mortgagee of the land.<sup>3</sup> Where a manufacturer delivered to the owner of a machine-shop a boiler to be used on trial, said boiler, by agreement, to remain the property of such manufacturer till paid for, and the same was placed in said shop and put in use to generate the steam necessary to run the machinery therein, and the owner of said shop, without having paid for such boiler, mortgaged the whole plant, including said boiler, in express terms, the mortgagee having no notice of any claims against it by a third party until foreclosure, it was held that the boiler became part of the realty, and passed under the mortgage.<sup>4</sup> If, after the execution of a mortgage, chattels which belong to a third person, or upon which he has a chattel mortgage, are affixed to the land, his interest or lien does not therefrom become subject to the prior mortgage.<sup>5</sup> Where the lessees of a manufactory

<sup>1</sup> Frankland v. Moulton, 5 Wis. 1.

<sup>4</sup> McLaughlin v. Nash, 14 Allen, 136;

<sup>2</sup> Tift v. Horton, 53 N. Y. 377; 13

92 Am. Dec. 741.

Am. Rep. 537.

<sup>3</sup> Campbell v. Roddy, 44 N. J. Eq.

<sup>5</sup> Harkey v. Cain, 69 Tex. 146.

244; 6 Am. St. Rep. 889.

put in fixed machinery, and afterwards bought the premises subject to a mortgage of the realty, including "buildings to be erected thereon," it was held that the machinery so put in by them came under the lien of the mortgage.<sup>1</sup> A mortgagee, after recovery in equity by the mortgagor to redeem, and before possession taken under the judgment, may lawfully take down and carry away any buildings erected by him on the land mortgaged, the materials of which were his own, and not so connected with the soil as that they cannot be removed without prejudice to it.<sup>2</sup>

ILLUSTRATIONS. — Manufacturers of machinery allowed the tenant of a mill to put it on trial. It was put in in such a manner as to be capable of removal without injury to the mill. The tenant refused to accept it, and left the premises without removing it. *Held*, that it became a fixture as to a prior mortgagee of the mill: *Hamilton v. Huntley*, 78 Ind. 521; 41 Am. Rep. 593. A lessee, under a provision in the lease allowing him so to do, purchased the premises from his lessor. The premises were sold subject to a mortgage by the lessor. The lessee, before the deed to him, had placed machinery on the premises. *Held*, that such machinery did not, by operation of law, become part of the realty as between the lessee and the mortgagee, although so affixed as to be realty as between vendor and vendee: *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23; 32 Am. Rep. 259. A bought land on which was a steam-mill containing machinery of a character removable from the land, although well adapted to use there. A mortgaged this machinery. *Held*, that the mortgagee and those succeeding to his title could hold it against one claiming under an attachment of the realty of a date later than that of the mortgage: *Manwaring v. Jenison*, 61 Mich. 117. A mortgagor claimed that certain fixtures, etc., were not embraced in the mortgage. At the mortgagee's request, the mortgagor repaid to the mortgagee taxes paid by the latter on these fixtures. *Held*, that the mortgagee must be presumed to have waived his claim: *Foster v. Prentiss*, 75 Me. 279. A mortgagor planted nursery-trees on the mortgaged premises and mortgaged them by chattel mortgage, and that mortgage was recorded. Afterwards the real mortgage was foreclosed, and the premises were sold. *Held*, that the purchaser on that sale took title to the trees: *Adams v. Beadle*, 47 Iowa, 439; 29 Am. Rep. 487.

<sup>1</sup> *Jones v. Detroit Chair Co.*, 38 Mich. 92; 31 Am. Rep. 314.

<sup>2</sup> *Taylor v. Townsend*, 8 Mass. 411; 5 Am. Dec. 107.

§ 2902. **What are and are not Fixtures—Buildings.**  
 — Buildings erected on land are *prima facie* fixtures.<sup>1</sup> A frame building erected by the side of a mill, intended for use as an office in connection with the mill, is a fixture, although intended to be ultimately removed, and only resting upon wooden blocks placed upon the surface of the earth.<sup>2</sup> So is an unfinished dwelling-house set on blocks laid in the ground, and intended to remain on the land, and an unfinished building standing on posts fixed in the ground, intended, but never used, for temporary occupancy.<sup>3</sup> So is a house brought upon land, and placed on stone foundations, and over a cellar;<sup>4</sup> and a barn, the sills of which rested in part on large stones imbedded in the soil, and in part upon the soil itself.<sup>5</sup> So is a wooden structure, built and used for dancing, of light materials, resting partly on the ground and partly on posts set in the ground, and roofed with brush, with a door opening into the owner's adjacent dwelling and saloon, with seats for musicians, between the two buildings, on cross-pieces fastened to both;<sup>6</sup> and a cotton-gin stand, put up after the usual manner, for use on the place.<sup>7</sup> So all repairs made by a person to a building become fixtures;<sup>8</sup> so do windows placed in a dwelling-house.<sup>9</sup> Fragments of a building blown down by a storm of wind continue to be realty.<sup>10</sup>

But the following are not fixtures, viz.: A wooden building standing upon blocks and rollers so that it can be removed without disturbing the freehold, and built for the purpose of removal if necessary;<sup>11</sup> nor a wooden ice-house of two thousand tons' capacity, built on leased land,

<sup>1</sup> Washburn v. Sproat, 16 Mass. 449; Stillman v. Hamer, 8 Miss. 421; Fisher v. Saffer, 1 E. D. Smith, 611; Reid v. Kirk, 12 Rich. 54.

<sup>2</sup> State Savings Bank v. Kircheval, 65 Mo. 682; 27 Am. Rep. 310.

<sup>3</sup> Butler v. Page, 7 Met. 40; 39 Am. Dec. 757.

<sup>4</sup> Madigan v. McCarthy, 108 Mass. 376; 11 Am. Rep. 371.

<sup>5</sup> Westgate v. Wixon, 123 Mass. 304.

<sup>6</sup> Lipsey v. Borgmann, 52 Wis. 256; 38 Am. Rep. 735.

<sup>7</sup> Richardson v. Borden, 42 Miss. 71; 2 Am. Rep. 595.

<sup>8</sup> Caldwell v. Eneas, 2 Mill. Const. 348; 12 Am. Dec. 681.

<sup>9</sup> State v. Elliot, 11 N. H. 504.

<sup>10</sup> Rogers v. Gilinger, 30 Pa. St. 185; 72 Am. Dec. 694.

<sup>11</sup> Robinson v. Wright, 2 McAr. 54.

on no foundations except wooden blocks;<sup>1</sup> nor a saw-mill built upon timbers lying upon the surface of the ground, and constructed with the object and purpose, after sawing the timber within a convenient distance, to be removed to another locality;<sup>2</sup> nor a small wooden building, placed by a photographer on another's land, without cellar or chimney;<sup>3</sup> nor a wooden structure or building merely resting by its own weight on flat stones laid upon the surface of the ground, and having no other foundation.<sup>4</sup> Materials collected together for the purpose of erecting a building do not form a part of the realty; nor do materials that result from the demolition of a building.<sup>5</sup>

§ 2903. **Gas-fixtures and Water-pipes.**—Gas-fixtures, such as burners, brackets, chandeliers, etc., are not fixtures.<sup>6</sup> They are movables, and neither are covered by a mechanic's lien, nor do they pass on sale of a house.<sup>7</sup> But gas-pipes which run through the walls or under the floors of a house are fixtures.<sup>8</sup> Water-pipes in a house are fixtures.<sup>9</sup>

ILLUSTRATIONS.—A former owner, in applying for a loan on mortgage, represented that the gas-fixtures and mirrors would go with the house, but no mention of them was made in the mortgage. *Held*, that the statements did not change the character of the property, nor affect subsequent purchasers for value who had no notice of them: *McKeage v. Ins. Co.*, 81 N. Y. 38; 37 Am. Rep. 471. But see *Funk v. Brigaldi*, 4 Daly, 359.

§ 2904. **Machinery.**—As a general rule, machinery, to become part of the realty, must be physically attached to it, or be, in ordinary understanding, part of the building

<sup>1</sup> *Antoni v. Belknap*, 102 Mass. 193.

<sup>2</sup> *Brown v. Lillie*, 6 Nev. 244.

<sup>3</sup> *O'Donnell v. Hitchcock*, 118 Mass. 401.

<sup>4</sup> *Carlin v. Ritter*, 68 Md. 478; 6 Am. St. Rep. 467.

<sup>5</sup> *Beard v. Durdal*, 23 La. Ann. 284.

<sup>6</sup> *Montague v. Dent*, 10 Rich. 135; 67 Am. Dec. 572; *Guthrie v. Jones*, 108 Mass. 191; *Shaw v. Lenke*, 1 Daly, 487; *McKeage v. Ins. Co.*, 81 N. Y. 38; 37 Am. Rep. 471; *Hay-*

*sham v. Dettre*, 89 Pa. St. 506; *Rogers v. Crow*, 40 Mo. 91; 93 Am. Dec. 299; *Towne v. Fiske*, 127 Mass. 125; 34 Am. Rep. 353; *Chapman v. Ins. Co.*, 4 Ill. App. 29; *Vaughen v. Haldeman*, 33 Pa. St. 522; 75 Am. Dec. 622. But see *Keeler v. Keeler*, 31 N. J. Eq. 191.

<sup>7</sup> *Jarechi v. Philharmonic Society*, 79 Pa. St. 403; 21 Am. Rep. 78.

<sup>8</sup> *McKeage v. Ins. Co.*, 81 N. Y. 38; 37 Am. Rep. 471.

<sup>9</sup> *Cohen v. Kyler*, 27 Mo. 122.

upon it, as where the building is constructed wholly or in part for the machinery, or the machinery is constructed for the building, or some part of it, and is fitted into it.<sup>1</sup> The rule in determining what are fixtures in a manufacturing establishment is, that where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either.<sup>2</sup> Thus the following machinery have been held fixtures, viz.: The boiler and engine of a mill attached to the realty;<sup>3</sup> a saw-mill and its appointments;<sup>4</sup> the steam-engine, boiler, whistle, and pumps of a woolen-mill, and its attachments and belts connecting it with other machinery, the fulling-mill and attachments, the main-shaft, pulleys, and belts, counter-shafting, dye-kettle, looms fastened to the floor by screws, carders kept in position by their own weight, spinning-jacks fastened to the floor by cleats, and all the machinery which was propelled by the engine;<sup>5</sup> a carding-

<sup>1</sup> Farmers' Loan and Trust Company v. Minneapolis Engine and Machine Works, 35 Minn. 543.

<sup>2</sup> Green v. Phillips, 26 Gratt. 752; 21 Am. Rep. 323.

<sup>3</sup> McNally v. Conolly, 70 Cal. 3; Sweetzer v. Jones, 35 Vt. 317; 82 Am. Dec. 639; Taylor v. Collins, 51 Wis. 123; Robertson v. Corsett, 39 Mich. 777; Richardson v. Copeland, 6 Gray, 536; 66 Am. Dec. 425; Winslow v. Ins. Co., 4 Met. 306; 38 Am. Dec. 368; Rice v. Adams, 4 Harr. (Del.) 332; Sparks v. State Bank, 7 Blackf. 469; Trull v. Fuller, 28 Me. 545; Corliss v. McLagin, 29 Me. 115; Parsons v. Copeland, 38 Me. 537; Symonds v. Harris, 51 Me. 14; 81 Am. Dec. 553; McKim v. Mason, 3 Md. Ch. 186; Union Bank v. Emerson, 15 Mass. 159; Phillipson v. Mallanphy, 1 Mo. 620; Baker v. Davis, 19 N. H. 325; Buckley v.

Buckley, 11 Barb. 43; Murdock v. Harris, 20 Barb. 407; Voorhis v. Freeman, 2 Watts & S. 116; 37 Am. Dec. 517; Oves v. Oglesby, 7 Watts, 106; Harlan v. Harlan, 15 Pa. St. 507; 53 Am. Dec. 612; Roberts v. Dauphin Bank, 19 Pa. St. 71; Christian v. Dripps, 28 Pa. St. 271; Witmer's Appeal, 45 Pa. St. 455; 84 Am. Dec. 506; Harris v. Haynes, 34 Vt. 220. These cases are applicable to contests other than between landlord and tenant; for, as we have seen, a tenant is allowed to remove at the end of his term trade fixtures, and machinery is of this class. See *ante*, § 2899.

<sup>4</sup> Farrar v. Stackpole, 6 Me. 154; 19 Am. Dec. 201; Robertson v. Corsett, 39 Mich. 777.

<sup>5</sup> Ottumwa Woollen Mill Co. v. Hawley, 44 Iowa, 57; 24 Am. Rep. 710.

machine, a billy, a mule, a tucking-machine, a steam-engine, and fly-wheel;<sup>1</sup> a steam-engine and boiler of a brewery, the beer-kettle and connecting pipes, the cooler, the malt-mill, the mash-tub, and two pumps connected therewith, the windmill and its attachments, and all the machinery connected with the gearing by cogs, but not that connected by belting;<sup>2</sup> nail-machines, grindstones, a pair of shears, scouring-machines, nail-bins, and grip levers,—all used in manufacturing nails in the factory, and some of them permanently fastened to the building, and the rest adapted to the factory,—a duplicate cylinder for a bluing-machine, and duplicate pulleys for the grindstones, kept on hand for emergencies, but never used;<sup>3</sup> a factory-bell, and a blower-pipe conveying air from a blower to a forge;<sup>4</sup> machinery set in bricks and run by steam, and used as a cotton-seed oil factory;<sup>5</sup> the water-wheel and gearing put into a mill to be used permanently for operating the mill;<sup>6</sup> all the machinery of an ore-bank which is necessary to constitute it such, and without which it would not be an ore-bank equipped and ready for use;<sup>7</sup> machinery used in canning, parts of which are attached to the soil, and the other parts of which are necessary to the use of the parts so attached;<sup>8</sup> a thrashing-machine fixed in a barn by means of screws and bolts;<sup>9</sup> mill-chains, dogs, and bars in a mill;<sup>10</sup> iron-rolls and the plates constituting the floor of a rolling-mill, though not attached to the freehold;<sup>11</sup> a gin-mill;<sup>12</sup> the running-gear

<sup>1</sup> Irish Soc. v. Mahony, 10 I. R. C. L. 363.

<sup>2</sup> Scheifele v. Schmitz, 42 N. J. Eq. 700.

<sup>3</sup> Delaware, Lackawanna etc. R. R. Co. v. Oxford Iron Co., 36 N. J. Eq. 452.

<sup>4</sup> Alvord etc. Mfg. Co. v. Gleason, 36 Conn. 86.

<sup>5</sup> Theurer v. Nautre, 23 La. Ann. 749.

<sup>6</sup> Lapham v. Norton, 71 Me. 83.

<sup>7</sup> Ege v. Kille, 84 Pa. St. 333.

<sup>8</sup> Dudley v. Hurst, 67 Md. 44; 1 Am. St. Rep. 368.

<sup>9</sup> Wiltshier v. Cottrell, 1 El. & B. 674.

<sup>10</sup> Farrar v. Stackpole, 6 Me. 154; 19 Am. Dec. 201.

<sup>11</sup> Pyle v. Pennoek, 2 Watts & S. 390; 37 Am. Dec. 517.

<sup>12</sup> Degraffenreid v. Scruggs, 4 Humph. 451; 40 Am. Dec. 658; Latham v. Blakely, 70 N. C. 369.

thereof, and a packing-screw;<sup>1</sup> a portable grist-mill;<sup>2</sup> boilers situated in part of a mill or shop, and used to supply steam thereto;<sup>3</sup> a steam-engine securely and permanently bolted to a foundation set in the ground, with the boilers as a necessary adjunct thereto, together with the shafting, belting, couplings, and pulleys to communicate the power; also water-wheels and a water-wheel governor; a gas-generator situated in a pit in a building constructed for it on the premises, the gas-pump connected with it, and the pipes; gas-burners not being furniture, but mere accessories to the mill; steam-heating pipes laid on hooks attached to boards fastened to the walls, and heating-pipes, part of the system of piping, which merely rested upon the floor, without being attached to it;<sup>4</sup> a drill, a large, heavy machine, from six to eight feet high, having a base of cast iron, and weighing about a ton, firmly fastened to the floor, and supported by braces attached to the flooring above;<sup>5</sup> machines, pulleys, and shafting, bolted or screwed to the building, or to blocks bolted to the building, also essential parts of the machinery, although they can be detached therefrom without injury;<sup>6</sup> machinery for the business of lead-smelting, consisting of boiler, engine, pump, fan, water-tank, pulleys, air-drums, and basins, affixed to the premises in the usual way;<sup>7</sup> a furnace placed in a building;<sup>8</sup> a sugar-mill sold with a plantation;<sup>9</sup> a smutter loaned to the owner of a grist-mill, and fastened in the usual way;<sup>10</sup> an iron table weighing thirty-three tons, resting on brick foundations, and adapted only for the use of the factory;<sup>11</sup> tubs, vats, casks, and similar articles,

<sup>1</sup> *McDaniel v. Moody*, 3 Stew. 314; *McKenna v. Hammond*, 3 Hill (S. C.), 331; 30 Am. Dec. 366.

<sup>2</sup> *Potter v. Cromwell*, 40 N. Y. 287; 100 Am. Dec. 485.

<sup>3</sup> *Kelley v. Border City Mills*, 126 Mass. 148; *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542.

<sup>4</sup> *Keeler v. Keeler*, 31 N. J. Eq. 181.

<sup>5</sup> *Southbridge Sav. Bank v. Stevens Tool Co.*, 130 Mass. 547.

<sup>6</sup> *Pierce v. George*, 108 Mass. 78; 11 Am. Rep. 310.

<sup>7</sup> *Thomas v. Davis*, 76 Mo. 72; 43 Am. Rep. 756.

<sup>8</sup> *Thielman v. Carr*, 75 Ill. 385.

<sup>9</sup> *Hutchins v. Masterson*, 46 Tex. 551; 26 Am. Rep. 286.

<sup>10</sup> *Stillman v. Flenniken*, 58 Iowa, 450; 43 Am. Rep. 120.

<sup>11</sup> *Smith Paper Co. v. Servin*, 130 Mass. 511.

placed in a brewery for permanent use therein, and which are too large to pass out of the building through any opening existing.<sup>1</sup>

Where the principal part of machinery becomes a fixture by actual annexation, such part of it as may not be so physically annexed, but which, if removed, would leave the principal part unfit for use, and would not of itself, and standing alone, be well adapted to general use elsewhere, is considered as constructively annexed.<sup>2</sup>

But the mere use of machinery in a mill or factory does not render it a fixture, the question always depends on the use, nature, and character of the annexation and the intention of the parties.<sup>3</sup> Thus the following have been held not to be fixtures, viz.: Machines separately constructed, adapted for use in any building in which they can be put, secured in position by bolts, screws, nails, or cleats, and capable of being removed without injury to themselves or to the building in which they are placed;<sup>4</sup> movable machines, whose number and permanency are contingent on the varying circumstances of business, subject to its fluctuating conditions, and liable to be taken in or out as exigencies may require;<sup>5</sup> machinery put up in a drill-house on another's land for the temporary purpose of boring a salt-well;<sup>6</sup> a shingle-machine not fastened to the floor except by a strip to prevent its slipping, and a planing-machine held in place by its own weight;<sup>7</sup> a line-shaft, fastened to hang-

<sup>1</sup> *Equitable Trust Co. v. Christ*, 2 Flip. 599.

<sup>2</sup> *Dudley v. Hurst*, 67 Md. 44; 1 Am. St. Rep. 368.

<sup>3</sup> *Rogers v. Mfg. Co.*, 81 Ala. 483; 60 Am. Rep. 171; *Young v. Baxter*, 55 Ind. 188.

<sup>4</sup> *Maguire v. Park*, 140 Mass. 21; *Blanche v. Rogers*, 26 N. J. Eq. 563; *Carpenter v. Walker*, 140 Mass. 416; *Swift v. Thompson*, 9 Conn. 63; *Murdock v. Gifford*, 18 N. Y. 28; *Hovey v. Smith*, 1 Barb. 372; *Vanderpoel v.*

*Van Allen*, 10 Barb. 157; *Godard v. Gould*, 14 Barb. 662; *Voorhies v. McGinnia*, 46 Barb. 242; *Childress v. Wright*, 2 Cold. 350; *Fullam v. Stearns*, 30 Vt. 443; *Bartlett v. Wood*, 32 Vt. 372; *Sturgis v. Warren*, 11 Vt. 423; *Keeler v. Keeler*, 31 N. J. Eq. 181.

<sup>5</sup> *Rogers v. Brokaw*, 25 N. J. Eq. 496.

<sup>6</sup> *Bewick v. Fletcher*, 41 Mich. 625; 32 Am. Rep. 170.

<sup>7</sup> *Wells v. Maples*, 15 Hun, 90.

ers bolted to joists in a mill, and connecting a stave-machine in an adjoining shed with the mill;<sup>1</sup> machinery connected with the motive-power by means of bands and straps, and attached to the building only so far as to confine the different parts in their proper places for use, and subject to removal, as the interests of business or convenience may require, without injury to the machinery itself or the building;<sup>2</sup> the machinery of a cotton-factory, consisting partly of implements in no way attached to the building, and partly of spinning-frames standing upon the floor, and kept in their places by cleats about their feet nailed to the floor, and partly of other machinery fastened by wood screws passing into the floor, all of which could be removed without injury to the building or machinery;<sup>3</sup> frames in a factory for spinning flax and tow, though fastened by upright pieces extending to the upper floor, and cleats nailed to the floor around the feet;<sup>4</sup> the removable parts of the machinery of a woolen-mill, consisting of two double carding-machines, a picking-machine, shearing-machine, spinning-machine, looms, etc.;<sup>5</sup> a carding-machine, situated in a building erected for the purpose of carrying on the carding business, standing on the floor, but not fastened to the building;<sup>6</sup> articles of machinery in a cotton-mill, fastened to the building only by belts, by which the machinery was put in motion, and as to some parts by cleats tacked to the floor, to bring the machinery on a level;<sup>7</sup> looms in a woolen-factory, connected with the motive power by leathern bands, and fastened to the floor by screws, which kept them steady while working, and which could be removed without injury to themselves or the building;<sup>8</sup> machinery in a

<sup>1</sup> Balliett v. Humphreys, 78 Ind. 388.

<sup>5</sup> Walker v. Sherman, 20 Wend.

<sup>2</sup> Teaff v. Hewitt, 1 Ohio St. 511; 636.

59 Am. Dec. 635.

<sup>6</sup> Taffe v. Warnick, 3 Blackf. 111;

<sup>3</sup> Swift v. Thompson, 9 Conn. 63; 21

23 Am. Dec. 333.

Am. Dec. 718.

<sup>7</sup> Vanderpoel v. Van Allen, 10 Barb.

<sup>4</sup> Cresson v. Stout, 17 Johns. 116; 157.

<sup>8</sup> Murdock v. Gifford, 18 N. Y. 23.

8 Am. Dec. 373.

bedstead manufactory and a grist-mill, consisting of a planing-machine, a machine for cutting screws, a turning-lathe, a circular saw and frame, and a boring-machine, which, though spiked to the floor, studs, and posts of the building, could still be removed, and in fact were removed, without difficulty or injury, either to the building or the machinery itself, and were used in another building;<sup>1</sup> machinery in a blacksmith's shop and a wagon-maker's shop, which, though fastened to the building, was only so attached for the purpose of making it firm for use in its place, and which could be removed without seriously injuring the building, said machinery consisting of a boring-machine, an engine-lathe, a wood-turning lathe, a press-drill, a press-punch, an upright saw, and a circular saw, all being propelled by water;<sup>2</sup> the saw-frames in a marble-mill, fastened to the top and bottom of the building by bolts;<sup>3</sup> a planer, a hoisting-block and chain, two iron lathes, and a drill-press;<sup>4</sup> a steam-boiler only attached to a building by a pipe;<sup>5</sup> an embossing-press;<sup>6</sup> carding-machines not attached to the building, but capable of being removed by being taken apart;<sup>7</sup> a gin-head, though attached to the gin-house by a brace;<sup>8</sup> a saw-mill;<sup>9</sup> a steam-winch;<sup>10</sup> heavy machines in a factory, steadied by being screwed to the floor, and connected with the shafting, but removable without injury to the building, and useful elsewhere;<sup>11</sup> machines which are not fastened to the floor, but are supported by their own weight; machines which are fastened to benches, although run from the shafting; vises screwed to benches,

<sup>1</sup> *Fullam v. Stearns*, 30 Vt. 443.

<sup>2</sup> *Bartlett v. Wood*, 32 Vt. 372.

<sup>3</sup> *Sweetzer v. Jones*, 35 Vt. 317; 82 Am. Dec. 639.

<sup>4</sup> *Roddy v. Brick*, 42 N. J. Eq. 218.

<sup>5</sup> *Early v. Burtis*, 40 N. J. Eq. 501.

<sup>6</sup> *Pope v. Jackson*, 65 Me. 162.

<sup>7</sup> *Tobias v. Francis*, 3 Vt. 425; 23 Am. Dec. 217; *Graves v. Pierce*, 53

Mo. 423; *Gale v. Ward*, 14 Mass. 352;

7 Am. Dec. 223.

<sup>8</sup> *Hancock v. Jordan*, 7 Ala. 448; 42 Am. Dec. 600.

<sup>9</sup> *Witherspoon v. Nickels*, 27 Ark. 332.

<sup>10</sup> *Irish C. S. B. Soc. v. Mahony*, 10 L. R. C. L. 363.

<sup>11</sup> *Hubbell v. East Cambridge Five Cents Savings Bank*, 132 Mass. 447; 42 Am. Rep. 446.

although the benches are nailed to the building;<sup>1</sup> counter-shafting, pulleys, hangers, and belts, though fastened to a building, a portable boiler, and steam-pipes supported by hooks attached to a building, and a portable wood-cutting machine worked by a belt attached to a factory;<sup>2</sup> a boiler made of copper, and built into a furnace erected for that purpose, but capable of removal without injury to the building.<sup>3</sup>

§ 2905. **Other Things.**—The following are also fixtures, viz.: The road-bed, rails, and right of way of a railroad;<sup>4</sup> the machinery, shafting, rollers, and other articles constituting a marine railroad;<sup>5</sup> an elevator to raise its cars from the bottom to the top of a hill;<sup>6</sup> telegraph-poles, wires at first and afterwards attached thereto;<sup>7</sup> the poles, wires, and lamps erected in the streets, for lighting purposes, by an electric light company;<sup>8</sup> fencing materials on a farm temporarily detached without any intent of diverting them from their use as such;<sup>9</sup> a fence inclosing a field, of whatever construction and material, whether having stakes inserted in the ground, or not;<sup>10</sup> hay-scales annexed for use to land in the usual manner by the owner of the land, with no purpose of removing them;<sup>11</sup> boards used as a permanent floor in a corn-barn, and stone posts on a farm to be used for fences;<sup>12</sup> unburnt, but

<sup>1</sup> *Pierce v. George*, 108 Mass. 78; 11 Am. Rep. 310.

<sup>2</sup> *Holbrook v. Chamberlin*, 116 Mass. 155; 17 Am. Rep. 146.

<sup>3</sup> *Hunt v. Mullanphy*, 1 Mo. 508; 14 Am. Dec. 300.

<sup>4</sup> *Hart v. R. R. Co.*, 7 Mo. App. 446; *Van Keuren v. R. R. Co.*, 38 N. J. L. 165. As to the case of railroad tracks, buildings, etc., placed on land before or pending condemnation proceedings, see *post*, Title Eminent Domain.

<sup>5</sup> *Tyson v. Post*, 108 N. Y. 217; 2 Am. St. Rep. 410.

<sup>6</sup> *Booraem v. Wood*, 27 N. J. Eq. 371.

<sup>7</sup> *New York etc. R. R. Co. v.*

*Western Union Tel. Co.*, 36 Hun, 205.

<sup>8</sup> *Keating Implement and Machine Co. v. Marshall Electric Light and Power Co.*, Tex., 1889.

<sup>9</sup> *Goodrich v. Jones*, 2 Hill, 142.

<sup>10</sup> *Smith v. Carroll*, 4 G. Greene, 146; *Boon v. Orr*, 4 G. Greene, 304; *Glidden v. Bennett*, 43 N. H. 306; *Wentz v. Fincher*, 12 Ired. 297; 55 Am. Dec. 416; *Emrich v. Ireland*, 55 Miss. 370; *Climmer v. Wallace*, 28 Mo. 556; 75 Am. Dec. 135.

<sup>11</sup> *Dudley v. Foote*, 63 N. H. 57; 56 Am. Rep. 489; *Arnold v. Crowder*, 81 Ill. 56; 25 Am. Rep. 260.

<sup>12</sup> *Hackett v. Amsden*, 57 Vt. 432.

not burnt, bricks on the land;<sup>1</sup> soil removed from the land of one person and placed on the land of another, with his consent, and without an intention on the part of the former to reclaim it, or any agreement authorizing him to remove it;<sup>2</sup> an iron safe which has been incased in a brick wall, with its foundation laid in bricks and mortar or plaster;<sup>3</sup> a wooden half-partition, nailed at the ends to blocks let through the plastering, and at the bottom to a strip of board nailed to the floor;<sup>4</sup> poles used in cultivating hops, though taken down and piled on the land;<sup>5</sup> potash-kettles set in masonry, appertaining to an ashery, though not fastened to the building;<sup>6</sup> a copper kettle or boiler in a brew-house;<sup>7</sup> pumps, cisterns, iron gratings and doors of a still-house, distillery, and horse-mills;<sup>8</sup> mirrors set in walls of a dwelling-house, the frames corresponding with the cabinet-work of the rooms, and some of the frames being arranged for hat-racks and umbrella-stands, and the removal of which would leave the walls unfinished;<sup>9</sup> a furnace so placed in a house that it cannot be removed without injury to the house;<sup>10</sup> portable hot-air furnaces used for warming a dwelling-house, set in pits prepared for them in the cellar, and kept in place by their own weight, also the pipes leading from the furnaces to the chimney;<sup>11</sup> a heavy stove placed in a chimney having no fire-place, without legs, set on brick-work, with a short funnel bricked around in the chimney, so as to render it doubtful whether it could be

<sup>1</sup> *Lampton v. Preston*, 1 J. J. Marsh. 454; 19 Am. Dec. 104.

<sup>2</sup> *Lacustrine Fertilizer Co. v. Lake Guano and Fertilizer Co.*, 82 N. Y. 476.

<sup>3</sup> *Folger v. Kenner*, 24 La. Ann. 436.

<sup>4</sup> *McAuliffe v. Mann*, 37 Mich. 539.

<sup>5</sup> *Bishop v. Bishop*, 11 N. Y. 125; 62 Am. Dec. 68; *Sullivan v. Toole*, 26 Hun, 203.

<sup>6</sup> *Miller v. Plumb*, 6 Cow. 665; 16 Am. Dec. 456.

<sup>7</sup> *Gray v. Holdship*, 17 Serg. & R. 413; 17 Am. Dec. 680.

<sup>8</sup> *Kirwan v. Latour*, 1 Har. & J. 289; 2 Am. Dec. 519.

<sup>9</sup> *Ward v. Kilpatrick*, 85 N. Y. 413; 39 Am. Rep. 674; *Mackie v. Smith*, 5 La. Ann. 717; 52 Am. Dec. 615. But mirrors supported by hooks driven into the walls are not: *McKeage v. Ins. Co.*, 81 N. Y. 38; 37 Am. Rep. 471.

<sup>10</sup> *Main v. Schwarzwelder*, 4 E. D. Smith, 273.

<sup>11</sup> *Stockwell v. Campbell*, 39 Conn. 362; 12 Am. Rep. 393.

removed without disturbing the brick-work;<sup>1</sup> the kitchen range and boiler, a patent water-filter, tanks, and mosquito-screens of a hotel;<sup>2</sup> a cistern standing on blocks in the cellar;<sup>3</sup> tapestry, pictures in panels, frames filled with satin, and attached to the walls, statues, figures, vases, and stone garden-seats;<sup>4</sup> a church organ.<sup>5</sup>

But the following are not fixtures: Rails not in a fence;<sup>6</sup> posts and boards on a farm when there is nothing to show that they are kept for the purpose of fencing;<sup>7</sup> rails and brick not actually or constructively annexed to the realty;<sup>8</sup> old rails, the refuse material of a fence which had been removed;<sup>9</sup> unattached pieces of scantling, used on a tobacco-farm to hang tobacco on, and put up and taken down, as required for the purpose of curing the tobacco;<sup>10</sup> the rolling stock of a railroad;<sup>11</sup> a ferry-boat run by means of a chain supported by buoys, and fastened upon an island, and its chain and buoys;<sup>12</sup> a banker's safe, even though bricked up;<sup>13</sup> joists, vats, buckets, pickets, and faucets of a still-house not fastened to the freehold;<sup>14</sup> a large and heavy wooden box, lined with zinc, which is put together in a room of a tavern, and used for an ice-chest;<sup>15</sup> casks or hogsheads, fermenting-tubs, and a copper cooler used in a brewery, and not fastened to the freehold;<sup>16</sup> stills set up in furnaces, in the usual manner for making whisky;<sup>17</sup> a portable hot-air furnace, though

<sup>1</sup> Tuttle v. Robinson, 33 N. H. 104.

<sup>2</sup> Fratt v. Whittier, 58 Cal. 126; 41 Am. Rep. 251.

<sup>3</sup> Blethen v. Towle, 40 Me. 310.

<sup>4</sup> D'Eyncourt v. Gregory, L. R. 5 Eq. 382.

<sup>5</sup> Chapman v. Ins. Co., 4 Ill. App. 29; Rogers v. Crow, 40 Mo. 91; 93 Am. Dec. 299.

<sup>6</sup> Robertson v. Phillips, 3 G. Greene, 220.

<sup>7</sup> Wing v. Gray, 36 Vt. 261.

<sup>8</sup> Thweat v. Stamps, 67 Ala. 96.

<sup>9</sup> Fullington v. Goodwin, 57 Vt. 641.

<sup>10</sup> Noyes v. Terry, 1 Lans. 219.

<sup>11</sup> Randall v. Elwell, 52 N. Y. 521; 11 Am. Rep. 747; Hoyle v. R. R. Co., 54 N. Y. 314; 13 Am. Rep. 695.

<sup>12</sup> Cowart v. Cowart, 3 Lea, 57.

<sup>13</sup> Moody v. Aiken, 50 Tex. 65.

<sup>14</sup> Kirwan v. Latour, 1 Har. & J. 289; 2 Am. Dec. 519.

<sup>15</sup> Park v. Baker, 7 Allen, 78; 83 Am. Dec. 668.

<sup>16</sup> Wolford v. Baxter, 33 Minn. 12; 53 Am. Rep. 1.

<sup>17</sup> Burk v. Baxter, 3 Mo. 207; Moore v. Smith, 24 Ill. 512; Terry v. Robins, 13 Miss. 291; Cole v. Roach, 37 Tex. 413.

connected with the house;<sup>1</sup> stoves not standing in their places, but put away for the summer in a garret;<sup>2</sup> a portable iron furnace for heating a church, standing on the cellar-floor, and held in position by its own weight, and capable of being detached, and also its pipes, etc., without injury to the building;<sup>3</sup> a stove of the kind known as a "Baltimore Heater"; a weather-vane with the owner's name on it, though fastened to the roof;<sup>4</sup> a bell, though used for farm purposes, only set upon posts, and not permanently affixed;<sup>5</sup> a sign-board of a tavern fixed to the outside wall by iron fasteners;<sup>6</sup> settees used by a Sunday-school society in its sabbath-school exercises, but not attached to the building.<sup>7</sup> Marble slabs on a counter may or may not be fixtures, according to whether they are necessary or only ornamental.<sup>8</sup>

<sup>1</sup> *Towne v. Fiske*, 127 Mass. 125; 34 Am. Rep. 353.

<sup>2</sup> *Blethen v. Towle*, 40 Me. 310.

<sup>3</sup> *Rahway Sav. Inst. v. Baptist Church*, 36 N. J. Eq. 61.

<sup>4</sup> *Harmony Bldg. Ass'n v. Berger*, 99 Pa. St. 320.

<sup>5</sup> *Cole v. Roach*, 37 Tex. 413. *Aliter* as to a bell hung on an axle resting on and hasped to a wooden frame secured

to the platform of a cupola by cleats fastened by nails: *Weston v. Weston*, 102 Mass. 514.

<sup>6</sup> *Ex parte Sheen*, 43 L. T., N. S., 638.

<sup>7</sup> *Chapman v. Ins. Co.*, 4 Ill. App. 29.

<sup>8</sup> *Harmony Building Ass'n v. Berger*, 99 Pa. St. 320. See *Weston v. Weston*, 102 Mass. 514.



**TITLE XXX.**  
**WATERCOURSES.**



# TITLE XXX.

## WATERCOURSES.

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### CHAPTER CXXXIV.

#### WATERCOURSES IN GENERAL.

- § 2906. Watercourse — What is.
- § 2907. Artificial watercourses.
- § 2908. Right of adjoining proprietor as to extent — Fresh-water lakes and ponds.
- § 2909. Fresh-water streams.
- § 2910. Where tide ebbs and flows.
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- § 2912. Boundaries.
- § 2913. Accretion — Alluvion — Reliction.
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- § 2917. What is a reasonable use — In diversion of water.
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- § 2921. Mill-owners — Use of water by.
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- § 2923. Right to erect barriers to protect one's land.
- § 2924. Right to use water to injury of adjoining proprietors — By grant or prescription.
- § 2925. By acquiescence.
- § 2926. Remedies — Damages.

§ 2906. Watercourse — What is. — “A watercourse is a stream of water, usually flowing in a definite channel, having a bed and sides or banks, and usually discharging itself into some other stream or body of water.” Water

<sup>1</sup> Luther v. Winnisimmet, 9 Cush. Wills v. Madison, 75 Ind. 253; Eulrich 174; Ashley v. Wolcott, 11 Cush. 192; v. Richter, 41 Wis. 318; Earl v. De

flowing through a hollow or ravine only in time of rain or melting snows is not a watercourse.<sup>1</sup> But it is different where surface-water, supplied by rain from a hilly region or high bluffs, by natural formation of the ground, is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite channel through which it escapes at regular seasons, and such has always been the case within the memory of men;<sup>2</sup> or where water having its source in a spring takes a definite channel;<sup>3</sup> so of a lake, when fed by streams, and having a natural channel, and whose waters find exit by percolation in a perceptible current through a bed of gravel.<sup>4</sup> Nevertheless, the mere flow of water through a ravine does not create a watercourse;<sup>5</sup> nor is a slough which originally carries no water

Hart, 12 N. J. Eq. 280; 72 Am. Dec. 395; *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349; *Shields v. Arndt*, 3 N. J. Eq. 234. "'A watercourse consists of bed, banks, and water; yet the water need not flow continually; and there are many watercourses which are sometimes dry'": *Fryer v. Warne*, 29 Wis. 515. "'A channel or canal for the conveyance of water, particularly in draining lands.' It may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land, from which the water is collected into one channel, or it may be artificial, as in case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land": *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395. "It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing into the hollows or ravines in land which is the mere surface-water from rain or melting snow, and is dis-

charged through them from a higher to a lower level, but which, at other times, are destitute of water. Such hollows or ravines are not, in legal contemplation, watercourses": *Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473; *Jeffers v. Jeffers*, 107 N. Y. 650; *Shively v. Hume*, 10 Or. 76; *Tuthill v. Scott*, 43 Vt. 525; 5 Am. Rep. 301; *Dickenson v. Worcester*, 7 Allen, 19; *Ashley v. Wolcott*, 11 Cosh. 192; *Bangor v. Lansil*, 51 Me. 525; *Gillett v. Johnson*, 30 Conn. 180; *Kunffman v. Grieswiler*, 26 Pa. St. 407; *Curtis v. Kessler*, 14 Barb. 511; *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349, holding that a brook spreading itself several rods wide, without defined banks, does not cease to be a natural watercourse in land wherein it resumes a defined channel.

<sup>1</sup> *Wagner v. R. R. Co.*, 2 Hun, 633.

<sup>2</sup> *Gibbs v. Williams*, 25 Kan. 210; 37 Am. Rep. 241; *Palmer v. Waddle*, 22 Kan. 352; *Barnes v. Sabron*, 10 Nev. 218.

<sup>3</sup> *Pyle v. Richards*, 17 Neb. 180.

<sup>4</sup> *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192; 46 Am. Rep. 199.

<sup>5</sup> *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395; *Wagner v. R. R. Co.*, 2 Hun, 633; *Jones v. R. R. Co.*, 18 Mo. App. 251; *Gregory v. Bush*, 64 Mich. 37; 8 Am. St. Rep. 797.

of its own, but simply acts as a conduit by which occasionally some of the flood-water of a navigable river escapes into the lower lands adjoining;<sup>1</sup> nor water flowing in no defined channel, and the course of which can be traced only by the deeper green of the grass which it moistens.<sup>2</sup>

§ 2907. **Artificial Watercourses.** — Artificial watercourses are those where either their source or supply, or the channel through which the water flows, is provided by other than natural causes.<sup>3</sup> Such watercourses are usually found where by statute, or by contract with the owners of the bed of a stream, the channel is changed and the water turned into a new one. Where a person makes an artificial watercourse, as by draining his lands, or allowing the water on his lands to escape into a natural watercourse, whereby the flow is so increased as to make it available for mill or other purposes, no rights are acquired, either on the part of the owners of lands through which the waters escape, or in behalf of those who have erected mills upon the natural stream, relying upon the supply of water afforded by the artificial source, which will prevent the owners of the property upon which the water originates from diverting it or stopping it altogether.<sup>4</sup>

<sup>1</sup> *Lamb v. Reclamation District*, 73 Cal. 125; 2 Am. St. Rep. 775.

<sup>2</sup> *Bloodgood v. Ayers*, 108 N. Y. 400; 2 Am. St. Rep. 443.

<sup>3</sup> *Wood on Nuisances*, 456.

<sup>4</sup> *Norton v. Valentine*, 14 Vt. 239; 39 Am. Dec. 220; *Greatrex v. Hayward*, 8 Ex. 291; *Wood v. Waud*, 3 Ex. 748; *Sampson v. Hoddinott*, 1 Com. B., N. S., 590; *Curtiss v. Ayrault*, 47 N. Y. 73; *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156; *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Arkwright v. Gell*, 5 Mees. & W. 203, the court saying: "Suppose a steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of an adjoining

land-owner, and is there used for agricultural purposes for twenty years, is it possible from such a user to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burden himself and the assigns of his mine with the obligation to keep a steam-engine forever, for the benefit of the land-owner? Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used by its occupants for twenty years for domestic purposes, could it be successfully contended that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not. In all, the

But he cannot claim compensation from one who makes use of such artificial watercourse.<sup>1</sup> But a person may make a new watercourse upon his own land, and withhold its use from all those who will not make compensation, and authorize its use by those who will.<sup>2</sup> The right to exact a toll must be established by proof that the same was exposed and offered for the use of all at a fixed compensation.<sup>3</sup> One who obstructs the flow of rivers or streams over their accustomed beds, so as to prevent them from being used as formerly, and turns them into a new channel, thereby authorizes the public to make the same use of them in the new channel as they had been accustomed to do in the old.<sup>4</sup> So where a person opens, even for temporary purposes, a spring of water which overflows and passes off in a regular channel over the land of another for twenty years, if from its nature the supply will not be stopped except from natural causes; if the stream is allowed to flow thus during the statutory period, the owner of the land upon which the supply originates would be estopped from cutting it off.<sup>5</sup>

**§ 2908. Right of Adjoining Proprietor as to Extent — Fresh-water Lakes and Ponds.**—In the case of fresh-water lakes and large ponds, the boundary of private

nature of the case distinctly shows that no right is required as against the owner of the property from which the course of water takes its origin, though as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired."

<sup>1</sup> Weatherby v. Meiklejohn, 56 Wis. 73.

<sup>2</sup> Dwinel v. Barnard, 28 Me. 554; 48 Am. Dec. 508.

<sup>3</sup> Dwinel v. Barnard, 28 Me. 554; 48 Am. Dec. 508.

<sup>4</sup> Dwinel v. Barnard, 28 Me. 554; 48 Am. Dec. 508; Townsend v. McDonald, 12 N. Y. 381; 64 Am. Dec. 508.

<sup>5</sup> Wood v. Wand, 3 Ex. 748; Bee-

ton v. Waste, 5 El. & B. 966; Watkins v. Peck, 13 N. H. 360; 40 Am. Dec. 156; Sampson v. Hoddinott, 1 Com. B., N. S., 590; Greatrex v. Hayward, 8 Ex. 291; Gaved v. Martyn, 13 L. T., N. S., 74; Magor v. Chadwick, 11 Ad. & E. 584, the court saying: "The imputed misdirection is, that the law of watercourses is the same, whether natural or artificial. We think this was no misdirection, but clearly right. The contrary proposition, that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to us quite indefensible."

ownership is low-water mark.<sup>1</sup> Other cases hold it to be the point where the water usually stands when free from disturbing causes.<sup>2</sup> In Michigan it is held that the bed of those little lakes through which rivers flow, and which are in the nature of expansions of the rivers themselves, belong to the bank proprietors, subject to the public rights therein.<sup>3</sup>

<sup>1</sup> *Waterman v. Johnson*, 13 Pick. 261; *Cummings v. Barrett*, 10 Cush. 186; *Champlain etc. R. R. Co. v. Valentine*, 19 Barb. 484; *Canal Comm'rs v. People*, 5 Wend. 423; *Wheeler v. Spinola*, 54 N. Y. 377; *Austin v. R. R. Co.*, 45 Vt. 205; *Fletcher v. Phelps*, 28 Vt. 257; *Jake-way v. Barrett*, 38 Vt. 316; *Seaman v. Smith*, 24 Ill. 521. The rights of riparian owners attach as well to an artificial pond made by an obstruction of a watercourse as to a stream of running water: *Finley v. Hershey*, 41 Iowa, 389; *Attorney-General v. Jamaica Pond etc. Co.*, 133 Mass. 361.

<sup>2</sup> *Sloan v. Biemiller*, 34 Ohio St. 492; *State v. Gilmanton*, 9 N. H. 461; *State v. Franklin Falls Co.*, 49 N. H. 240; 6 Am. Rep. 513; *Diedrich v. R. R. Co.*, 42 Wis. 248; 24 Am. Rep. 399; *Trustees of Schools v. Schroll*, 120 Ill. 509; 60 Am. Rep. 575; *Seaman v. Smith*, 24 Ill. 521, the court saying: "The great lakes of the north present questions affecting riparian rights that are different from those arising under boundaries on the sea, upon rivers, or other running streams. They have neither appreciable tides nor currents, nor are they affected, like running streams, by rises and falls produced by a wet or dry season. Yet the rules that govern boundaries on the ocean govern this case. A grant giving the ocean or a bay as the boundary, by the common law carries it down to ordinary high-water mark. The doctrine, it is believed, is well settled, that the point at which the tide usually flows is the boundary of a grant to its shore. As the tide ebbs and flows at short and regularly recurring periods to the same points, a portion of the shore is alternately sea and dry

land. This, being unfit for cultivation or other private use, is held not to be the subject of private ownership, but belongs to the public. When the adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms, or unusually high tides, is not adopted as the boundary. On the contrary, the ordinary high-water mark indicated by the usual rise of the tide is his boundary. The principle, however, which requires that the usual high-water mark is the boundary on the sea, and not the highest or lowest point to which it rises or recedes, applies in this case, although this body of water has no appreciable tides. Here, as there, the highest point to which storms or other extraordinary disturbing causes may drive the water on the shore, should not be regarded as the point where the owner's rights terminate, nor yet should it be extended to the lowest point to which it may recede from like disturbing causes. But it should be at that line where the water usually stands when unaffected by any disturbing cause. The portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes. And the line at which it usually stands, unaffected by storms and other causes, represents the ordinary high-water mark on the ocean, and the point between the highest and lowest water-marks produced by the tides. Again, where is the lake as called for by the deed? A fair and reasonable construction of the language, running to the lake, and with the lake, would mean to that place where its outer edge is usually found."

<sup>3</sup> *Rice v. Ruddiman*, 10 Mich. 125.

§ 2909. **Fresh-water Streams.**—The owner of the bank of a fresh-water stream owns to the middle or thread of the stream,<sup>1</sup> although the United States survey, under which they hold, meandered the bank, and the bed of the stream was not in terms conveyed.<sup>2</sup> In some states, however, a different rule is applied; and it is held that, in the case of large rivers whose chief characteristic is their navigability, the line of private ownership is the bank, and not the thread, of the stream.<sup>3</sup>

§ 2910. **Where Tide Ebbs and Flows.**—On waters where the tide ebbs and flows, the line of high-water mark is the boundary of the adjoining proprietor's ownership.<sup>4</sup> But in some states this rule is modified by statute or by custom.<sup>5</sup>

<sup>1</sup> *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48; *Palmer v. Mulligan*, 3 Caines, 307; 2 Am. Dec. 270; *Jackson v. Halstead*, 5 Cow. 216; *Home v. Richards*, 4 Cal. 441; 2 Am. Dec. 574; *Browne v. Kennedy*, 5 Har. & J. 195; 9 Am. Dec. 503; *Arnold v. Mundy*, 6 N. J. L. 1; 10 Am. Dec. 556; *Gough v. Bell*, 21 N. J. 160; *Young v. Harrison*, 6 Ga. 141; *Adams v. Pease*, 2 Conn. 281; *Rice v. Ruddiman*, 10 Mich. 126; *Hayes v. Bowman*, 1 Rand. 417; *McCullough v. Wall*, 4 Rich. 68; 53 Am. Dec. 715; *Norway Plains Co. v. Bradley*, 52 N. H. 85; *Boston v. Richardson*, 105 Mass. 351; *Houck v. Yates*, 82 Ill. 179; *Delaplaine v. R. R. Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Morgan v. Redding*, 3 Smedes & M. 366; *Magnolia v. Marshall*, 39 Miss. 109; *Birney v. Snyder*, 3 Bush, 266; *Granger v. Avery*, 64 Me. 292; *O'Fallon v. Daggett*, 4 Mo. 343; 39 Am. Dec. 640; *Ross v. Faust*, 54 Ind. 471; 23 Am. Rep. 655; *People v. Platt*, 17 Johns. 195; 8 Am. Dec. 382; *Ingraham v. Wilkinson*, 4 Pick. 268; 16 Am. Dec. 342; *Knight v. Wilder*, 2 Cush. 199; 48 Am. Dec. 660; *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Stuart v. Clark*, 2 Swan, 9; 58 Am. Dec. 49. And this rule applies, regardless of the size or importance of the river: *Baily v. R. R. Co.*, 4 Harr. (Del.) 389; *Berry v. Snyder*, 3 Bush,

266; 96 Am. Dec. 219; *Dwyer v. Rich*, 1 R. & C. L. 424; *Rundle v. Canal Co.*, 1 Wall. Jr. 275; *Adams v. Pease*, 2 Conn. 481; *Schurmeier v. R. R. Co.*, 10 Minn. 82; 88 Am. Dec. 59; *Houck v. Yates*, 82 Ill. 179; *Arnold v. Elmore*, 16 Wis. 509; *Gas Light Co. v. Industrial Works*, 28 Mich. 182; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435.

<sup>2</sup> *Ross v. Faust*, 54 Ind. 471; 23 Am. Rep. 655.

<sup>3</sup> *Wood v. Fowler*, 26 Kan. 682; 40 Am. Rep. 330; *Wilson v. Forbes*, 2 Dev. 30; *Collins v. Benbury*, 3 Ired. 277; 38 Am. Dec. 722; *Fagan v. Armistead*, 11 Ired. 433; *McManus v. Carmichael*, 3 Iowa, 57; *Fourten v. R. R. Co.*, 32 Iowa, 106; *Houghton v. R. R. Co.*, 47 Iowa, 370; *Sherlock v. Bainbridge*, 41 Ind. 35; 13 Am. Rep. 302; *Zug v. Commonwealth*, 70 Pa. St. 138; *People v. Canal Appraisers*, 33 N. Y. 461; *Barney v. Keokuk*, 94 U. S. 324.

<sup>4</sup> *Pollard v. Hogan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 367; *State v. Jersey City*, 25 N. J. L. 575; 86 Am. Dec. 240; *East Hampton v. Kirk*, 68 N. Y. 459; *Storer v. Freeman*, 6 Mass. 436; 4 Am. Dec. 155; *Hagan v. Campbell*, 8 Port. 9; 33 Am. Dec. 267; *Stuart v. Clark*, 2 Swan, 9; 58 Am. Dec. 49. See post, *Navigable Waters*.

<sup>5</sup> *Gough v. Bell*, 22 N. J. L. 441; *Bell v. Gough*, 23 N. J. L. 624; *Common-*

§ 2911. **Where Water and Land are in different Proprietors.**—A deed of the land over and along which water runs conveys also all the usufructuary interest or property in the water;<sup>1</sup> but a deed of the water, or the usufructuary interest therein, does not pass the title to soil over which the water flows.<sup>2</sup> One person may be the owner of the soil over which a stream flows, and yet have no interest in the water that flows there; or he may have a partial interest therein, according to the terms or conditions of the grant by which he holds the soil. But it is not water itself, but the beneficial uses to which it may be applied by the owner of the land while passing over the soil, that becomes the subject of traffic.<sup>3</sup> Water has value as a distinct inheritance, and a right to the perpetual use thereof need not be dependent on lands to which it is appurtenant. Cases seemingly to the contrary are generally where the facts confine the use not only to special places, but also to specified purposes. In many instances the right to use and dispose of water may not only be more valuable than any land which is occupied for its gathering and disposal, but it is also of special value to be taken to a distance and parceled out among several users or occupants. Its ownership cannot be confined to a right in the nature of a license, and is as much a title or interest of a real nature as land itself.<sup>4</sup>

§ 2912. **Boundaries.**—A grant or conveyance of land lying along a non-navigable stream, and bounded by it,

wealth v. Vincent, 108 Mass. 441; Myers, 46 N. Y. 511; 7 Am. Rep. 373; Parker v. Cutler Mill Dam Co., 20 Me. 353; 37 Am. Dec. 56; Nudd v. Hobbs, 17 N. H. 524.

<sup>1</sup> Browne v. Kennedy, 5 Har. & J. 195; 9 Am. Dec. 503; Canal Comm'rs v. People, 5 Wend. 423; Van Gorden v. Jackson, 5 Johns. 440.

<sup>2</sup> Bullen v. Runnels, 2 N. H. 255; 9 Am. Dec. 55.

<sup>3</sup> Wood v. Waud, 3 Ex. 748; Mason v. Hill, 6 Barn. & Ad. 1; Clinton v.

<sup>4</sup> Hall v. Ionia, 38 Mich. 493; citing Hathaway v. Mitchell, 34 Mich. 164; Hurd v. Curtis, 7 Met. 94; Pettes v. Hawes, 13 Pick. 323; Cary v. Daniels, 5 Met. 236; Goodrich v. Burbank, 12 Allen, 459; 90 Am. Dec. 161; Owen v. Field, 102 Mass. 90; Emerson v. Mooney, 50 N. H. 315.

passes to the grantee the soil to the middle thereof.' A boundary by a line running "to the river, and thence on the river shore," conveys to the center of the stream.<sup>2</sup> But the rule that a deed bounding upon a stream carries the land under water to the thread of the stream does not apply to conveyances of land bounded by navigable streams.<sup>3</sup> A conveyance includes land to low-water mark where the land is bounded "by the sea or beach."<sup>4</sup> So a conveyance of lands bordering on flats of a river passes the flats as appurtenances, unless they are expressly excluded.<sup>5</sup> A deed describing a boundary as following the course of a river preserves the boundary as it was at the time of the execution of the deed, and is not changed by excessive floods causing such stream to desert its bed, and producing violent and visible alterations in its course.<sup>6</sup> A boundary stated to be high-water mark does not fluctuate with the advancing or receding shore line.<sup>7</sup>

**§ 2913. Accretion — Alluvion — Reliction.**—The slow and imperceptible deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water, is termed alluvion. It becomes the property of the owner of the property of the shore line, for as he is exposed to loss by

<sup>1</sup> *Browne v. Kennedy*, 5 Har. & J. 195; 9 Am. Dec. 503; *Ex parte Jennings*, 6 Cow. 518; 16 Am. Dec. 447; *Chase v. Haight*, 3 Wend. 635; *Varick v. Smith*, 5 Paige, 143; 28 Am. Dec. 417; *Lowell v. Robinson*, 16 Ma. 357; 33 Am. Dec. 671; *Cold Spring Iron Works v. Tolland*, 9 Cush. 496; *Luce v. Carley*, 24 Wend. 451; 35 Am. Dec. 637; *Williams v. Buchanan*, 1 Ired. 535; 35 Am. Dec. 760; *McCullough v. Wall*, 4 Rich. 68; 53 Am. Dec. 715; *Norcross v. Griffiths*, 65 Wis. 599; 56 Am. Dec. 642; *Paul v. Carter*, 26 Pa. St. 223; 66 Am. Dec. 413; *Cole v. Wells*, 49 Mich. 450; *Day v. R. R. Co.*, 44 Ohio St. 406; *Phinney v. Watts*, 9 Gray, 269; 69 Am. Dec. 288; *Piper v. Connolly*, 108 Ill. 646.

<sup>2</sup> *Sleeper v. Laconia*, 60 N. H. 201; 49 Am. Rep. 311.

<sup>3</sup> *Ex parte Jennings*, 6 Cow. 518; 16 Am. Dec. 447; *Middletown v. Sage*, 8 Conn. 221; *Canal Commissioners etc. v. People*, 5 Wend. 423; *Adams v. Pease*, 2 Conn. 481; *Carson v. Blazer*, 2 Binn. 475; 4 Am. Dec. 463; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. 71; *Ball v. Slack*, 2 Whart. 508; 30 Am. Dec. 278; *Cates v. Wadlington*, 1 McCord, 580; 10 Am. Dec. 699.

<sup>4</sup> *Doane v. Willcutt*, 5 Gray, 328; 66 Am. Dec. 369.

<sup>5</sup> *Jones v. Janney*, 8 Watts & S. 436; 42 Am. Dec. 309.

<sup>6</sup> *Lynch v. Allen*, 4 Dev. & R. 62; 32 Am. Dec. 671; *Cook v. McClure*, 68 N. Y. 437; 17 Am. Rep. 270.

<sup>7</sup> *Nixon v. Walter*, 41 N. J. Eq. 103.

reason of his contiguity to the water,<sup>1</sup> he should be allowed to reap the corresponding benefit that may be occasioned by its presence.<sup>2</sup> Reliction differs from alluvion in this, that the term is applied to land made by the withdrawal of the waters by which it was previously covered. Title to land thus made will vest in the adjacent proprietor, if the withdrawal of the waters was "slow, gradual, and imperceptible."<sup>3</sup> If accretions are formed on the shore of non-navigable ponds by slow degrees, or if the bed is uncovered by the gradual recession of the waters, the land thus made or recovered belongs to the adjoining proprietor.<sup>4</sup> The proprietor of lands bounded by a stream of water is entitled to all accretions thereto caused by the deposition of alluvion thereon, without regard to the question of whether such accretions were formed solely by natural causes or by such causes influenced by the artificial works of others, and without regard to the question whether such stream is navigable or not.<sup>5</sup> Where a river suddenly abandons its bed, the title to the soil remains as it was, and does not change.<sup>6</sup> If land once submerged by

<sup>1</sup> *Hollister v. Union Co.*, 9 Conn. 436; 25 Am. Dec. 37. The state owns land submerged by the gradual advance of the sea: *Wilson v. Shiveley*, 11 Or. 215.

<sup>2</sup> *New Orleans v. United States*, 10 Pet. 717; *Giraud v. Hill*, 1 Gill & J. 249; *Patterson v. Gelston*, 23 Md. 447; *Smith v. Public Schools*, 30 Mo. 290; *De Lord v. New Orleans*, 11 La. Ann. 699; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Benson v. Morrow*, 61 Mo. 353; *Morgan v. Livingston*, 6 Mart. 19; *Deerfield v. Arms*, 17 Pick. 41; 28 Am. Dec. 276; *Barney v. Keokuk*, 94 U. S. 324; *Gerrish v. Clough*, 48 N. H. 9; 97 Am. Dec. 561; *Niehaus v. Shepherd*, 26 Ohio St. 45; *Lammers v. Nissen*, 4 Neb. 245; *Mento v. Delaney*, 7 Or. 337; *Hopkins Academy v. Dickenson*, 9 Cush. 544; *Saulet v. Shepherd*, 4 Wall. 502; *Jones v. Soulard*, 24 How. 41; *Schools v. Risley*, 10 Wall. 110; *County of St. Claire v. Livingston*, 23 Wall. 68; *Spigener v. Cooner*, 8 Rich. 301; 64 Am. Dec. 755; *Adams v. Frothingham*, 3 Mass. 352; 3 Am. Dec.

151; *Hagan v. Campbell*, 8 Port. 9; 33 Am. Dec. 267; *Municipality No. 2 v. Cotton Press*, 18 La. 122; 36 Am. Dec. 625; *Stephenson v. Goff*, 10 Rob. (La.) 99; 43 Am. Dec. 171; *Godfrey v. City of Alton*, 12 Ill. 29; 52 Am. Dec. 476; *Batchelder v. Keniston*, 51 N. H. 496; 12 Am. Rep. 143; *Canden etc. Land Co. v. Lippincott*, 45 N. J. L. 405. As to the method of dividing land thus formed among different proprietors, see *Kerr v. Snyder*, 114 Ill. 313; 55 Am. Rep. 866; *Deerfield v. Arms*, 17 Pick. 41; 28 Am. Dec. 276.

<sup>3</sup> *Warren v. Chambers*, 25 Ark. 120; 4 Am. Rep. 23; *Murray v. Sermon*, 1 Hawks, 56; *Banks v. Ogden*, 2 Wall. 57; *Boorman v. Sumucks*, 42 Wis. 235. <sup>4</sup> *Boorman v. Sumucks*, 42 Wis. 233; *Jones v. Johnson*, 18 How. 156.

<sup>5</sup> *Lovington v. St. Clair Co.*, 64 Ill. 56; 16 Am. Rep. 523; 23 Wall. 46.

<sup>6</sup> *Lynch v. Allen*, 4 Dev. & B. 62; 32 Am. Dec. 671; *Norbury v. Short*, 17 Vt. 387; *Spigener v. Cooner*, 8 Rich. 301; 64 Am. Dec. 755.

the sea is left again by its receding, it returns to the owner if he can locate it.<sup>1</sup> It has been held that a grant could not be made in front of the water line, so as to cut off the bank-owner's right to alluvion.<sup>2</sup>

Most of the cases relating to alluvion relate to rivers; but the same rules apply as to alluvion formed by the sea or by lakes, whether navigable or not.<sup>3</sup> But it is held in some states that alluvion formed on the shores of a lake does not belong to the owners of land fronting on the lake. It is the accretion formed by rivers and streams only that belongs to adjacent proprietors.<sup>4</sup> If there are islands in the river, they belong to the owner of the bank on whose side of the center they lie; or if they divide the main channel, they will themselves be divided in ownership between the bank proprietors.<sup>5</sup> But islands springing up in navigable streams—such as the Missouri River—belong to the United States, and do not belong to the owners of other islands to which they may gradually become annexed; and so of accretions to an unnumbered and unsurveyed island belonging to the United States. But accretions formed upon an island belonging to a private person are the property of such person, whether formed gradually or suddenly.<sup>6</sup> Sea-weed thrown on land by the sea is an accretion, and belongs to the owner of the soil.<sup>7</sup> Where soil has been wrongfully deposited by human hands in the ocean or other public waters, in front of the

<sup>1</sup> *Murphy v. Norton*, 61 How. Pr. 197; 29 Hun, 660.

<sup>2</sup> *Murray v. Lennon*, 1 Hawks, 56; *Municipality No. 2 v. Cotton Press*, 18 La. 122; 36 Am. Dec. 624; *Belding v. State*, 25 Ark. 315; 4 Am. Rep. 26. But see *Cook v. McClure*, 58 N. Y. 437; 17 Am. Rep. 270.

<sup>3</sup> *King v. Yarborough*, 3 Barn. & C. 91; *Banks v. Ogden*, 2 Wall. 68; *Warren v. Chambers*, 25 Ark. 120; 4 Am. Rep. 23.

<sup>4</sup> *Zeller v. Southern Yacht Club*, 34 La. Ann. 837; *Hodges v. Williams*, 95 N. C. 331; 59 Am. Rep. 243.

<sup>5</sup> *Ingraham v. Wilkinson*, 4 Pick. 268; 16 Am. Dec. 342; *Trustees v. Dickinson*, 9 Cush. 548; *Deerfield v. Arms*, 17 Pick. 41; 28 Am. Dec. 276; *Giraud v. Hughes*, 1 Gill & J. 249; *Claremont v. Carlton*, 2 N. H. 369; 9 Am. Dec. 88; *McCullough v. Wall*, 4 Rich. 68; 53 Am. Dec. 715.

<sup>6</sup> *Benson v. Morrow*, 61 Mo. 345; *Wiggenhorn v. Kountz*, 23 Neb. 690; 3 Am. St. Rep. 150.

<sup>7</sup> *Emans v. Turnbull*, 2 Johns. 313; 3 Am. Dec. 427.

uplands, so that the water line is carried farther out, the same rule applies as when such a deposit has been gradually made by natural causes.<sup>1</sup> The rule for distribution of alluvial accretion formed on lands bordering on un-navigable river owned by coterminous proprietors is, to extend the side lines of each owner to the nearest river bank, giving to each that part of the accretion formed in front of his own land.<sup>2</sup> But the right to accretions, as such, in the bed of a river, depends on actual contiguity. Any separation of the claimant's land from the alluvion by the land of another defeats the claim.<sup>3</sup> A lot bounded by a street which faces on the water is not entitled to the alluvion that may be formed on the water side of the street.<sup>4</sup> So where the bordering land has been sold, the original estate of which it formed a part has no right of alluvion.<sup>5</sup> As a river changes its course and its center, the riparian right to accretions changes. And where a lot not originally riparian becomes so by the changes in the river, such lot acquires the riparian right to accretions.<sup>6</sup> The title to accretions is held subject to the same encumbrances and with the benefit of the same rights as the title to the land to which the accretion is made.<sup>7</sup>

**ILLUSTRATIONS.**—An act of Congress laying out a city provided that a strip of land along the river should be reserved for public use. *Held*, that the natural accretions from the river partook of the same character as the original strip: *Cook v. Burlington*, 30 Iowa, 94; 6 Am. Rep. 649. The sea had cut off the sea front of the mainland between certain points, and afterwards a beach was re-formed outside the mainland, and divided from it by a bay of navigable water. *Held*, that the title to the new formation was in the owners of the part cut off: *Murphy v. Norton*, 61 How. Pr. 197; 100 N. Y. 426; 53 Am. Rep. 206.

<sup>1</sup> *Steers v. Brooklyn*, 101 N. Y. 51.

<sup>2</sup> *Hubbard v. Manwell*, 60 Vt. 235; 6 Am. St. Rep. 110.

<sup>3</sup> *In re State Reservation Comm'rs*, 37 Hun, 537; *Bristol v. Carroll Co.*, 95 Ill. 84; *Fulton v. Frandolig*, 63 Tex. 330.

<sup>4</sup> *Mayor of Mobile v. Eslava*, 9 Port. 577; 33 Am. Dec. 325.

<sup>5</sup> *Saulet v. Shepherd*, 4 Wall. 502.

<sup>6</sup> *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48.

<sup>7</sup> *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352.

§ 2914. **Rights of Riparian Proprietors.**—The owner of land through which a stream of water runs has a right to have it flow over his land in the natural channel, undiminished in quantity, and unimpaired in quality, except to the extent that grows out of and is inseparable from a reasonable use of it for the usual and ordinary purposes of life by those above him on the stream,<sup>1</sup> even though he may not require the whole or any part for the use of machinery.<sup>2</sup> On the other hand, he has no property in the water itself, but a simple usufruct of it as it passes along.<sup>3</sup> The right only continues with its possession; nor can a party reclaim water that he has lost.<sup>4</sup> The proprietors above have no right to divert or unreasonably to

<sup>1</sup> *Mason v. Hill*, 5 Barn. & Ad. 1; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102; *Shamleffer v. Connart*, *Grove Mill Co.*, 18 Kan. 24; *Gardner v. Newburgh*, 2 Johns. Ch. 161; 7 Am. Dec. 527; *Merrifield v. Lombard*, 13 Allen, 16; 90 Am. Dec. 172; *Holsman v. Boiling Spring Co.*, 14 N. J. Eq. 335; *Bardwell v. Ames*, 22 Pick. 354; *Twiss v. Baldwin*, 9 Conn. 291; *Platt v. Johnson*, 5 Johns. 213; 8 Am. Dec. 233; *Embrey v. Owen*, 6 Ex. 353; *Haas v. Choussard*, 17 Tex. 588; *Evans v. Merriweather*, 3 Scam. 492; 38 Am. Dec. 106; *Shreve v. Voorhees*, 3 N. J. Eq. 25; *Dilling v. Murray*, 6 Ind. 324; 63 Am. Dec. 385; *Hayes v. Waldron*, 44 N. H. 584; 84 Am. Dec. 105; *Bliss v. Kennedy*, 43 Ill. 71; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Wood v. Wand*, 3 Ex. 748; *Gould v. Boston Dock Co.*, 13 Gray, 443; *Campbell v. Smith*, 8 N. J. L. 150; 14 Am. Dec. 400; *Hendrick v. Cook*, 4 Ga. 241; *Johnson v. Jordan*, 2 Met. 234; 37 Am. Dec. 85; *Williamson v. Locks Creek Can. Co.*, 78 N. C. 156; *Olney v. Ferner*, 2 R. I. 211; 5 Am. Dec. 711; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91. See note to *Davis v. Getchell*, 50 Me. 604, in 79 Am. Dec. 638-645; *Crooker v. Bragg*, 10 Wend. 260; 25 Am. Dec. 555.

<sup>2</sup> *Crooker v. Bragg*, 10 Wend. 260; 25 Am. Dec. 555.

<sup>3</sup> *Clinton v. Myers*, 46 N. Y. 511; 7

Am. Rep. 373; *Tyler v. Wilkinson*, 4 Mason, 397; *Cooper v. Williams*, 4 Ohio, 253; 22 Am. Dec. 745; *Cooper v. Williams*, 5 Ohio, 391; 24 Am. Dec. 279; *Eddy v. Simpson*, 3 Cal. 249; 58 Am. Dec. 408; *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394; *King v. Laird*, 15 Cal. 161; 76 Am. Dec. 472. In *Kensit v. Great R. R. Co.*, L. R., 23 Ch. Div. 569, *Pollock, B.*, says: "The law of England, and, as far as I am aware, the same may be said of the law of any other country, has never acknowledged the right to flowing water in a person by whose land it flows in the same sense and manner as the possessorial right to land. It has been spoken of in different ways,—as a thing that is a right *publici juris*, a thing that is a natural right, and by other expressions of that kind; but in the result it comes to this, that it is a right of the same character as the right to the pure flow of air; a right of such a nature that the person who enjoys it cannot, at any time, fix upon a particular portion of water to which he is entitled; he cannot say of any single pint or globule of water that that pint or globule is his; he can only say that he is entitled to the flow of that water in its accustomed manner, both as to quantity and as to purity."

<sup>4</sup> *Eddy v. Simpson*, 3 Cal. 249; 58 Am. Dec. 408.

retard the natural flow to those below, and the proprietors below have no right to turn it back on those above, to their injury.<sup>1</sup>

To turn aside a useful element from one's premises is as much an actionable injury as to turn upon them a destructive element;<sup>2</sup> and such right may be protected by injunction.<sup>3</sup> The property in the stream is indivisible, each proprietor being entitled to the use of the whole of it as it flows through his land, and one proprietor cannot appropriate a specific portion of it to his use to the exclusion of those below him;<sup>4</sup> and one who, while not a riparian owner, derives his right to the use of running water from a riparian owner, may restrain an interference with such right by an upper riparian owner who uses the water for purposes not riparian.<sup>5</sup> So A, after

<sup>1</sup> *Plumleigh v. Dawson*, 1 Gilm. 544; 41 Am. Dec. 199; *Wright v. Howard*, 1 Sim. & St. 190; *Blanchard v. Baker*, 8 Me. 253; 23 Am. Dec. 504; *Thurber v. Martin*, 2 Gray, 394; 61 Am. Dec. 468; *Chandler v. Howland*, 7 Gray, 348; 66 Am. Dec. 487; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Miller v. Miller*, 9 Pa. St. 74; 49 Am. Dec. 545; *Pool v. Lewis*, 41 Ga. 162; 5 Am. Rep. 526; *Arnold v. Foot*, 12 Wend. 330; *Omelvany v. Jagers*, 2 Hill, 634; 27 Am. Dec. 417; *Evans v. Merriweather*, 3 Scam. 492; 38 Am. Dec. 106; *Cary v. Daniels*, 8 Met. 466; 41 Am. Dec. 533; *Newhall v. Ireson*, 8 Cush. 595; 54 Am. Dec. 790; *Tillotson v. Smith*, 32 N. H. 90; 64 Am. Dec. 355; *Hoy v. Sterrett*, 2 Watts, 327; 27 Am. Dec. 313; *Lindeman v. Lindsay*, 69 Pa. St. 93; 8 Am. Rep. 219; *Colrick v. Swinburne*, 105 N. Y. 503; *Parker v. Griswold*, 17 Conn. 288; 42 Am. Dec. 739; *Buddington v. Bradley*, 10 Conn. 213; 26 Am. Dec. 387; *Webb v. Portland Mfg. Co.*, 3 Sum. 189, *Story, J.*, saying: "The true doctrine is laid down by Sir John Leach, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the king's bench. '*Prima facie*' (says that learned judge), 'the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the

water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations; no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right, either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant."

<sup>2</sup> *Parke v. Kilham*, 8 Cal. 78; 68 Am. Dec. 310.

<sup>3</sup> *Silver Spring etc. Co. v. Waukegan Co.*, 13 R. I. 611; *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373.

<sup>4</sup> *Plumleigh v. Dawson*, 1 Gilm. 544; 41 Am. Dec. 199.

<sup>5</sup> *Williams v. Wadsworth*, 51 Conn. 277.

purchasing land of B, may recover of C damages for wrongfully diverting a watercourse prior to the purchase.<sup>1</sup> So where a lake formed by surface-water is situated on the lands of different owners, neither can drain it without the consent of the other;<sup>2</sup> and the owners along a creek forming an outlet from a lake have a legal right to the natural flow of the waters of the lake through it.<sup>3</sup> But the right to have water flow in its natural channel by a riparian owner only extends to the channel in his own land. An owner above and below him on the stream may divert the water into a new channel, provided he does not thereby affect the flow of the water in its natural channel upon the lands of others.<sup>4</sup> And the burden of proof is on him to show that he diverts no more than he conveyed into the stream.<sup>5</sup> Where the watercourse divides two estates, each proprietor has a right to the use, not of one half merely, but of the whole bulk of the stream; that is, he is entitled to such advantage as it can be to him to have the whole stream flow past his estate; and neither can carry off or divert any part of it without the consent of the other.<sup>6</sup>

**ILLUSTRATIONS.**—A riparian owner granted a license to a stranger, F., to take water from a natural stream for his factory. The water taken by F. was returned to the stream undiminished and undeteriorated. The points of withdrawal and return of the water were on the licensor's land. *Held*, that a riparian owner lower down the stream, who showed no inconvenience

<sup>1</sup> *Chapman v. Copeland*, 55 Miss. 476.

<sup>2</sup> *Schaefer v. Marthaler*, 34 Minn. 487; 57 Am. Rep. 73.

<sup>3</sup> *Mohr v. Gault*, 10 Wis. 513; 78 Am. Dec. 687.

<sup>4</sup> *Norton v. Volentino*, 14 Vt. 239; 39 Am. Dec. 220; *Tolle v. Correth*, 31 Tex. 362; 98 Am. Dec. 540; *Dilling v. Murray*, 6 Ind. 324; 63 Am. Dec. 385; *Van Hoesen v. Coventry*, 10 Barb. 518; *Sachrider v. Beers*, 10 Johns. 241; *Merritt v. Brinkerhoff*, 17 Johns. 306; 8 Am. Dec. 404; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Porter v. Durham*, 74 N. C. 767; *Blanchard v. Baker*, 8 Me. 23; 253 Am. Dec. 504; *Oregon*

*Iron Co. v. Trullinger*, 3 Or. 1; *Kensit v. R. R. Co.*, L. R. 23 Ch. Div. 569; *Society v. Morris Canal Co.*, 1 N. J. Eq. 41; *Larimer County Reservoir Co. v. People*, 8 Col. 614; *Railroad Co. v. Carr*, 38 Ohio St. 448; 43 Am. Rep. 428; *Butte Canal etc. Co. v. Vaughn*, 11 Cal. 143; 70 Am. Dec. 769.

<sup>5</sup> *Butte Canal etc. Co. v. Vaughn*, 11 Cal. 143; 70 Am. Dec. 769.

<sup>6</sup> *Blanchard v. Baker*, 8 Me. 253; 23 Am. Dec. 504; *Vandenburgh v. Van Bergen*, 13 Johns. 212; *Pratt v. Lamson*, 2 Allen, 275; *Canal Trustees v. Haven*, 11 Ill. 554; *Harding v. Water Co.*, 41 Conn. 87; *Arthur v. Case*, 1 Paige, 447.

caused to himself thereby, was not entitled to an injunction to restrain such user of the water: *Kensit v. R. R. Co.*, L. R. 23 Ch. Div. 569. An island divided the stream so that only a small portion of it descended on the defendant's side of the island, and the rest on the other side. Defendant placed obstructions at the head of the island for the purpose of diverting more of the water of the stream to his side. *Held*, that each owner was entitled to all the water that naturally descended to him, and that where there was a natural barrier that divided the stream, neither owner could erect obstructions to change the natural course of the water: *Crooker v. Bragg*, 10 Wend. 260; 25 Am. Dec. 555.

§ 2915. **To Use of Water.**—Every riparian proprietor has a right to use the water primarily for domestic purposes, for the support of life in man and beast, and next, in a proper and reasonable way, for the irrigation of his land, or for the propulsion of machinery, if the quantity of water in the stream will warrant such use above domestic uses.<sup>1</sup> The right of a riparian owner to divert the water of a stream for the purposes of irrigation is subject to the restriction that he must not materially diminish the quantity of the water of the stream, or unreasonably detain it.<sup>2</sup> But the right to use water for domestic purposes does not justify the use of an equal quantity thereof for other purposes, even though none is used or required for domestic purposes by the riparian owner.<sup>3</sup> And while one may use the water as it flows, he cannot withdraw and sell it.<sup>4</sup>

<sup>1</sup> Wood on Nuisances, 347, 355; *Evans v. Merriweather*, 4 Ill. 492; 38 Am. Dec. 106; *Fleming v. Davis*, 37 Tex. 173; *Blanchard v. Baker*, 8 Me. 253; 23 Am. Dec. 504; *Bliss v. Kennedy*, 43 Ill. 68; *Gillett v. Johnson*, 30 Conn. 180; *Arnold v. Foot*, 12 Wend. 330; *Lakin v. Ames*, 10 Cush. 198; *Wadsworth v. Tillotson*, 15 Conn. 369; 39 Am. Dec. 391; *Elliot v. R. R. Co.*, 10 Cush. 191; 57 Am. Dec. 85; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102; *Dilling v. Murray*, 6 Ind. 324; 63 Am. Dec. 385; *Tillotson v. Smith*, 32 N. H. 90; 64 Am. Dec. 355; *Messenger's Appeal*, 109 Pa. St. 285; *Shook v. Colohan*, 12 Or. 239.

<sup>2</sup> Wood on Nuisances, 408; *Blanchard v. Baker*, 8 Me. 253; 23 Am. Dec. 505; *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394; *Burwell v. Hobson*, 12 Gratt. 322; 65 Am. Dec. 247.

<sup>3</sup> *Attorney-General v. R. R. Co.*, 18 Week. Rep. 1187. But see *Bullen v. Runnels*, 2 N. H. 255; *Kidd v. Laird*, 15 Cal. 161; 26 Am. Dec. 472. A right to use water "for all ordinary domestic and household purposes, and for the generation of steam," does not authorize a corporation to take it for generating steam, and for grinding, washing, and cooling rubber: *Para Rubber Shoe Co. v. Boston*, 139 Mass. 155.

<sup>4</sup> *Moulton v. Water Co.*, 137 Mass. 163.

§ 2916. **No Superior Right at Common Law by Prior Appropriation.** — At common law no superior rights can be acquired by one riparian proprietor over another by prior appropriation.<sup>1</sup> The rule is somewhat different in the mining states, where the use of water upon the public domain is allowed to be appropriated to private use, independent of any ownership in the soil; and there the right of the first appropriator is recognized as the superior right.<sup>2</sup> It is also modified by those statutes which in some states allow a riparian proprietor to flow the lands of those above him, for manufacturing purposes, on making compensation.<sup>3</sup>

§ 2917. **What is a Reasonable Use—In Diversion of Water.** — What is a reasonable use in the diversion of flowing water depends upon the nature and size of the stream, the purposes to which it is made subservient, and in short, on the circumstances of the particular case.<sup>4</sup>

<sup>1</sup> *Hoy v. Sterrett*, 2 Watts, 327; 27 Am. Dec. 313; *Tyler v. Wilkinson*, 4 Mason, 397; *Wright v. Howard*, 1 Sim. & St. 190; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Thurber v. Martin*, 2 Gray, 394; 61 Am. Dec. 468; *Wood v. Edes*, 2 Allen, 578; *Snow v. Parsons*, 28 Vt. 459; 67 Am. Dec. 723; *Bliss v. Kennedy*, 43 Ill. 67; *Parker v. Hotchkiss*, 25 Conn. 321; *Keeney etc. Co. v. Union etc. Co.*, 39 Conn. 576; *Platt v. Johnson*, 15 Johns. 213; 8 Am. Dec. 233; *Hartzall v. Sill*, 12 Pa. St. 24; *Gilman v. Tilton*, 5 N. H. 231; *Davis v. Fuller*, 12 Vt. 178; 36 Am. Dec. 334; *Heath v. Williams*, 25 Me. 209; 43 Am. Dec. 265.

<sup>2</sup> *Stiles v. Laird*, 5 Cal. 120; 63 Am. Dec. 111; *Irwin v. Phillips*, 5 Cal. 140; 63 Am. Dec. 113; *Hill v. Newman*, 5 Cal. 445; 63 Am. Dec. 140; *Atchison v. Peterson*, 20 Wall. 507; *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Butte Canal etc. Co. v. Vaughn*, 11 Cal. 143; 70 Am. Dec. 769; *Nevada Water Co. v. Powell*, 34 Cal. 109; 91 Am. Dec. 685; *Lobdell v. Simpson*, 2 Nev. 274; 90 Am. Dec. 537; *Ophir S. M. Co. v.*

*Carpenter*, 4 Nev. 534; 97 Am. Dec. 550; *Barnes v. Sabron*, 10 Nev. 217; *Conger v. Weaver*, 6 Cal. 548; 65 Am. Dec. 528; *Sims v. Smith*, 7 Cal. 148; 68 Am. Dec. 233; *Bear River etc. M. Co. v. N. Y. Mining Co.*, 8 Cal. 327; 68 Am. Dec. 325; *Schilling v. Romminger*, 4 Col. 100; *Edgar v. Stevenson*, 70 Cal. 286; *Irvin v. Straight*, 18 Nev. 436; *Chedovich v. Davis*, 17 Nev. 133; *Coffin v. Left Hand Ditch Co.*, 6 Col. 443; *Thomas v. Guirard*, 6 Col. 530; *Parke v. Kilham*, 8 Cal. 77; 68 Am. Dec. 310; *Weaver v. R. R. Co.*, 15 Cal. 271; *Maeris v. Bicknell*, 7 Cal. 261; 68 Am. Dec. 257; *White v. Water Co.*, 8 Cal. 443; 68 Am. Dec. 328. If the first appropriator of water takes only a part of the quantity flowing in a stream, another may afterwards appropriate the remainder; *Smith v. O'Hara*, 43 Cal. 371; *Wheeler v. Irrigation Co.*, 10 Col. 582; 3 Am. St. Rep. 603; *Hammond v. Rose*, 11 Col. 524; 7 Am. St. Rep. 258.

<sup>3</sup> *Cooley on Torts*, 582.

<sup>4</sup> *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788; *Elliot v. R. R. Co.*, 10 Cush. 191; 67 Am. Dec. 191; *Davis*

An upper owner on a stream has no right to divert the water, by pipes and reservoirs, for the use of his locomotive-engines, to the detriment of a lower proprietor, a mill-owner, and such conduct may be enjoined.<sup>1</sup> In determining upon the reasonableness of the use, it is necessary to take into account not only the general customs of the country, but also any local customs along the stream, and such general rule should be laid down as appears best calculated to secure the entire water of the stream to useful purposes.<sup>2</sup>

§ 2918. **In Detention of Water.**—Though each proprietor is entitled to the steady flow of the water, yet this must often yield to circumstances, and it is not unlawful to detain the water for a reasonable time if done in good faith, for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practicable under the circumstances.<sup>3</sup> It is a reasonable use to detain surplus water not used in a wet season, and discharge it in proper quantities for use in a dry season.<sup>4</sup> The owner of a mill whose dam and machinery are suited to the size and capacity of the stream has a right to the reasonable use of the water to propel his machinery.<sup>5</sup> But it is an unreasonable detention of the water to gather it into reservoirs for future use in a dry season, or for the

*v. Winslow*, 51 Me. 264; 81 Am. Dec. 573; *Davis v. Getchell*, 50 Me. 602; 79 Am. Dec. 636; *Hayes v. Waldron*, 44 N. H. 580; 84 Am. Dec. 105; *Holden v. Lake Co.*, 53 N. H. 552; *Parker v. Hotchkiss*, 25 Conn. 321; *Pool v. Lewis*, 41 Ga. 162; 5 Am. Rep. 526; *Houee v. Hammond*, 39 Barb. 89; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Timm v. Bear*, 29 Wis. 254; *Snow v. Parsons*, 28 Vt. 459; 67 Am. Dec. 723; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102; *Chase-more v. Richards*, 2 Hurl. & N. 168.

<sup>1</sup> *Garwood v. R. R. Co.*, 83 N. Y. 400; 38 Am. Rep. 452.

<sup>2</sup> *Keuney etc. Mfg. Co. v. Union*

*Mfg. Co.*, 39 Conn. 576; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102.

<sup>3</sup> *Hoy v. Sterrett*, 2 Watts, 327; *Pitts v. Lancaster Mills*, 13 Met. 156; *Pool v. Lewis*, 41 Ga. 162; 5 Am. Rep. 526; *Oregon Iron Co. v. Trullinger*, 3 Or. 1; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Springfield v. Harris*, 4 Allen, 496; 81 Am. Dec. 715; *Ferrea v. Knipe*, 28 Cal. 343; *Casebeer v. Mowry*, 55 Pa. St. 423; 93 Am. Dec. 766.

<sup>4</sup> *Oregon Iron Co. v. Trullinger*, 3 Or. 1. See *Drake v. Hamilton Wool-len Co.*, 99 Mass. 574.

<sup>5</sup> *Pool v. Lewis*, 41 Ga. 162; 5 Am. Rep. 526.

purpose of obtaining a greater supply than the stream affords by its natural flow in ordinary stages,<sup>1</sup> or in order that, by letting it off occasionally, a flood may be obtained with which to float logs.<sup>2</sup> The discharge must not be made in such unusual and unnatural quantities as to preclude the lower proprietors from making use of it as it flows past them.<sup>3</sup>

§ 2919. **Dams.**—A riparian owner has no right to erect for his own benefit an embankment that will cause the water, in time of ordinary floods, to overflow and cause material injury to the land of his neighbor.<sup>4</sup> Though a person may confine the water by a dam erected across the stream, or by other artificial means, to store it, he is bound at his peril to see that it is safe, and for injury caused by what he should have foreseen he will be responsible.<sup>5</sup> If a dam is constructed on a stream subject to extraordinary freshets, these must be anticipated in building it, though they occur only once in many years.<sup>6</sup> But from injuries that result from unusual, extraordinary or unforeseen causes, such as extraordinary floods or storms, no liability attaches, provided the person has used due and reasonable care.<sup>7</sup> The right to construct a dam on the land of another implies the right to the exclusive use and possession of as much land as may be necessary for such purpose.<sup>8</sup> One who dams a stream

<sup>1</sup> *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373; *Brace v. Yale*, 10 Allen, 441; *Timm v. Bear*, 29 Wis. 254.

<sup>2</sup> *Thunder Bay etc. Co. v. Speechly*, 31 Mich. 336; 18 Am. Rep. 184.

<sup>3</sup> *Pollitt v. Long*, 58 Barb. 20; *Merritt v. Brinkerhoff*, 17 Johns. 306; 8 Am. Dec. 404; *Thunder Bay Co. v. Speechly*, 31 Mich. 336; 18 Am. Rep. 184; *Thurber v. Martin*, 2 Gray, 394; 61 Am. Dec. 468; *Oregon Iron Co. v. Trullinger*, 3 Or. 1.

<sup>4</sup> *Crawford v. Rambo*, 44 Ohio St. 279.

<sup>5</sup> *Mayor of New York v. Bailey*, 2 Denio, 433; *Bell v. McClintock*, 9

*Watts*, 119; 34 Am. Dec. 507; *Lapham v. Curtis*, 5 Vt. 371; 26 Am. Dec. 310; *McCay v. Danley*, 20 Pa. St. 85; 57 Am. Dec. 680; *Fraler v. Sears Water Co.*, 12 Cal. 555; 73 Am. Dec. 562; *Rich v. Keshena etc. Co.*, 56 Wis. 257.

<sup>6</sup> *Gray v. Harris*, 107 Mass. 492; 9 Am. Rep. 61; *Mayor of New York v. Bailey*, 2 Denio, 433.

<sup>7</sup> *Lapham v. Curtis*, 5 Vt. 371; 26 Am. Dec. 310; *Downes v. Ames*, 12 Minn. 451; *Proctor v. Jennings*, 6 Nev. 83; 3 Am. Rep. 240.

<sup>8</sup> *Conwell v. Brookhart*, 4 B. Mon. 580; 41 Am. Dec. 245.

cannot be enjoined at the instance of one showing no right in himself.<sup>1</sup>

§ 2920. **Mill-dams — Mill-sites.** — A riparian owner cannot dam a stream for a mill-site when the effect of the dam is to raise the water above its natural surface, to the injury of other owners.<sup>2</sup> But he may, where other owners are not damaged.<sup>3</sup> Where water flows through land upon what is termed a "dead level," with no perceptible fall, it can hardly be said that a man has a "mill-seat" or "mill privilege," within the meaning of the law. But if there is a point upon his land to which the water can be directed with sufficient momentum and fall to be beneficially applied as a power, the owner may thus divert it, if he can and does again return it to its original channel before it leaves his land; but he cannot divert the water entirely from its natural channel for any purpose.<sup>4</sup> In confining the water by a dam, the proprietor must not

<sup>1</sup> *Wattier v. Miller*, 11 Or. 329.

<sup>2</sup> *Colwell v. May's Landing Co.*, 19 N. J. Eq. 248; *McCalmont v. Whitaker*, 3 Rawle, 84; 23 Am. Dec. 102; *Brown v. Bush*, 45 Pa. St. 66; *Rhodes v. Whitehead*, 27 Tex. 310; 84 Am. Dec. 631; *Stackpole v. Curtis*, 32 Me. 383; *Russell v. Scott*, 9 Cow. 281; *Dwinel v. Veazie*, 44 Me. 167; 69 Am. Dec. 94; *Drake v. Hamilton Woollen Co.*, 99 Mass. 574; *Prentiss v. Wood*, 132 Mass. 486.

<sup>3</sup> *Garrett v. McKie*, 1 Rich. 444; 44 Am. Dec. 263.

<sup>4</sup> *Wood on Nuisances*, 499; *Davis v. Fuller*, 12 Vt. 178; 36 Am. Dec. 334; *Van Hoesen v. Coventry*, 10 Barb. 518; *Binney's Case*, 2 Bland, 99; *Bardwell v. Ames*, 22 Pick. 333; *Crittenden v. Field*, 8 Gray, 621; *Samuels v. Blanchard*, 25 Wis. 329; *Brace v. Yale*, 10 Allen, 447; *Bealey v. Shaw*, 6 East, 208; *Proctor v. Jennings*, 6 Nev. 87; 3 Am. Rep. 240; *Baldwin v. Calkins*, 10 Wend. 167. In *McCalmont v. Whitaker*, 3 Rawle, 84, 23 Am. Dec. 102, the court say: "The water-power to which a riparian owner is entitled consists of the fall in the stream when in its natural state, as it passes through

his land, or along the boundary of it, or in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it. This natural power is as much the subject of property as is the land itself, of which it is an accident; and it may in the same way be occupied in whole or in part, or not at all, without endangering the right, or restricting the mode of its enjoyment, unless where there has been an actual adverse occupancy or enjoyment for a period commensurate with that required by the statute of limitations, a fact that is not pretended here; and as to a right by prior appropriation, that has regard to the quantum of water withdrawn from a stream common to both parties, and not the quantum of fall. The latter can be augmented only by subtracting from the proprietor above by swelling back on him; or by appropriating a part of the adjoining proprietor's fall below, by excavating the channel within his boundary and carrying out the bottom on a level to some point in the inclined line of the natural descent."

detain it so long as to set it back upon higher proprietors, nor to keep it from going to the lower proprietors.<sup>1</sup> Nor must he discharge it fitfully and in unusual quantities upon the lower proprietors.<sup>2</sup> In the erection of dams, lower mill-owners are restricted to the erection of such dams as will not set back the water upon the wheels of upper mill-owners, or in any wise interfere with them.<sup>3</sup> They cannot injure the power of an upper owner by throwing the water back upon him.<sup>4</sup> It makes no difference that the upper owner has not a mill upon his premises;<sup>5</sup> and if the water is set back upon the premises of one who has a mill-site, even though the lands are not overflowed, the backing of the water creates an actionable injury.<sup>6</sup> The mill-owner, even by authority of the state, cannot dam the stream to the injury of other riparian owners.<sup>7</sup> A "mill privilege" means the land and water used with the mill and on which it and its appendages stand.<sup>8</sup> By a sale of mills, the right of the grantor in the water will pass as an incident.<sup>9</sup> And so the right to land covered by water-power will pass by the conveyance of a mill with its appurtenances.<sup>10</sup> The grantee of the privilege of locating a mill-dam and constructing a race for the purpose of supplying his mill with water, having once selected his

<sup>1</sup> *Merritt v. Parker*, 1 N. J. L. 460.

<sup>2</sup> *Merritt v. Brinkerhoff*, 17 Johns. 306; 8 Am. Dec. 404; *Hetrich v. Deachler*, 6 Pa. St. 32; *Richardson v. Kier*, 34 Cal. 69; 91 Am. Dec. 681; *Lapham v. Curtis*, 5 Vt. 371; 26 Am. Dec. 310; *Hodges v. Hodges*, 5 Met. 205.

<sup>3</sup> *Graver v. Sholl*, 42 Pa. St. 67; *Warring v. Martin*, Wright, 281; *Shreve v. Voorhees*, 3 N. J. Eq. 25; *Thompson v. Crocker*, 9 Pick. 59; *Good v. Dodge*, 3 Pittsb. Rep. 557; *Ripka v. Sergeant*, 7 Watts & S. 9; 42 Am. Dec. 214; *Pixley v. Clark*, 35 N. Y. 5:5; 91 Am. Dec. 72; *Stout v. McAdams*, 3 Ill. 67; 33 Am. Dec. 441.

<sup>4</sup> *Good v. Dodge*, 3 Pittsb. Rep. 557.

<sup>5</sup> *Stout v. McAdams*, 3 Ill. 67; 33 Am. Dec. 441.

<sup>6</sup> *Amoskeag v. Goodale*, 46 N. H. 56. See *Sherwood v. Burr*, 4 Day, 244; 4 Am. Dec. 211.

<sup>7</sup> *Morrill v. St. Anthony's Falls Co.*, 26 Minn. 222; 37 Am. Rep. 399.

<sup>8</sup> *Moore v. Fletcher*, 16 Me. 63; 33 Am. Dec. 633.

<sup>9</sup> *Wetmore v. White*, 2 Caines Cas. 87; 2 Am. Dec. 323; *Strickler v. Todd*, 10 Serg. & R. 63; 13 Am. Dec. 649. And see *Lammott v. Ewers*, 106 Ind. 310; 55 Am. Rep. 746; *Carter v. R. R. Co.*, 26 W. Va. 644; 53 Am. Rep. 116; *Baker v. Bessey*, 73 Me. 472; 40 Am. Rep. 377; *Adams v. Conover*, 87 N. Y. 422; 41 Am. Rep. 381.

<sup>10</sup> *Swartz v. Swartz*, 4 Pa. St. 353; 45 Am. Dec. 697.

site and erected his dam, is not restricted to such location if it afterwards turns out to be impracticable for the purposes intended.<sup>1</sup> If the vendor owning a tract of land over which he has dug a trench to carry water to his mill on the lower part of the tract, sells the upper part without expressly reserving the water right, the vendee has no right to obstruct the trench and cut off this water supply; but he takes the land subject to this easement of the vendor.<sup>2</sup>

§ 2921. **Mill-owners—Use of Water by.**—Mill-owners on a stream may detain the water reasonably, for the propulsion of their machinery, even though the proprietors of mills below are thereby prevented from receiving their water in as beneficial a manner as they otherwise would, and this, even though the upper mill is a modern, and the lower mill is an ancient, one.<sup>3</sup> What is a reasonable detention is a question of fact for the jury, to be considered in connection with the size of the stream, the adaptability of the machinery to the ordinary condition and volume of the stream, the uses to which it is or can be applied, as well as the character of the machinery used as compared with the improvements in machinery for a similar purpose.<sup>4</sup> The mere fact that a mill is ancient, and has had the entire use of the water of a stream, does not confer a right upon the owners to use the water at their own convenience or as their interests may dictate,

<sup>1</sup> *Conwell v. Brookhart*, 4 B. Mon. 590; 41 Am. Dec. 245.

<sup>2</sup> *Seibert v. Levan*, 8 Pa. St. 383; 49 Am. Dec. 525.

<sup>3</sup> *Thurber v. Martin*, 2 Gray, 394; 61 Am. Dec. 468; *Platt v. Johnson*, 15 Johns. 213; 8 Am. Dec. 233; *Palmer v. Mulligan*, 3 Caines, 307; 2 Am. Dec. 270; *Davis v. Winslow*, 51 Me. 290; 81 Am. Dec. 573; *Parker v. Hotchkiss*, 25 Conn. 321; *Olney v. Fenner*, 2 R. I. 211; 57 Am. Dec. 711; *Martin v. Bigelow*, 2 Aiken, 185; 16 Am. Dec. 696; *King v. Tiffany*, 9 Conn. 162; *Baird v. Wells*, 22 Pick. 237.

<sup>4</sup> *Thomas v. Brackney*, 17 Barb. 654; *Hill v. Ward*, 7 Ill. 285; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Sampson v. Hoddinott*, 38 Eng. L. & Eq. 241; *Pollitt v. Long*, 3 Thomp. & C. 232; 58 Barb. 79; *Hetrick v. Deachler*, 6 Pa. St. 32; *Whaler v. Ahl*, 29 Pa. St. 98; *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373; *Timm v. Bear*, 29 Wis. 254; *Snow v. Parsons*, 28 Vt. 459; 67 Am. Dec. 723; *Parker v. Hotchkiss*, 25 Conn. 321; *Norway Plains Co. v. Bradley*, 52 N. H. 110.

as against a new mill lower down the stream.<sup>1</sup> So priority of occupation in the use of water by a mill-owner gives him no such rights as will deprive those above or below him on the stream from also turning the water to beneficial purposes.<sup>2</sup> But it has been held that he who is first in point of time in turning the water of a stream to a beneficial use has a right to water sufficient to operate his mill, even though the effect be, in a reasonable use thereof, to destroy the value of a lower privilege,<sup>3</sup> or even though the effect is that the proprietor above is prevented from placing a dam and mill on his land.<sup>4</sup> A mill-owner has no right to put in machinery requiring more water, and thereby injuring lower mill-owners on the stream; and where a mill has been used for a particular purpose, though it may use the same quantity of water for other machinery or other business,<sup>5</sup> it cannot engage in a new business requiring more water to the injury of others.<sup>6</sup> Where water rights are granted with a specific limitation as to the application of the water, it can only be applied in that manner, and any different use would be actionable.<sup>7</sup> But the restriction must be positive and unequivocal.<sup>8</sup> It is actionable for a mill-owner or other person to

<sup>1</sup> *Barrett v. Parsons*, 10 Cush. 367.

<sup>2</sup> *Platt v. Johnson*, 15 Johns. 213; 8 Am. Dec. 233; *Martin v. Bigelow*, 2 Aiken, 184; 16 Am. Dec. 696; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Thurber v. Martin*, 2 Gray, 394; 62 Am. Dec. 468; *Tyler v. Wilkinson*, 4 Mason, 397; *Davis v. Getchell*, 50 Me. 604; 79 Am. Dec. 636; *Springfield v. Harris*, 4 Allen, 494; 81 Am. Dec. 715; *Hoy v. Sterrett*, 2 Watts, 327; 27 Am. Dec. 313.

<sup>3</sup> *Lincoln v. Chadborne*, 56 Me. 197; *Hatch v. Dwight*, 17 Mass. 289; 9 Am. Dec. 145; *Chandler v. Howland*, 7 Gray, 348; 66 Am. Dec. 487; *Thurber v. Martin*, 2 Gray, 394; 61 Am. Dec. 468; *Smith v. Agawam Canal Co.*, 2 Allen, 355. See *Cook v. Hall*, 3 Pick. 269; 15 Am. Dec. 208; *Tye v. Catching*, 78 Ky. 463; *Palmer v. Mulhigan*, 3 Cainea, 307; 2 Am. Dec. 270.

<sup>4</sup> *Cary v. Daniels*, 8 Met. 466; 41 Am. Dec. 532.

<sup>5</sup> *Bullen v. Runnels*, 2 N. H. 255; 9 Am. Dec. 55; *Blanchard v. Baker*, 8 Me. 253; 23 Am. Dec. 504; *Whittier v. Cochecho Mfg. Co.*, 9 N. H. 454; 32 Am. Dec. 382.

<sup>6</sup> *Simpson v. Seavey*, 8 Me. 138; 22 Am. Dec. 228; *Pratt v. Lamson*, 2 Allen, 275; *Bardwell v. Ames*, 22 Pick. 354; *Miller v. Lapham*, 44 Vt. 433; *Kaler v. Beaman*, 49 Me. 208; *Adams v. Warner*, 23 Vt. 395; *Dewey v. Williams*, 40 N. H. 227; 71 Am. Dec. 708; *Wakely v. Davidson*, 26 N. Y. 387.

<sup>7</sup> *Tourtellot v. Phelps*, 4 Gray, 370; *McDonald v. Askey*, 29 Cal. 207; *Deshon v. Porter*, 33 Me. 239; *Shed v. Leslie*, 22 Vt. 498; *Strong v. Benedict*, 5 Conn. 219.

<sup>8</sup> *Wood on Nuisances*, 497; *Adams v. Warner*, 23 Vt. 395; *Wakely v. Davidson*, 26 N. Y. 387.

turn a new stream into the stream, or by means of a reservoir or otherwise to increase the volume of water naturally flowing in the stream.<sup>1</sup> But this, as we shall see, does not apply to surface-water or water sent into the streams by drains on the land.<sup>2</sup> If foreign water is turned into a stream by a mill-owner, while it runs there he will have a right to use water in excess of his grant or original right, to the extent of the excess thus turned into the stream.<sup>3</sup>

§ 2922. **Injury to Higher Proprietor—By Setting back Water.**—The owner of land has no right, by dams or otherwise, to cause the water of a stream passing through his land to set back upon the lands of a proprietor above,<sup>4</sup> and any act of his which causes the water to raise in the stream above is presumptively damaging and actionable.<sup>4</sup>

§ 2923. **Right to Erect Barriers to Protect One's Land.**—A riparian owner may erect walls or bulwarks to protect his property from being washed away by the stream in such cases only as he can do so without injury to other proprietors, either above, below, or on the opposite side of the stream from him.<sup>5</sup>

<sup>1</sup> Tillotson v. Smith, 32 N. H. 90; 64 Am. Dec. 355; Merritt v. Parker, 1 N. J. L. 460.

<sup>2</sup> Kauffman v. Griesemer, 26 Pa. St. 407; 67 Am. Dec. 437. And see *post*, Surface-water.

<sup>3</sup> Burnett v. Whitesides, 15 Cal. 35; Whittier v. Cochecho Mfg. Co. 9 N. H. 454; 32 Am. Dec. 382.

<sup>4</sup> Lee v. Pembroke Co., 57 Me. 481; 2 Am. Rep. 59; Eaton v. R. R. Co., 51 N. H. 504; Stout v. McAdams, 2 Scam. 67; 33 Am. Dec. 441; Martin v. Riddle, 26 Pa. St. 415; Brown v. Bowen, 30 N. Y. 519; 86 Am. Dec. 406; Bellinger v. R. R. Co., 23 N. Y. 42; Pixley v. Clark, 35 N. Y. 520; 91 Am. Dec. 72; Williams v. Nelson, 23 Pick. 141; 34 Am. Dec. 45; Staple v. Spring, 10 Mass. 72; Smith v. Agawam Canal, 2 Allen, 355; Monson v. Fuller, 15 Pick. 554;

Pillsbury v. Moore, 44 Me. 154; 69 Am. Dec. 91; Monroe v. Gates, 43 Me. 463; Strout v. Milbridge Co., 45 Me. 76; Merritt v. Parker, 1 N. J. L. 460; Phinzy v. Augusta, 47 Ga. 260; Whitcomb v. R. R. Co., 25 Vt. 49; Davis v. Fuller, 12 Vt. 178; 36 Am. Dec. 334; Hutchinson v. Granger, 13 Vt. 386; Cowles v. Kidder, 24 N. H. 364; 57 Am. Dec. 287; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53; Miss. Cent. R. R. Co. v. Caruth, 51 Miss. 77; Arimond v. Green Bay etc. Co., 31 Wis. 316; McCoy v. Danley, 20 Pa. St. 85; 57 Am. Dec. 680; Burwell v. Hobson, 12 Gratt. 322; 65 Am. Dec. 247.

<sup>5</sup> Pierce v. Kinney, 57 Barb. 56; Wallace v. Drew, 59 Barb. 413; Jones v. Souldard, 24 How. 41; Adams v. Frothingham, 3 Mass. 352; 3 Am. Dec. 151; Burwell v. Hobson, 12 Gratt.

§ 2924. **Right to Use Water to Injury of Adjoining Proprietors—By Grant or Prescription.**—One may acquire a right to use water to the prejudice of other proprietors by an actual grant or license<sup>1</sup> from the proprietor affected by his operations,<sup>2</sup> or by an uninterrupted adverse enjoyment for such a length of time as would afford a presumption of a grant,<sup>3</sup> which, in England and in most of the states, is a period of twenty years.<sup>4</sup> In Massachusetts it has been held that no period less than twenty years would give the owner of the upper land any right to flood the land of the lower owner, both having derived title from the same grantor.<sup>5</sup> But when the water had run in an indefinite channel for more than twenty years, or long as the memory of men could recollect, it was held that a prescription to have it flow in that direction was obtained.<sup>6</sup> And merely permitting the water to flow from the upper to the lower land, when the two pieces are

322; 65 Am. Dec. 247; *Amick v. Tharp*, 13 Gratt. 564; 67 Am. Dec. 787; *Gerrish v. Clough*, 48 N. H. 9; 2 Am. Rep. 165; *Boyd v. Conklin*, 54 Mich. 583; 52 Am. Rep. 831; *Lessard v. Stram*, 62 Wis. 112; 51 Am. Rep. 715.

<sup>1</sup> *Cook v. Pridgen*, 45 Ga. 331; 12 Am. Rep. 582; *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156. But the grantor of an easement in water may restrict the purposes for which it shall be used: *Mandeville v. Comstock*, 9 Mich. 536. As to license to use, see *Cowles v. Kidder*, 24 N. H. 364; 57 Am. Dec. 287; *Stevens v. Stevens*, 11 Met. 251; 45 Am. Dec. 203; *Coalter v. Hunter*, 4 Rand. 58; 15 Am. Dec. 726; *Seidensparger v. Spear*, 17 Me. 123; 35 Am. Dec. 234; *Johnson v. Lewis*, 13 Conn. 303; 33 Am. Dec. 405.

<sup>2</sup> *Avon Mfg. Co. v. Andrews*, 30 Conn. 476; *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16; 25 Am. Rep. 125; *Bobo v. Wolf*, 18 Ohio St. 463; *Hines v. Robinson*, 57 Me. 324; 99 Am. Dec. 772; *Houston v. Laffee*, 46 N. H. 505; *Mason v. Hill*, 5 Barn. & Adol. 1.

<sup>3</sup> *Wadsworth v. Tillotson*, 15 Conn. 366; 39 Am. Dec. 391; *White v. Cha-*

*pin*, 12 Allen, 516; *Bucklin v. Truell*, 54 N. H. 122; *Steffy v. Carpenter*, 37 Vt. 41. In Connecticut such enjoyment need not have been adverse: *Parker v. Hotchkiss*, 25 Conn. 321. See also *Perrin v. Garfield*, 37 Vt. 308.

<sup>4</sup> *Mason v. Hill*, 5 Barn. & Adol. 1; *Townsend v. McDonald*, 12 N. Y. 381; 64 Am. Dec. 508; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *Campbell v. Smith*, 8 N. J. L. 140; 14 Am. Dec. 400; *Cuthbert v. Lawton*, 3 McCord, 194; *Law v. McDonald*, 9 Hun, 23; *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395; *Odiorne v. Lyford*, 9 N. H. 502; 32 Am. Dec. 387; *Perley v. Hilton*, 55 N. H. 444. In Texas and in Louisiana the period is ten years: *Haas v. Choussard*, 17 Tex. 588; *Delahoussaye v. Judice*, 13 La. Ann. 587; 71 Am. Dec. 521. In Connecticut, fifteen years: *Wadsworth v. Tillotson*, 15 Conn. 366; 39 Am. Dec. 391. And in Pennsylvania, twenty-one years: *Cooper v. Smith*, 9 Serg. & R. 26; 11 Am. Dec. 658.

<sup>5</sup> *Luther v. Winnisimmet*, 9 Cush. 171.

<sup>6</sup> *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395.

owned by different owners, is not sufficient to create a right to the continuation of the flowage by prescription or adverse usage.<sup>1</sup> The land must have been flowed for some portion of each year for twenty consecutive years, doing damage to it to some appreciable extent.<sup>2</sup> And the use must have been uninterrupted during the time.<sup>3</sup> But mere temporary suspensions in the user, such as occur from accidental<sup>4</sup> or necessary causes,<sup>5</sup> that are not permitted to continue for any considerable period, will not defeat the right. An easement to foul or corrupt the water of a stream may be thus acquired;<sup>6</sup> so of an easement to discharge water upon the land of another, either by an artificial channel, or by a pipe, or by drip from a roof;<sup>7</sup> or to maintain water at a given height in a mill-dam.<sup>8</sup> And a mill-owner may thus acquire a right to discharge water from his mill by a race-way through the land of another.<sup>9</sup> And a right to maintain an aqueduct through another's land may be acquired by a user of twenty years or more.<sup>10</sup> No prescription begins to run until the right of action accrues, and no right of action accrues until injury is inflicted.<sup>11</sup> The proprietor of lands below may, by prescription, acquire the right to have water, which in its natural course flowed through and over his lands, diverted from its natural course, and

<sup>1</sup> *Prescott v. White*, 25 Pick. 342; 32 Am. Dec. 266; *Wood v. Ward*, 3 Ex. 778; *Greatrix v. Haywood*, 8 Ex. 261; *Arkwright v. Gell*, 5 Mees. & W. 203; *Rawston v. Taylor*, 11 Ex. 369; *Parks v. Newburyport*, 10 Gray, 29; *Fryer v. Warne*, 29 Wis. 511; *Dickinson v. Worcester*, 7 Allen, 19; *White v. Chapin*, 12 Allen, 518.

<sup>2</sup> *Augusta v. Moulton*, 75 Me. 284.

<sup>3</sup> *Cotton v. Pocasset Mfg. Co.*, 13 Met. 429.

<sup>4</sup> *Haag v. Delorme*, 30 Wis. 594.

<sup>5</sup> *Perrin v. Garfield*, 37 Vt. 310; *Brace v. Yale*, 10 Allen, 443.

<sup>6</sup> *Merrifield v. Lombard*, 13 Allen, 16; 90 Am. Dec. 172; *Moore v. Webb*, 1 Com. B., N. S., 673; *Crossley v.*

*Lightowler*, L. R. 2 Ch. 478; 3 Eq. Cas. 279.

<sup>7</sup> *Ashley v. Ashley*, 6 Cush. 70; *Cherry v. Stein*, 11 Md. 1; *Major v. Chardwick*, 11 Ad. & E. 571.

<sup>8</sup> *Stiles v. Hooker*, 7 Cow. 266; *Olney Mills etc. Co. v. Meese*, 54 Ga. 459; *Gifford v. Lake Co.*, 52 N. H. 362.

<sup>9</sup> *Prescott v. White*, 21 Pick. 341; 32 Am. Dec. 266; *Prescott v. Williams*, 5 Met. 429; 39 Am. Dec. 688; *Tillotson v. Smith*, 32 N. H. 90; 64 Am. Dec. 355; *Williams v. Nelson*, 23 Pick. 141; 34 Am. Dec. 45.

<sup>10</sup> *Northam v. Hurley*, 1 El. & B. 665; *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156.

<sup>11</sup> *Norton v. Volentine*, 14 Vt. 239; 39 Am. Dec. 221.

thrown back upon the lands of the proprietor above,<sup>1</sup> or to divert a stream.<sup>2</sup>

**§ 2925. By Acquiescence.**—It does not justify the flooding of a person's land by the erection of a dam that the injured person consented to its construction, unless he could then have known, or reasonably foreseen, that his land would be injured by the dam in the manner complained of.<sup>3</sup>

**§ 2926. Remedies—Damages.**—An action for damages lies for wrongly throwing water back upon the plaintiff's land,<sup>4</sup> or for diverting the water.<sup>5</sup> For an unlawful interference with the right of a riparian owner to use the water

<sup>1</sup> *Middleton v. Gregorie*, 2 Rich. 631; *Stiles v. Hooker*, 7 Cow. 266; *Cowles v. Kidder*, 24 N. H. 364; 57 Am. Dec. 287; *Carlisle v. Cooper*, 21 N. J. Eq. 578; *Cowell v. Thayer*, 5 Met. 253; 38 Am. Dec. 400.

<sup>2</sup> *Coalter v. Hunter*, 4 Rand. 58; 15 Am. Dec. 726; *Blanchard v. Baker*, 8 Me. 253; 23 Am. Dec. 504.

<sup>3</sup> *Bell v. Elliott*, 5 Blackf. 113; *Smith v. Scott*, 1 Kerr, 1; *Veght v. Water Power Co.*, 19 N. J. Eq. 142; *Huddleston v. West Bellevue*, 111 Pa. St. 110; *Logansport v. Uhl*, 99 Ind. 531; 50 Am. Rep. 109. But in *Cain v. Hays*, 4 Dana, 338, it was held that where a person had consented to the erection of a dam, this consent might be pleaded in bar in an action to recover for injuries sustained therefrom. In a New York case (*Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406), the court says: It is true that the dam was built with the assent of the plaintiffs, and it is quite probable one of them may have aided in the work. But it must be borne in mind that the defendants needed no assent from the plaintiffs to build a dam on their own side of the river, on their own land, provided that such a dam caused no damage to the plaintiff's property. If the defendants propose to so build their dam as to throw the water back on the plaintiff's wheels, it is difficult to see why the plaintiffs

should consent to the building of the dam, or to work on it without consideration. The probability is, that the jury found that the plaintiffs' consent and aid were given on the condition that the work should be so done as not to injure the plaintiffs. It is said that the remedy of the plaintiffs is an action for breach of the agreement by the defendants to so build the dam as not to injure the plaintiffs. Technically, there was no such agreement, although doubtless the law might imply one, if it was necessary, to prevent injustice, but the parties did not understand that the rights of either party rested in agreement. The acts and assent of the plaintiffs might be treated as a parol license on condition, which condition has never been performed, and hence the license fails. But the facts proved do not amount to a license even. The consent of the plaintiffs, then, can only operate by way of estoppel, and it cannot thus operate because of the implied condition upon which such aid and assent were given.

<sup>4</sup> *Cowles v. Kidder*, 24 N. H. 364; 57 Am. Dec. 287.

<sup>5</sup> An action may be maintained in one state for diverting a stream in that state and preventing it from coming to the plaintiff's mill in another state: *Mannville Co. v. Worcester*, 138 Mass. 89; 52 Am. Rep. 261.

flowing past his land, an injunction is a proper remedy.<sup>1</sup> So an embankment erected by one upon his own lands by which the waters of a stream are thrown back upon the complainant's opposite lands will be restrained as a nuisance.<sup>2</sup> So one may abate a nuisance, and himself remove a dam built on his land, or an obstruction in the stream,<sup>3</sup> or an obstruction upon the land of another.<sup>4</sup> So the right to navigate a creek justifies the removal of obstructions therefrom, and the use of the force requisite.<sup>5</sup> . . .

A riparian proprietor is entitled to nominal damages for any disturbance of his right without proof of actual damage.<sup>6</sup> And exemplary damages may be awarded for maliciously stopping a watercourse.<sup>7</sup> But the measure of damages is only such loss as cannot be prevented by the use of other appliances.<sup>8</sup> Damages cannot be recovered for trouble and expense of establishing the plaintiff's right to recover for the injury caused by the flooding.<sup>9</sup> And damages for the loss of the possible use of realty, as a mill privilege by the wrongful overflowing of the same, where the plaintiff did not actually intend in good faith to make such use of it, cannot be allowed.<sup>10</sup>

<sup>1</sup> *Heilbron v. Fowler etc. Co.*, 75 Cal. 426; 7 Am. St. Rep. 183; *Morrill v. St. Anthony's Falls Co.*, 26 Minn. 222; 37 Am. Rep. 399; *Gardner v. Newburgh*, 2 Johns. Ch. 161; 7 Am. Dec. 527; *Balknap v. Belknap*, 2 Johns. Ch. 463; 7 Am. Dec. 548; *Coalter v. Hunter*, 4 Rand. 58; 15 Am. Dec. 727; *Lawson v. Wooden-ware Co.*, 59 Wis. 393; 48 Am. Rep. 528; *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; *Shields v. Arndt*, 4 N. J. Eq. 234. But an individual cannot have redress against a public injury of this kind: *Delaware etc. R. R. Co. v. Stump*, 8 Gill & J. 479; 29 Am. Dec. 561. And equity will not, by injunction, restrain the diversion of water until the party complaining is in a condition to use it: *Nevada etc. Canal Co. v. Kidd*, 37 Cal. 282.

<sup>2</sup> *Farris v. Dudley*, 78 Ala. 124; 56 Am. Rep. 24; *Ogletree v. McQuagga*, 67 Ala. 580; 42 Am. Rep. 112. A

judgment is proper directing the lowering of the dam to such a height as will abate the nuisance: *Rothery v. New York Rubber Co.*, 90 N. Y. 30.

<sup>3</sup> *Richardson v. Emerson*, 3 Wis. 319; 62 Am. Dec. 695; *Almy v. Grinnell*, 11 Met. 53; 45 Am. Dec. 238.

<sup>4</sup> *Prescott v. Williams*, 5 Met. 429; 39 Am. Dec. 688; *Colburn v. Richards*, 13 Mass. 420; 7 Am. Dec. 160. But *alter* as to one who has not been injured: *Dwinel v. Barnard*, 28 Me. 554; 48 Am. Dec. 508.

<sup>5</sup> *Brubaker v. Paul*, 7 Dana, 428; 32 Am. Dec. 111.

<sup>6</sup> *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453.

<sup>7</sup> *Walker v. Butz*, 1 Yeates, 574.

<sup>8</sup> *Decorah Woollen Mill Co. v. Greer*, 49 Iowa, 490.

<sup>9</sup> *Good v. Mylin*, 8 Pa. St. 51; 49 Am. Dec. 493.

<sup>10</sup> *Worcester v. Mfg. Co.*, 41 Me. 159; 66 Am. Dec. 217.

ILLUSTRATIONS.—The keeper of a seaside summer hotel was entitled to the beach in front of his premises, to which visitors resorted for bathing and air. The defendants, setting up title, intruded thereon, and undertook to get possession, and threatened litigation. One of them was of no pecuniary responsibility. *Held*, that an action to quiet title, and for an injunction, would lie: *Mulry v. Norton*, 100 N. Y. 426; 53 Am. Rep. 206.

## CHAPTER CXXXV.

## NAVIGABLE WATERS.

- § 2927. What are navigable waters.
- § 2928. Floatable streams — Booms and booming companies.
- § 2929. Navigability a question of fact — What streams are and are not navigable.
- § 2930. Rights of riparian proprietors — As to extent.
- § 2931. High or low water mark.
- § 2932. As to use.
- § 2933. Control of state over inland streams and waters.
- § 2934. Tidal streams and waters of interstate commerce.
- § 2935. State may convey its right to shore.
- § 2936. Any obstruction of a navigable stream a nuisance.
- § 2937. Right of riparian proprietors to erect wharves, etc.
- § 2938. Rights of fishery — In fresh waters.
- § 2939. In tide-waters — Oysters.
- § 2940. State regulations as to fishing.
- § 2941. Remedies.

§ 2927. What are Navigable Waters. — By the common law of England only such streams as were subject to the ebb and flow of the tide were deemed navigable waters.<sup>1</sup> In the United States this rule is much extended. Here, on account of the vast number of large inland waters — lakes and rivers — which we possess, the test of navigability is, in the majority of the cases, made to depend upon the capacity of the stream in its natural state to subserve the ends of commerce or trade, without any reference to the ebb and flow of the tide, or as to whether it has become so by long usage or by express statute.<sup>2</sup> Those

<sup>1</sup> Wood on Nuisances, 522; Rhodes v. Otis, 33 Ala. 578; 73 Am. Dec. 439.

<sup>2</sup> State v. Narrows Club, 100 N. C. 477; 6 Am. St. Rep. 618; Fulmer v. Williams, 122 Pa. St. 191; 9 Am. St. Rep. 88; Ecanaba Co. v. Chicago, 107 U. S. 678; Barney v. Keokuk, 94 U. S. 324; Carson v. Blazer, 2 Binn. 475; 4 Am. Dec. 413; Hooker v. Cummings, 20 Johns. 90; 11 Am. Dec. 249; People v. St. Louis, 3 Gilm. 351; 48 Am. Dec. 339; Moore v. Veazie, 32 Me. 343; 52

Am. Dec. 655; Comm'rs v. Withers, 29 Miss. 21; 64 Am. Dec. 126; Treat v. Lord, 42 Me. 552; 66 Am. Dec. 298; Rhodes v. Otis, 33 Ala. 578; 73 Am. Dec. 439; Baker v. Lewis, 33 Pa. St. 301; 75 Am. Dec. 598; Lorman v. Benson, 8 Mich. 18; 77 Am. Dec. 435; Little Rock R. R. Co. v. Brooks, 39 Ark. 403; 43 Am. Rep. 277; Charleston etc. R. R. Co. v. Johnson, 73 Ga. 306; Sullivan v. Spottswood, 82 Ala. 361.

rivers are regarded as navigable in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water,<sup>1</sup> whether they be so continuously at all seasons of the year or not;<sup>2</sup> or whether they be navigable in every part or not;<sup>3</sup> or whether they are only navigable with pleasure-boats;<sup>4</sup> or for mill-logs and small boats at high water.<sup>5</sup> Courts will take judicial notice of the navigability of large rivers.<sup>6</sup> So where the fact of navigability of a stream is generally

<sup>1</sup> *The Daniel Ball*, 10 Wall. 557; *The Montello*, 11 Wall. 411; *Moore v. Sanborn*, 2 Mich. 519; 59 Am. Dec. 209; *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *People v. Canal Appraisers*, 33 N. Y. 461; *Morgan v. King*, 35 N. Y. 459; 91 Am. Dec. 58; *Flannagan v. Philadelphia*, 42 Pa. St. 219; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112; 84 Am. Dec. 527; *Cox v. State*, 3 Blackf. 193; *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410; *Hickok v. Hine*, 23 Ohio St. 527; 13 Am. Rep. 255; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 237; *Rowe v. The Granite Bridge Co.*, 21 Pick. 346; *Illinois River Packet Co. v. Peoria Bridge Co.*, 38 Ill. 467; *Harrington v. Edwards*, 17 Wis. 586; 84 Am. Dec. 768; *Carson v. Blazer*, 2 Binn. 475; 4 Am. Dec. 413; *The Montello*, 20 Wall. 430, the court saying: "The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country, over which rafts of lumber of great value are constantly taken to market. It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than ex-

tent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said (21 Pick. 344), 'every small creek in which a fishing-skiff or gunning-canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'"

<sup>2</sup> *Walker v. Allen*, 72 Ala. 456; *Little Rock etc. R. R. Co. v. Brooks*, 39 Ark. 403; 43 Am. Rep. 277.

<sup>3</sup> Notwithstanding the obstruction of falls: *In re State Reservation Comm'rs*, 37 Hun, 537; *Spooner v. McConnell*, 1 McLean, 337.

<sup>4</sup> *Attorney-General v. Woods*, 108 Mass. 436; 11 Am. Rep. 380. But see *Burrows v. Whitman*, 59 Mich. 279.

<sup>5</sup> *Shaw v. Iron Co.*, 10 Or. 371; 45 Am. Rep. 146.

<sup>6</sup> *Wood v. Fowler*, 26 Kan. 682; 40 Am. Rep. 330.

known, the court may take judicial notice of it, and proof upon the trial is not required.<sup>1</sup>

**§ 2928. Floatable Streams—Booms and Booming Companies.**—There is a class of streams which, although not navigable by “boats or lighters,” are yet susceptible, for the whole or a portion of the year, of valuable use for the purpose of floating logs and other products of the country along their banks to market or to mills, and which are considered to that extent navigable.<sup>2</sup> But if such stream in its natural state is not floatable, it is absolutely private, and though made floatable by the owner by artificial means, is not subject to public use;<sup>3</sup> nor where it is only fit for that purpose during high water or periodical freshets.<sup>4</sup> A stream that would not float logs without the aid of a person in a canoe or of people on the banks to push them along, and when the logs are frequently injured by the difficulty in passing them through, is not a navigable stream.<sup>5</sup> The public may use a stream for floating logs, although it may injure the riparian owner, or although it may at times be necessary to go upon its banks to effect such floating,<sup>6</sup> and one is not liable to a

<sup>1</sup> *Ross v. Faust*, 54 Ind. 471; 23 Am. Rep. 655.

<sup>2</sup> *Morgan v. King*, 35 N. Y. 454; 91 Am. Dec. 58; *Davis v. Winalow*, 51 Me. 264; 81 Am. Dec. 573; *Magnolia v. Marahall*, 39 Miss. 126; *Com. v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386; *Volk v. Eldred*, 23 Wis. 410; *Stuart v. Clark*, 2 Swan, 9; 58 Am. Dec. 49; *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439; *Neaderhouser v. State*, 28 Ind. 270; *Ellis v. Carey*, 30 Ala. 725; *Hubbard v. Bell*, 54 Ill. 112; *People v. Canal Appraisers*, 33 N. Y. 472; *Weise v. Smith*, 3 Or. 445; 7 Am. Rep. 621; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336; 18 Am. Rep. 184; *Treat v. Lord*, 42 Me. 552; 66 Am. Dec. 298; *Smith v. Fonda*, 64

Miss. 551; *Olson v. Merrill*, 42 Wis. 203.

<sup>3</sup> *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 526. A mill-owner is under no obligation to afford to one desiring to float logs down the river better facilities than the stream, in its natural state, would afford: *Pearson v. Rolfe*, 76 Me. 380.

<sup>4</sup> *Hubbard v. Bell*, 54 Ill. 110; 5 Am. Rep. 98; *Lewis v. Coffee Co.*, 77 Ala. 190; 54 Am. Rep. 55.

<sup>5</sup> *Morgan v. King*, 35 N. Y. 454; 91 Am. Dec. 58; *Treat v. Lord*, 42 Me. 552; 66 Am. Dec. 298.

<sup>6</sup> *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Field v. Apple Log Driving Co.*, 67 Wis. 569; *Buchanan v. Grand River etc. Co.*, 48 Mich. 364; *Weise v. Smith*, 3 Or. 445; 8 Am. Rep. 621.

riparian owner on whose land they strand.<sup>1</sup> But a needless obstruction, or negligence in any respect, will render the party liable.<sup>2</sup>

The state may regulate the passage of logs down a stream, and may authorize a boom company to take charge of them and collect compensation, whether the services of the company have been requested by the owners of the logs, or not.<sup>3</sup> Such a corporation is not liable for flowage of land caused by an extraordinary freshet not reasonably to have been anticipated and guarded against, although to some extent occasioned by the boom;<sup>4</sup> nor for lumber lost by inevitable accident, or if the insufficiency of the boom arose from the unavoidable dangers of the river;<sup>5</sup> nor for an obstruction which is unreasonable.<sup>6</sup> But it is liable for a needless or willful obstruction.<sup>7</sup>

**§ 2929. Question of Navigability One of Fact — What Streams are and are not Navigable.**—The question of navigability—outside of waters which ebb and flow—is one of fact to be proved by the party alleging.<sup>8</sup> No use of a stream by one party alone, however valuable it may be to him, will make it a navigable stream.<sup>9</sup> A creek in a salt marsh is not navigable merely because a skiff can be

<sup>1</sup> *Carter v. Thurston*, 58 N. H. 104; 42 Am. Rep. 584. *Aliter* where the stranding is willful: *Haines v. Welch*, 14 Or. 319.

<sup>2</sup> *Grand Rapids etc. Co. v. Jarvis*, 30 Mich. 308; *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Sullivan v. Jernigan*, 21 Fla. 264; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; *Union Mill Co. v. Shires*, 66 Wis. 476; *McPheeters v. Log Driving Co.*, 78 Me. 329.

<sup>3</sup> *Duluth Lumber Co. v. Boom Co.*, 17 Fed. Rep. 419; *Osborne v. Knife Falls Boom Corporation*, 32 Minn. 412; 50 Am. Rep. 590.

<sup>4</sup> *Borchardt v. Wausau Boom Co.*, 54 Wis. 107; 41 Am. Rep. 12.

<sup>5</sup> *Brown v. Susquehanna Boom*

*Co.*, 109 Pa. St. 57; 58 Am. Rep. 708.

<sup>6</sup> *Attorney-General v. Evert Booming Co.*, 34 Mich. 462.

<sup>7</sup> *Watts v. Boom Co.*, 52 Mich. 203; *Union Mill Co. v. Shires*, 66 Wis. 476; *McPheeters v. Log Driving Co.*, 78 Me. 329.

<sup>8</sup> *McManus v. Carmichael*, 3 Iowa, 1; *Morgan v. King*, 35 N. Y. 454; 91 Am. Dec. 58; *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439; *Treat v. Lord*, 42 Me. 552; 66 Am. Dec. 298; *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525; *Martin v. Bliss*, 5 Blackf. 35; 32 Am. Dec. 52; *Stump v. McNairy*, 5 Humph. 363; 42 Am. Dec. 437.

<sup>9</sup> *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439.

floated in it at high water, or because it can be used at extraordinary tides;<sup>1</sup> nor is a river because it was used after a dam was built across it, for pleasure boating or fishing, nor because its waters eventually find their way through the great lakes to the sea.<sup>2</sup> If it can be used only by a few individuals, and only for a few weeks in each year, it is not regarded as a public stream;<sup>3</sup> nor unless it is capable of use without deepening or widening, or other artificial means, as by a dam;<sup>4</sup> or digging out the channel, or widening the stream,<sup>5</sup> or other mechanical devices.<sup>6</sup>

### § 2930. Rights of Riparian Proprietors—As to Extent.

—In a majority of the cases it is held that while the ebb and flow of the tide is no longer the test of navigability, yet that while in streams affected by the ebb and flow of the tide the title to the bed of the stream is in the state, and those of the riparian proprietors end at high-water mark, in all other streams, whether large or small, the owner of the bank is the owner of the bed of the river to the center thereof.<sup>7</sup> In some of the states no distinction is made between the rights of riparian owners upon freshwater streams navigable in fact, and those streams affected by the ebb and flow of the tide, but the same rule pre-

<sup>1</sup> *Rowe v. Granite Bridge Corporation*, 21 Pick. 344.

<sup>2</sup> *Burroughs v. Whitwam*, 59 Mich. 279.

<sup>3</sup> *Munson v. Hungerford*, 6 Barb. 265; *Burrows v. Gallup*, 32 Conn. 493; 87 Am. Dec. 186.

<sup>4</sup> *Volk v. Eldred*, 23 Wis. 410.

<sup>5</sup> *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525.

<sup>6</sup> *Morgan v. King*, 35 N. Y. 454; 91 Am. Dec. 58.

<sup>7</sup> *Avery v. Fox*, 1 Abb. 246; *Arnold v. Mundy*, 6 N. J. L. 1; 10 Am. Dec. 356; *Gough v. Bell*, 21 N. J. L. 156; 22 N. J. L. 455; *Bell v. Gough*, 23 N. J. L. 656; *Stevens v. R. R. Co.*, 34 N. J. L. 532; 3 Am. Rep. 269; *City v. Ladin*, 49 Ill. 177; *Braxton v. Bressler*,

64 Ill. 488; *Berry v. Snider*, 3 Bush, 266; 96 Am. Dec. 219; *Miller v. Hepburn*, 8 Bush, 326; *Granger v. Avery*, 64 Me. 292; *O'Fallon v. Daggett*, 4 Mo. 343; 29 Am. Dec. 640; *Magnolia v. Marshall*, 39 Miss. 109; *Morgan v. Reading*, 3 Smedes & M. 366; *Ingraham v. Wilkinson*, 4 Pick. 268; 16 Am. Dec. 342; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Young v. Harrison*, 6 Ga. 141; *Adams v. Pease*, 2 Conn. 481; *Chapman v. Kimball*, 9 Conn. 38; 21 Am. Dec. 707; *Cates v. Wadlington*, 1 McCord, 580; 10 Am. Dec. 698; *Hooker v. Cummings*, 20 Johns. 90; 11 Am. Dec. 249; *Brooklyn v. Smith*, 104 Ill. 429; 44 Am. Rep. 90; *State v. Pacific Guano Co.*, 22 S. C. 50.

vails as to all, and the bed of all navigable streams is held to be vested in the state.<sup>1</sup>

§ 2931. **High or Low Water Mark.**—The common-law rule was that the riparian owner's title ended at high-water mark, and this is laid down in most of the American cases.<sup>2</sup> But in several of the states, where it is held

<sup>1</sup> *Home v. Richards*, 4 Call, 441; 2 Am. Dec. 574; *Benson v. Morrow*, 81 Mo. 345; *Shrunk v. Schuylkill Co.*, 14 Serg. & R. 71; *Bridge Co. v. Kirk*, 46 Pa. 112; *Ellis v. Carey*, 30 Ala. 725; *Bullock v. Wilson*, 2 Port. 436; *Ingram v. Threadgill*, 3 Dev. 59; *Collins v. Benbury*, 3 Ired. 277; 38 Am. Dec. 722; *Stuart v. Clark*, 2 Swan, 9; 58 Am. Dec. 49; *Elder v. Burrus*, 6 Humph. 358; *Haight v. Keokuk*, 4 Humph. 199; *McManus v. Carmichael*, 3 Humph. 1; *Tomlin v. R. R. Co.*, 32 Iowa, 106; 7 Am. Rep. 176; *Attorney-General v. Wood*, 108 Mass. 436; 11 Am. Rep. 380; *People v. Canal Appraisers*, 33 N. Y. 461. In *Barney v. Keokuk*, 94 U. S. 324, the court say: "The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas. And under the like influence it laid the foundation in many states of doctrines with regard to ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367; *Pollard's Lessee v. Hagan*, 3 How.

212; and *Goodtitle v. Kibbe*, 9 How. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genessee Chief*, 12 How. 443, has declared that the great lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated."

<sup>2</sup> *McManus v. Carmichael*, 3 Iowa, 1; *Mussey v. Hershey*, 42 Iowa, 356; *Stevens v. R. R. Co.*, 34 N. J. L. 530; 3 Am. Rep. 269; *Mayor of Mobile v. Enslava*, 9 Port. 601; 33 Am. Dec. 325; *Gough v. Bell*, 21 N. J. L. 156; *Dutton v. Strong*, 1 Black, 25; *Yates v. Milwaukee*, 10 Wall. 497; *Stover v. Jack*, 60 Pa. St. 339; 100 Am. Dec. 566; *Attorney-General v. R. R. Co.*, 27 N. J. Eq. 1; *Arnold v. Mundy*, 6 N. J. L. 1; 10 Am. Dec. 356; *Ex parte Jennings*, 6 Cow. 518; 16 Am. Dec. 447; *Chapman v. Kimball*, 9 Conn. 38; 21 Am. Dec. 706; *Collins v. Benbury*, 5 Ired. 118; 42 Am. Dec. 155; *Ward v. Willis*, 6 Jones, 183; 72 Am. Dec. 570; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Long Beach etc. Water Co. v. Richardson*, 70 Cal. 206.

that the title to the beds of the streams are in the state, the titles of riparian owners are extended to low-water mark, thus vesting in them the power and the right to erect and maintain wharves in front of their property, where it can be done without actual impediment to navigation.<sup>1</sup> The correct doctrine, it is said, in some cases, is, that the riparian proprietor takes an absolute title to the high-water mark, and a qualified right to low-water mark.<sup>2</sup> In Massachusetts the owner of land adjoining the sea owns the flats to low-water mark, or to at least one hundred rods, if low-water mark is more than that from high-water mark.<sup>3</sup> The terms "usual" or "high-water" mark, as applied to tide-waters, are used to designate the limit reached by the neap-tides, that is, those tides which happen between the full and change of the moon, twice in every twenty-four hours.<sup>4</sup>

**§ 2932. Right of Riparian Owners — As to Use.** — The riparian owner has a right to use the stream in all ways and for all purposes which are not inconsistent with its use by the public.<sup>5</sup> He may use the water for the purpose

<sup>1</sup> *Sherlock v. Bainbridge*, 41 Ind. 35; 13 Am. Rep. 302; *Martin v. Nonce*, 3 Head, 649; *Bullock v. Wilson*, 2 Port. 447; *O'Fallon v. Daggett*, 4 Mo. 343; 29 Am. Dec. 640; *Storer v. Freeman*, 6 Mass. 435; 4 Am. Dec. 155; *East Haven v. Hemmingway*, 7 Conn. 186; *Harvey v. Thomas*, 10 Watts, 63; 36 Am. Dec. 141; *Stevens v. King*, 76 Me. 197; 49 Am. Rep. 609; *Walker v. Shepardson*, 4 Wis. 486; 65 Am. Dec. 324.

<sup>2</sup> *Stover v. Jack*, 60 Pa. St. 339; 100 Am. Dec. 566; *Dutton v. Strong*, 1 Black, 25; *Musser v. Hershey*, 42 Iowa, 356; *Stevens v. R. R. Co.*, 34 N. J. L. 530; 3 Am. Dec. 269; *Ball v. Slack*, 2 Whart. 508; 30 Am. Dec. 278.

<sup>3</sup> *Storer v. Freeman*, 6 Mass. 435; 4 Am. Dec. 155; *Barker v. Bates*, 13 Pick. 255; 23 Am. Dec. 678; *Mayhew v. Norton*, 17 Pick. 357; 28 Am. Dec. 300; *Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715; *Ashley v. R. R. Co.*, 5 Met. 368; 38 Am. Dec. 426. So in

Maine: 3 Kent's Com. 430; *Deering v. Long Wharf Co.*, 25 Me. 51; *State v. Wilson*, 42 Me. 9; *Parker v. Cutter Milldam Co.*, 20 Me. 353; 37 Am. Dec. 56; *Duncan v. Sylvester*, 24 Me. 482; 41 Am. Dec. 400; *Gerrish v. Union Wharf*, 26 Me. 384; 46 Am. Dec. 568; *Pike v. Monroe*, 36 Me. 309; 58 Am. Dec. 751.

<sup>4</sup> *Teschemacher v. Thompson*, 18 Cal. 11; 79 Am. Dec. 151.

<sup>5</sup> *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Lancey v. Clifford*, 54 Me. 491; 92 Am. Dec. 561; *Morgan v. King*, 18 Barb. 277; *Scofield v. Lansing*, 17 Mich. 437; *Avery v. Fox*, 1 Abb. 246; *Yates v. Milwaukee*, 10 Wall. 497. Owners of shores of navigable rivers have power to control right of embarkation and landing even at the terminus of a public road: *Bird v. Smith*, 8 Watts, 434; 34 Am. Dec. 483; *O'Fallon v. Daggett*, 4 Mo. 343; 29 Am. Dec. 640. The public may not gain by prescription the right

of manufacture. He may erect dams across the stream, provided he leaves room for the passage of logs and other products.<sup>1</sup> The state in many of the states being the owner of all the bed of the stream below high-water mark, the riparian owner does not acquire any interest in the stream over any other member of the public, except that by his proximity thereto he enjoys greater conveniences than the public generally. And the state may deprive him entirely of this convenience, by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of his convenience altogether, and for such act he is without a remedy.<sup>2</sup> Thus the state may authorize the erection of wharves, or the construction of embankments for railroads, on the shore of navigable streams, or its use in any way that does not directly trench on the land itself of the riparian owner.<sup>3</sup> A riparian owner on the banks of a navigable river has no such interest in the soil between high and low water mark as will enable him to maintain trespass against one who removes sand from the shore.<sup>4</sup> Seaweed deposited upon the shore between high and low water mark belongs to the first appropriator, and the owner of adjacent land cannot maintain trespass therefor.<sup>5</sup>

**§ 2933. Control of State over Inland Streams and Waters.**—A state has exclusive jurisdiction and control over its inland streams that are not avenues of commercial intercourse with other states. It may authorize the erection of wharves, piers, docks, or dams thereon, or the

to use the land of an individual on a navigable river as a place of landing and of deposit of chattels for an indefinite time: *Thomas v. Ford*, 63 Md. 346; 52 Am. Rep. 513.

<sup>1</sup> *Soofield v. Lansing*, 17 Mich. 437; *Thurman v. Morrison*, 14 B. Mon. 397; *Douglas v. State*, 4 Wis. 387.

<sup>2</sup> *Wood on Nuisances*, 539.

<sup>3</sup> *Barney v. Keokuk*, 94 U. S. 324; *Gould v. R. R. Co.*, 6 N. Y. 522; *Tom-*

*lin v. R. R. Co.*, 32 Iowa, 106; 7 Am. Rep. 176; *McManus v. Carmichael*, 3 Iowa, 1; *Stevens v. R. R. Co.*, 34 N. J. L. 532; 3 Am. Rep. 269; *Lansing v. Smith*, 8 Cow. 146; *In re Water Commissioners*, 3 Edw. Ch. 306.

<sup>4</sup> *McManus v. Carmichael*, 3 Iowa, 1; *Goodwin v. Thompson*, 15 Lea, 209; 54 Am. Rep. 411.

<sup>5</sup> *Mather v. Chapman*, 40 Conn. 382; 16 Am. Rep. 46.

erection of bridges over them, or even divert the water thereof, and entirely destroy their navigability; and upon such streams, whatever is done by individuals strictly within the scope of the power given is lawful, and cannot be regarded either as a public or private nuisance.<sup>1</sup> But neither the state nor the general government can do any act that will entirely destroy the navigability of an arm of the sea or an interstate stream.<sup>2</sup>

**§ 2934. Tidal Streams and Avenues of Interstate Commerce.**—But in the case of tidal streams and freshwater streams which are avenues of commercial intercourse between the states, the national government, under its power to regulate commerce, has the superior jurisdiction, and the state can authorize no act to be done upon them which will materially interfere with their navigability.<sup>3</sup> Nevertheless, the state, as to streams of this character, has a limited jurisdiction. Where Congress has not acted, the state has authority over navigable waters within its boundaries, and over the lands under them.<sup>4</sup> An act done therein under state authority, as the erection of a bridge, dam, or other erection in or over the stream, although operating as a slight obstruction to navigation, will not be regarded as a nuisance if the public

<sup>1</sup> Wood on Nuisances, 548; Bailey v. R. R. Co., 4 Harr. (Del.) 389; 44 Am. Dec. 593; Glover v. Powell, 10 N. J. Eq. 211; Crittenden v. Wilson, 5 Cow. 165; 15 Am. Dec. 462; Renwick v. Morris, 7 Hill, 575; Gibbons v. Ogden, 9 Wheat. 1; The Daniel Bell, 10 Wall. 557; The Montello, 11 Wall. 411; The Wharf Case, 3 Bland, 383; Grant v. Davenport, 18 Iowa, 178; Dutton v. Strong, 1 Black, 23; Wilson v. Blackford & Co., 2 Pet. 245.

<sup>2</sup> Cox v. State, 3 Blackf. 193; Bennett v. Baggs, 1 Bald. 60; Corfield v. Caryell, 4 Wash. C. C. 371; Polard's Lessee v. Hagan, 3 How, 229.

<sup>3</sup> Wood on Nuisances, 549; Jolly v. Terre Haute Drawbridge Co., 6 McLean, 237; Columbus Ins. Co. v.

Curtenius, 6 McLean, 209; Pennsylvania v. Bridge Co., 13 How. 519. The United States may maintain a suit to compel a company erecting a bridge across a navigable river, under a federal or state statute, to comply with the statute, or to abate the bridge as a nuisance: United States v. R. R. Co., 25 Fed. Rep. 113; New Orleans etc. R. R. Co. v. Mississippi, 112 U. S. 12.

<sup>4</sup> American Dock and Improvement Co. v. Public School Trustees, 39 N. J. Eq. 409; People v. R. R. Co., 67 Cal. 166; Pound v. Turk, 95 U. S. 459; Cardwell v. American Bridge Co., 113 U. S. 205; Keator Lumber Co. v. Boom Co., 72 Wis. 62; 7 Am. St. Rep. 837.

benefit therefrom is equal to the inconvenience created thereby to navigation.<sup>1</sup> The state may authorize improvements to be made in any navigable stream, tidal or non-tidal, by clearing out its bed, deepening its channel, or otherwise, but these changes must not impair navigation.<sup>2</sup> So it may authorize the formation of corporations to improve streams that cannot without improvement be used for floatage, and may authorize such corporations to levy tolls.<sup>3</sup> So, too, it may authorize the erection of wharves below low-water mark to render access to the port more easy and convenient, and authorize the erection of piers, slips, and docks, and these erections will not be regarded as nuisances, unless they materially interfere with free navigation to the stream or port.<sup>4</sup> But all such erections below low-water mark are made at the peril of having them declared nuisances by the federal courts, if they unreasonably or essentially impair the convenience or safety of navigation, unless Congress has conferred the power upon the state or corporation to make the erections,<sup>5</sup> or unless the title to the bed of the sea, bay, or stream below low-water mark is vested in the corporation erecting them or authorizing their erection.<sup>6</sup>

**§ 2935. State may Convey its Right to Shore.**—The state, being the owner of the shore of navigable streams,—

<sup>1</sup> *United States v. New Bedford Bridge Co.*, 1 Wood. & M. 402; *Works v. R. R. Co.*, 5 McLean, 425; *Columbus Ins. Co. v. Peoria Bridge Ass'n*, 6 McLean, 70; *Jolly v. Terre Haute Drawbridge Co.*, 6 McLean, 237; *Chicago v. McGinn*, 51 Ill. 266; 2 Am. Rep. 295; *Sweeney v. R. R. Co.*, 60 Wis. 600. Individuals have no cause of action for closing, bridging, or obstructing a navigable river when done by the authority of the state, though benefits and advantages before enjoyed by them are thereby cut off: *Bailey v. R. R. Co.*, 4 Harr. (Del.) 389; 44 Am. Dec. 593. Under a legislative authority to construct a railroad between certain points, the company may build, main-

tain, and repair necessary drawbridges across navigable streams, and will not be liable for temporary obstruction of the stream in the course of such work: *Hamilton v. R. R. Co.*, 34 La. Ann. 970; 44 Am. Rep. 451.

<sup>2</sup> *Avery v. Fox*, 1 Abb. 246; *Gilman v. Philadelphia*, 3 Wall. 713; *Palmer v. Cuyahoga Co.*, 3 McLean, 226; *Williams v. Beardsley*, 2 Ind. 391; *Spooner v. McConnell*, 1 McLean, 337.

<sup>3</sup> *Manistee River Improvement Co. v. Sands*, 53 Mich. 593.

<sup>4</sup> *Devoe v. Penrose Ferry Co.*, 3 Am. Law Reg. 79.

<sup>5</sup> *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 578.

<sup>6</sup> *Wood on Nuisances*, 552.

that is, of the space between high and low water mark,—may grant the same to individuals or corporations, and such grant vests in the grantee a *quasi* franchise for the use of the portion of the stream so conveyed in any way that the state could use it.<sup>1</sup> A riparian owner cannot recover damages for being deprived of access to a navigable river by reason of the building of a railroad along its banks below high-water mark;<sup>2</sup> or because it occupies land which the riparian owner had made by filling in the lake in front of his land.<sup>3</sup>

**§ 2936. Any Obstruction of a Navigable Stream a Nuisance.**—Any unauthorized obstruction of a navigable stream, whether an actual hindrance to navigation or not, is a nuisance; and this, even though it may be a benefit or convenience to those using the stream.<sup>4</sup> It is not necessary that vessels should be actually obstructed in the navigation of the stream or harbor; it is enough if navigation is rendered less convenient or less safe than formerly.<sup>5</sup> Obstructions cannot be placed in a watercourse even if it is already so obstructed that its use is prevented.<sup>6</sup> And the following have been held to be unlawful obstructions, and when erected or maintained without authority, nuisances, viz.: Floating docks,<sup>7</sup> or floating storehouses;<sup>8</sup> a vessel located in the channel of a stream for an unreasonable time;<sup>9</sup> or a raft, or drift, or a wreck;<sup>10</sup> or

<sup>1</sup> Delaware etc. Canal Co. v. Lawrence, 2 Hun, 163, 56 N. Y. 612.

<sup>2</sup> Tomlin v. R. R. Co., 32 Iowa, 106; 7 Am. Rep. 176.

<sup>3</sup> Diedrich v. R. R. Co., 42 Wis. 248; 24 Am. Rep. 399.

<sup>4</sup> R. R. Co. v. Caldwell, 1 Dall. 150; Hecker v. N. Y. Balance Co., 13 How. Pr. 549; Diedrich v. R. R. Co., 42 Wis. 248; 24 Am. Rep. 399; People v. St. Louis, 10 Ill. 351; the court saying: "While the state may partially obstruct navigable streams for the public benefit, yet individuals have no such right; and where such an obstruction is made by an individual as amounts to a

nuisance, though sufficient room for passage is left, the fact that the public is really benefited by the obstruction will not be considered."

<sup>5</sup> Wood on Nuisances, 567.

<sup>6</sup> Chapman v. Mfg. Co., 13 Conn. 269; 33 Am. Dec. 401.

<sup>7</sup> Hecker v. N. Y. Balance Co., 13 How. Pr. 549.

<sup>8</sup> Wetmore v. Atlantic White Lead Co., 37 Barb. 70; Hart v. Mayor, 9 Wend. 571; 24 Am. Dec. 165.

<sup>9</sup> Hart v. Mayor, 3 Paige, 213; 9 Wend. 571; 24 Am. Dec. 165.

<sup>10</sup> Beach v. Schoff, 28 Pa. St. 195; 70 Am. Dec. 122; State v. Babcock, 30

bridges;<sup>1</sup> building a highway between high and low water mark;<sup>2</sup> depositing stone or other matter in the stream;<sup>3</sup> driving piles in the stream,<sup>4</sup> or obstructing it with logs;<sup>5</sup> erecting dams<sup>6</sup> or piers in the river;<sup>7</sup> erecting a jetty so as to throw the water on the other shore, or narrow the channel;<sup>8</sup> laying gas-pipes or telegraph-wires in the bed of the stream;<sup>9</sup> stretching a cable across the river;<sup>10</sup> taking water from the stream so as to interfere with its navigability.<sup>11</sup> But slight inconveniences and occasional interruptions in the use of a navigable stream, which are temporary and reasonable, are not illegal merely because the public may not, for the time, have the full use of the highway or stream.<sup>12</sup> A structure in the channel of a river will not necessarily be held subject to abatement as a nui-

N. J. L. 29; *St. Louis etc. R. R. Co. v. Meese*, 44 Ark. 414. But a vessel accidentally sunk in the stream, and abandoned, is not a nuisance: *Wood on Nuisances*, 560.

<sup>1</sup> *Com. v. New Bedford Bridge Co.*, 2 Gray, 339; *Barnes v. Racine*, 4 Wis. 454; *Arundel v. McCulloch*, 10 Mass. 70; *Com. v. Charlestown*, 1 Pick. 185; 11 Am. Dec. 161; *Attorney-General v. Stevens*, 1 N. J. L. 369; 22 Am. Dec. 526. And even when erected by authority, it must be so erected and with all such modern appliances of draws and machinery as will make it as slight an obstruction as possible, or the authority given will not afford protection for its maintenance: *Gilman v. Philadelphia*, 3 Wall. 713; *Jolliffe v. Wallace*, 29 L. T., N. S., 592; *Memphis etc. R. R. Co. v. Hicks*, 5 Sneed, 427; *State v. Freeport*, 43 Me. 198; *State v. Dibble*, 4 Jones, 107; *Columbus Ins. Co. v. Peoria Bridge Ass'n*, 6 McLean, 70; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 237; *Works v. R. R. Co.*, 5 McLean, 425; *People v. R. R. Co.*, 15 Wend. 113; 30 Am. Dec. 33. It is no defense that the bridge when built was not an obstruction. If the structure, at any time during its continuance, actually injures, stops, or interrupts the navigation, the company is liable to the party injured for the damages thereby sustained: *Dugan v. Bridge Co.*, 27 Pa. St. 303; 67 Am. Dec. 465.

<sup>2</sup> *Kean v. Stetson*, 5 Pick. 492; *Charlestown v. Middlesex*, 3 Met. 202.

<sup>3</sup> *R. v. Stephens*, L. R. 1 Q. B. 702.

<sup>4</sup> *Walker v. Shephardson*, 2 Wis. 384; 60 Am. Dec. 423.

<sup>5</sup> *Enos v. Hamilton*, 27 Wis. 256.

<sup>6</sup> *Dunbar v. Vinal*, 2 Dane's Abr. 695.

<sup>7</sup> *Atlee v. Packet Co.*, 21 Wall. 389.

<sup>8</sup> *Attorney-General v. Lonsdale*, L. R. 7 Eq. Cas. 377.

<sup>9</sup> And even by authority of the state, if they interfere with navigation: *Milwaukee Gas-Light Co. v. The Gamecock*, 23 Wis. 144; 99 Am. Dec. 138; *Blanchard v. Tel. Co.*, 60 N. Y. 510.

<sup>10</sup> *McCord v. The Tiber*, 6 Biss. 407. Unless merely temporary: *The Echo*, 19 Fed. Rep. 453; *The Vancouver*, 2 Saw. 381. Or if timely notice be given of its existence, and it be loosened to allow vessels to pass: *The Swan*, 19 Fed. Rep. 455.

<sup>11</sup> *Phila. v. Collins*, 68 Pa. St. 106; *Phila. v. Gilmartin*, 71 Pa. St. 140; *Attorney-General v. R. R. Co.*, L. R. 6 Ch. App. 572. But in *Phila. v. Collins*, the court say: "If it was a supply of water for domestic purposes only which occasioned the insufficiency for navigation, then the law of paramount necessity would have existed, and brought into play the doctrine of riparian rights, and justified the taking."

<sup>12</sup> *People v. Horton*, 64 N. Y. 610.

sance.<sup>1</sup> A mill, to be a nuisance as being upon tide-water, must be within the flow of ordinary tides.<sup>2</sup>

§ 2937. **Right of Riparian Owners to Erect Wharves, etc.** — While a riparian owner upon a navigable stream or lake has no property or interest in it beyond that of any other member of the public, yet he has a right to erect a wharf or make any other erection upon the bank of the stream, and to use the same for his own convenience, or allow its use by others, either for the landing of passengers or freight, or any other purpose connected with navigation, and such use of his own property is no infringement of a public right, provided it does not interfere with navigation.<sup>3</sup> Any one doing anything in front of the land of such a riparian proprietor which makes it less accessible is liable in damages therefor.<sup>4</sup> But the state may authorize a use of the shore that will entirely deprive him of the beneficial use of his erections, and that, too, without compensation to him for the damage sustained therefrom.<sup>5</sup> Where the riparian proprietor owns to the center of the stream or to low-water mark, this gives him the exclusive right to use the shore and bed of the stream for every purpose for which it can be used,

<sup>1</sup> *St. Louis v. Knapp*, 2 McCrary, 516.

<sup>2</sup> *Simpson v. Seavey*, 8 Greenl. 138; 22 Am. Dec. 228.

<sup>3</sup> *Wood on Nuisances*, 566; *Ensinger v. People*, 47 Ill. 384; 95 Am. Dec. 495; *Chicago v. Lafin*, 49 Ill. 172; *Sloan v. Biemiller*, 34 Ohio St. 492; *Diedrich v. R. R. Co.*, 42 Wis. 248; 24 Am. Rep. 399; *Delaplaine v. R. R. Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Dutton v. Strong*, 1 Black, 23; *Frink v. Lawrence*, 20 Conn. 117; 50 Am. Dec. 274; *Thornton v. Grant*, 10 R. I. 477; 14 Am. Rep. 701; *Sherlock v. Bainbridge*, 41 Ind. 35; 13 Am. Rep. 302. No use can be made by a vessel of a wharf, even for a few minutes, without liability incurred for compensation: *The Whitburn*, 14 Phila. 600; *Robertson v. Wilder*, 69 Ga. 340; *The*

*Berry*, 25 Fed. Rep. 780; *Aiken v. Eager*, 35 La. Ann. 567.

<sup>4</sup> *Clark v. Peckham*, 10 R. I. 35; 14 Am. Rep. 654; *Delaplaine v. R. R. Co.*, 42 Wis. 214; 24 Am. Rep. 386. No one has a right to land goods on the private property of another, though it is the shore of a navigable river, except in cases of necessity: *O'Neill v. Annett*, 27 N. J. L. 261; 72 Am. Dec. 364.

<sup>5</sup> *People v. Albany*, 11 Wend. 539; 27 Am. Dec. 95; *Rex v. Smith*, 2 Doug. 425; *Gould v. R. R. Co.*, 6 N. Y. 522; *Stevens v. R. R. Co.*, 34 N. J. L. 532; 3 Am. Rep. 269; *Toulin v. R. R. Co.*, 32 Iowa, 106; 7 Am. Rep. 176; *In re Water Commissioners*, 3 Edw. Ch. 290; *Lansing v. Smith*, 8 Cow. 146; 4 Wend. 9; 21 Am. Dec. 89. See *ante*, § 2935.

not inconsistent with the public easement therein; e. g., to build wharves, docks, and slips opposite the banks; and even the state cannot divest the owner of the banks of this right without proper compensation.<sup>1</sup> A riparian proprietor cannot maintain ejectment for that portion of a wharf constructed on his land which extends below low-water mark.<sup>2</sup> The legislature may forbid the owner of land on the bank of a navigable river to build any wharf, pier, or bulk-head between high and low water marks without the consent of the council of the town or city.<sup>3</sup> A wharf extended below low water gives no right of possession to any adjacent land under water not actually covered by the wharf, nor any right to the exclusive use of the open space at its side. The only right of the wharf-owner over the adjacent water is that which he has in common with all others of mooring vessels upon it, or passing and repassing with boats and vessels engaged in navigation.<sup>4</sup>

§ 2938. **Rights of Fishery—In Fresh Waters.**—The right to take fish in fresh-water streams belongs to the owners of the soil under them, to the exclusion of the public.<sup>5</sup> Or the right may be acquired, distinct from

<sup>1</sup> *Bainbridge v. Sherlock*, 29 Ind. 364; 95 Am. Dec. 644; *Moore v. Comm'rs*, 32 How Pr. 184; *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70; *Rogers v. Barker*, 31 Barb. 447; *Hart v. Mayor etc.*, 9 Wend. 571; 24 Am. Dec. 165; *Hogg v. Zanesville Canal Co.*, Wright, 139; *Jones v. Pettibone*, 2 Wis. 308; *Yates v. Judd*, 18 Wis. 118; *Walker v. Shepardson*, 4 Wis. 486; 65 Am. Dec. 324; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Austin v. Carter*, 1 Mass. 231; *Gray v. Bartlett*, 20 Pick. 186; 32 Am. Dec. 208; *Del. etc. Canal Co. v. Lawrence*, 9 N. Y. Sup. Ct. 163; 26 N. Y. 287.

<sup>2</sup> *Coburn v. Ames*, 52 Cal. 385; 28 Am. Rep. 634.

<sup>3</sup> *Ravenswood v. Flemings*, 22 W. Va. 52; 46 Am. Rep. 485. But see *Union Depot etc. Co. v. Brunswick*, 31

*Minn.* 297; 47 Am. Rep. 739; *Walker v. Shepardson*, 4 Wis. 486; 65 Am. Dec. 324.

<sup>4</sup> *Gray v. Bartlett*, 20 Pick. 186; 32 Am. Dec. 208.

<sup>5</sup> *Mayor v. Graham*, 4 Ex. 361; *Browne v. Kennedy*, 5 Har. & J. 195; 9 Am. Dec. 503; *Waters v. Lilly*, 4 Pick. 145; 16 Am. Dec. 333; *Cottrill v. Myrick*, 12 Me. 222; *Adams v. Pease*, 2 Conn. 481; *People v. Platt*, 17 Johns. 195; 8 Am. Dec. 382; *Hooker v. Cummings*, 20 Johns. 90; 11 Am. Dec. 249; *Trustees etc. v. Strong*, 60 N. Y. 56; *Ingram v. Threadgill*, 3 Dev. 59; *Williams v. Buchanan*, 1 Ired. 535; 35 Am. Dec. 760; *Beckman v. Kreamer*, 43 Ill. 447; 92 Am. Dec. 146; *Cobb v. Davenport*, 32 N. J. L. 369; 33 N. J. L. 223; 97 Am. Dec. 718; *Com. v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386.

ownership, by grant or prescription.<sup>1</sup> The same rule applies to the small lakes and ponds of this country.<sup>2</sup> But not, it seems, to the larger lakes;<sup>3</sup> nor to the larger rivers which are regarded as navigable.<sup>4</sup> In Ohio it has been distinctly held that the right of fishing in Lake Erie and its bays is in the public, the same as though the waters were tide-waters.<sup>5</sup> It has been ruled in Michigan that while the land-owner has the exclusive right to fish in small lakes and ponds on his land, still, as it has always been customary to permit the public to take fish in all the small lakes and ponds of the state, one may understand, in the absence of notification to the contrary, that he is licensed to do so.<sup>6</sup> One who fishes and leaves his boat in

But this right does not carry with it the right to prevent the passage of fish to the lakes and ponds for increase of the species: *Commonwealth v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386.

<sup>1</sup> *Cobb v. Davenport*, 32 N. J. L. 369; 33 N. J. L. 223; 97 Am. Dec. 718.

<sup>2</sup> *Cobb v. Davenport*, 32 N. J. L. 369; 33 N. J. L. 223; 97 Am. Dec. 718.

<sup>3</sup> *State v. Franklin Falls Co.*, 49 N. H. 240; 6 Am. Rep. 513; *West Roxbury v. Stoddard*, 7 Allen, 158; *Lincoln v. Davis*, 53 Mich. 375; 51 Am. Rep. 116.

<sup>4</sup> *Carson v. Blazer*, 2 Binn. 475; 4 Am. Dec. 463. But see *Hooker v. Cummings*, 20 Johns. 90; 11 Am. Dec. 249.

<sup>5</sup> *Sloan v. Biemiller*, 34 Ohio St. 492, the court saying: "The question here is, whether the right of fishing in the lake and bay is limited to the plaintiff as the proprietor of the shores. 'Fishery in the sea, and in the waters which are made to flow inland therefrom by its egress and influence, constituting, as it does, a great source of sustentation, has, in all ages and in all countries, been deemed of such importance that it has ever been regarded as a privilege open and common to all purposes': *Angell on Tide-waters*, 124. And although the dominion over, and the right of property in, the waters of the sea and its inland waters were, at common law, in the crown, yet they were of common public right for every subject to navigate upon, and to fish in, without interruption: *Angell on*

*Tide-waters*, 21. They were regarded as the inherent privileges of the subject, and 'classed among those public rights denominated *jura publica* or *jura communia*, and thus contradistinguished from *jura coronæ*, or private rights of the crown': *Angell on Tide-waters*, 22, 80; *Hargr. Law Tracts*, 11. The sovereign was the proprietor of these waters as the representative or trustee of the public. In this country the title is vested in the states upon a like trust, subject to the power vested in Congress to regulate commerce: *Martin v. Waddell*, 16 Pet. 367, 412; *McCready v. Virginia*, 94 U. S. 391. That fishery in such waters as Lake Erie and its bays should be as free and common as upon tide-waters, and alike subject to control by public authority, is obviously just. The reasons for regarding the right as public is as great in the one case as in the other, and we have no hesitation in saying that the right of fishing in these waters is as open to the public as if they were subject to the ebb and flow of the tide. The supreme court of New Hampshire, in speaking of Lake Winnipiseogee, say: 'The right of fishing in the lake is not limited to the proprietors of the shore, but is common to all citizens of the state, just as much as the fishing in the tide-waters of the Piscataqua': *State v. Company*, 49 N. H. 240; 6 Am. Rep. 513."

<sup>6</sup> *Marsh v. Colby*, 37 Mich. 626; 33 Am. Rep. 439.

a navigable stream below low-water mark is not a trespasser upon the land of the riparian owner. A bridge across such stream, built and maintained for public use, resting at each end upon the land of the riparian owner, within the limits of a highway, is not his property. The fastening of a boat to such bridge is not a trespass upon the property of the riparian owner, or upon property of which he has possession or control.<sup>1</sup>

§ 2939. **In Tide-waters—Oysters.**—In tide-waters the right to take fish belongs to the public, and is considered common to all.<sup>2</sup> But in some states private persons may obtain exclusive rights of fishery by grant from the state, or by prescription;<sup>3</sup> while in others this power is denied.<sup>4</sup> In Ohio it is held that the *prima facie* right of the public is not rebutted by proof of the mere uninterrupted enjoyment of the privilege of fishing for the period requisite to perfect a title by prescription; the mere lawful exercise of a common right for that period does not establish an exclusive right.<sup>5</sup> The right to fish is subordinate to

<sup>1</sup> Parsons v. Clark, 76 Me. 476.

<sup>2</sup> Brown v. De Groff, 50 N. J. L. 409; 7 Am. St. Rep. 794; Wilson v. Forbes, 2 Dev. 30; Martin v. Waddell, 16 Pet. 367; Lay v. King, 5 Day, 72; Parker v. Cutler Mill Dam Co., 20 Me. 353; 37 Am. Dec. 56; Moulton v. Libbey, 37 Me. 472; 59 Am. Dec. 57; Preble v. Brown, 47 Me. 284; Cooledge v. Williams, 4 Mass. 140; Weston v. Sampson, 8 Cush. 347; 54 Am. Dec. 764; Trustees etc. v. Strong, 60 N. Y. 56; Proctor v. Wells, 103 Mass. 216; Lansing v. Smith, 4 Wend. 9; 21 Am. Dec. 88; Mayor v. Eslava, 9 Port. 577; 33 Am. Dec. 325; Collins v. Benbury, 3 Ired. 277; 38 Am. Dec. 722. A person may from a boat enter upon and walk and fish along the uninclosed flats of another in the sea between high and low water-mark, and within one hundred rods of the upland: Packard v. Ryder, 144 Mass. 440; 59 Am. Rep. 101. But a right of fishing in any water gives no right over the adjoining land,

nor any right to erect huts on the shore for that purpose: Cortelyou v. Brundt, 2 Johns. 357; 3 Am. Dec. 439. The owner of the soil between high and low water mark has the exclusive right to catch fish by means of fixtures attached to such soil: Matthews v. Treat, 75 Me. 594.

<sup>3</sup> Collins v. Benbury, 3 Ired. 118; 42 Am. Dec. 155; Chalker v. Dickinson, 1 Conn. 382; 6 Am. Dec. 250; Gould v. James, 6 Cow. 369; State v. Sutton, 2 R. I. 434; State v. Medbury, 3 R. I. 138; Paul v. Hazleton, 37 N. J. L. 106; Rogers v. Jones, 1 Wend. 255; 19 Am. Dec. 493; Phipps v. State, 22 Md. 389; 85 Am. Dec. 664; Stoughton v. Baker, 4 Mass. 522; 3 Am. Dec. 236.

<sup>4</sup> Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. 71; Cates v. Wadlington, 1 McCord, 580; 10 Am. Dec. 699; Delaware etc. R. R. Co. v. Stump, 8 Gill & J. 479; 29 Am. Dec. 561.

<sup>5</sup> Sloan v. Biemiller, 34 Ohio St. 492.

the right of navigation.<sup>1</sup> But one navigating the water is liable for negligent injuries to seines, nets, oyster-beds, etc., there.<sup>2</sup> Thus where a vessel ran into a net laid in a private fishery, and damaged it, it was held that the captain was liable, if, upon being warned, he could have changed his course without prejudice to the reasonable prosecution of his voyage.<sup>3</sup> The right of individuals to plant oyster-beds in navigable waters, and to be protected in the enjoyment of them, is generally recognized.<sup>4</sup> The right of taking shell-fish is included in the public right of fishing in tide-waters, whether such shell-fish are imbedded in the soil or lie upon the surface.<sup>5</sup> But it has been held in some cases that a person who plants oysters in navigable waters opposite to another's lands does not acquire such possession of them as will enable him to maintain an action against the riparian owner for taking them away.<sup>6</sup> And that one who, in taking clams from their natural beds, injures oysters planted thereon without authority, is not liable to the owner of the oysters for such injury, provided he acts with reasonable care, and does no unnecessary damage to the oysters.<sup>7</sup>

<sup>1</sup> *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; *Moulton v. Libby*, 37 Me. 472; 59 Am. Dec. 57; *Post v. Munn*, 4 N. J. L. 61; 7 Am. Dec. 570; *Lewis v. Keeling*, 1 Jones, 299; 62 Am. Dec. 168; the court saying: "A boat on a navigable stream has a right to 'take her course,' and go to the bank when and where it is necessary to do so,—doing no unnecessary damage, and acting without wantonness and malice,—and is not obliged to stop, or go out of her way, or wait upon the movements of those who are managing a seine or net, which they are permitted to use by the sufferance of the sovereign, and not as a right conferred by grant. This is the only line that can be established plain enough for practical purposes. There must be no wantonness or malice,—no unnecessary damage,—but a *bona fide* exercise of the right of navigation."

<sup>2</sup> *Marshall v. Steam Nav. Co.*, 3 Best & S. 722; *Cobb v. Bennett*, 75 Pa. St.

326; 15 Am. Rep. 752; *Post v. Munn*, 4 N. J. L. 61; 7 Am. Dec. 570.

<sup>3</sup> *Cobb v. Bennett*, 75 Pa. St. 326; 15 Am. Rep. 752.

<sup>4</sup> *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592; *Lowndes v. Dickerson*, 34 Barb. 586; *Power v. Tazewells*, 25 Gratt. 786; *State v. Taylor*, 27 N. J. L. 117; 72 Am. Dec. 347; *Haney v. Compton*, 36 N. J. L. 507; *State v. Sutton*, 2 R. I. 434; *McCarty v. Holman*, 22 Hun, 53; *Robins v. Ackerly*, 24 Hun, 499; *Birdsell v. Rose*, 46 N. J. L. 361; *Post v. Kreischer*, 32 Hun, 49.

<sup>5</sup> *Wetson v. Sampson*, 8 Cush. 347; 54 Am. Dec. 764; *Moulton v. Libbey*, 37 Me. 472; 59 Am. Dec. 58.

<sup>6</sup> *Shepherd v. Leverson*, 2 N. J. L. 391; *Arnold v. Mundy*, 6 N. J. L. 1; 10 Am. Dec. 356; *State v. Taylor*, 27 N. J. L. 117; 72 Am. Dec. 347; *Brinck-erhoff v. Starkins*, 11 Barb. 248.

<sup>7</sup> *Brown v. De Groff*, 50 N. J. L. 409; 7 Am. St. Rep. 794.

ILLUSTRATIONS.—Plaintiff and defendant were owners of boats employed in a fishery. Plaintiff's boat cast a fishing-seine round a shoal of mackerel, with the exception of a comparatively small opening which the seine did not quite fill up, but through which, in the opinion of witnesses, the fish could not escape. The defendant's boat then came through the opening and took the mackerel. *Held*, that plaintiff could not maintain trespass for taking his fish, his possession not having been complete: *Young v. Hichens*, Dav. & M. 592; 6 Q. B. 606.

§ 2940. **State Regulations as to Fishing.**—The state has power, for the protection of riparian owners above and below, to regulate even private fisheries, as by forbidding the employment of seines and other means of taking fish otherwise than singly in certain waters, or by prohibiting their being taken at all at certain seasons, and requiring a free passage to be kept open for the passage of fish in all streams in which rights of fishery are important;<sup>1</sup> or forbidding the catching of fish by seines, nets, or traps in the waters of the state;<sup>2</sup> or forbidding non-residents to catch fish in its waters for manure and oil, or to manufacture manure and oil from fish caught within its waters.<sup>3</sup> Such regulations are not prejudiced by a grant to individuals from the soil under such streams or of an exclusive privilege of fishing in them.<sup>4</sup> In some states the power of regulation is conferred by the legislature upon the county or township authorities.<sup>5</sup>

<sup>1</sup> *Commissioners v. Water Power Co.*, 104 Mass. 446; 6 Am. Rep. 247; *Commonwealth v. Canal Co.*, 66 Pa. St. 41; 5 Am. Rep. 329; *Randolph v. Braintree*, 4 Mass. 315; *Burnham v. Webster*, 5 Mass. 266; *Nickerson v. Brackett*, 10 Mass. 212; *Commonwealth v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386; *Vinton v. Welsh*, 9 Pick. 87; *Commonwealth v. Tiffany*, 119 Mass. 300; *Lunt v. Holland*, 14 Mass. 149; *Peables v. Hannaford*, 18 Me. 106; *State v. Skolfield*, 63 Me. 266; *Budd v. Sip*, 13 N. J. L. 348; *Haney v. Comp-ton*, 36 N. J. L. 507; *Hart v. Hill*, 1 Whart. 124; *People v. Reed*, 47 Barb. 235; *State v. Hockett*, 29 Ind. 302;

*State v. Boone*, 30 Ind. 225; *Stuttman v. State*, 57 Ind. 119; *State v. Sonover*, 42 N. J. L. 341; *State v. Roberts*, 59 N. H. 256; *Moulton v. Libbey*, 37 Me. 472; 59 Am. Dec. 58.

<sup>2</sup> *State v. Blount*, 85 Mo. 543; *State v. Skolfield*, 63 Me. 266; *Drew v. Hilliker*, 56 Vt. 641; *Rea v. Hampton*, 101 N. C. 51; 9 Am. St. Rep. 21.

<sup>3</sup> *Brothers v. Church*, 14 R. I. 398; 51 Am. Rep. 410.

<sup>4</sup> *Rogers v. Jones*, 1 Wend. 237; 19 Am. Dec. 493.

<sup>5</sup> *Nickerson v. Brackett*, 10 Mass. 212; *Vinton v. Welsh*, 9 Pick. 87; *Cottrill v. Myrick*, 12 Me. 222; *Hallock v. Downing*, 14 N. Y. Sup. Ct. 52.

§ 2941. **Remedies.** — The entire obstruction of a navigable river, where it is used by the public, is a public nuisance, and where such nuisance works a private injury, the party injured may recover damages or restrain its continuance by injunction.<sup>1</sup> An action cannot be maintained by a wharf-owner against one who has built a bridge containing no draw across a navigable stream below his wharf, where the direct injury alleged is to the navigation of the stream, to which the plaintiff is entitled only in common with the whole public.<sup>2</sup> Evidence of benefits conferred by an obstruction of a navigable river upon the community, as where the obstruction consists of a mill which is greatly needed in the neighborhood, is inadmissible to divest it of its character as a nuisance in case of an injury therefrom to one navigating the river.<sup>3</sup> A navigator on a public stream may remove obstructions, as a raft or the like, in the most speedy way, if the exigencies of the case require it, and is only liable for injury thereby where he is guilty of gross negligence or willful destruction.<sup>4</sup>

<sup>1</sup> *Hickok v. Hine*, 23 Ohio St. 523; 13 Am. Rep. 255. If one's boat is stopped by a bridge wrongfully built, an action lies for damages, though the nuisance is a public one: *Little Rock etc. R. R. Co. v. Brooks*, 39 Ark. 403. But not for damages resulting from the general obstruction of the plaintiff's business: *South Carolina R. R. Co. v. Moore*, 28 Ga. 398; 73 Am. Dec. 778. See *ante*, Vol. III., Torts.

<sup>2</sup> *Blackwell v. R. R. Co.*, 122 Mass.

1. But for an obstruction adjoining the wharf which prevents vessels from lying at it in the accustomed manner, this being a particular damage, he can maintain an action: *Brayton v. City of Fall River*, 113 Mass. 218; 18 Am. Rep. 470.

<sup>3</sup> *Gold v. Carter*, 9 Humph. 369; 49 Am. Dec. 712.

<sup>4</sup> *Beach v. Schoff*, 28 Pa. St. 195; 70 Am. Dec. 122.

## CHAPTER CXXXVI.

## SURFACE-WATER.

- § 2942. Surface-water — The common-law rule.
- § 2943. Drawing off surface water — Drains.
- § 2944. The civil-law rule.
- § 2945. Subterranean waters — Wells.
- § 2946. Injuries by escape of water — In general.
- § 2947. Water from roofs.
- § 2948. Water-pipes.
- § 2949. Percolating waters.

§ 2942. **Surface-water — The Common-law Rule.** — The owner of land may lawfully occupy and improve it in such a manner as either to prevent water which accumulates elsewhere from coming upon it, as by erecting a wall, dike, or barrier, or altering the course of the surface-water which falls upon it, or comes upon it from elsewhere, even though the water is made thereby to flow upon the adjoining land of another to his damage.<sup>1</sup> At

<sup>1</sup> Addison on Torts, 105; Cooley on Torts, 574; Hilliard on Torts, 584; Angell on Watercourses, sec. 108; 3 Kent's Com. 439; Washburn on Easements, 431; Chadeayne v. Robinson, 55 Conn. 345; 3 Am. St. Rep. 55; Bates v. Smith, 100 Mass. 181; Earl v. De Hart, 12 N. J. Eq. 280; Greatrex v. Hayward, 8 Ex. 291; Barkley v. Wilcox, 86 N. Y. 140; 40 Am. Rep. 519; Vanderwiele v. Taylor, 65 N. Y. 341; Lynch v. Mayor, 76 N. Y. 60; 32 Am. Rep. 271; O'Connor v. R. R. Co., 52 Wis. 526; 38 Am. Rep. 753; Cairo etc. R. R. Co. v. Stevens, 73 Ind. 278; 38 Am. Rep. 139; Beard v. Murphy, 37 Vt. 104; 86 Am. Dec. 693; Buffam v. Harris, 5 R. I. 253; Wadsworth v. Tillotson, 15 Conn. 366; 39 Am. Dec. 391; Atchison etc. R. R. Co. v. Hammer, 22 Kan. 763; 31 Am. Rep. 216; Morrison v. Bucksport, 67 Me. 353; Bowlsby v. Speer, 31 N. J. L. 351; Grant v. Allen, 41 Conn. 156; Franklin v. Fisk, 13 Allen, 211; Parks v. Newburyport, 10 Gray, 29; Dickinson v. Worcester, 7 Allen, 19; Hoyt v. Hudson, 27 Wis. 656; 9 Am. Rep. 473; Goodale v. Tuttle, 29 N. Y. 466; Avery v. Woolen Co., 82 N. Y. 582; Wilson v. Bradford, 108 Mass. 261; Waffle v. R. R. Co., 63 N. Y. 11; 13 Am. Rep. 467; Jackman v. Arlington Mills, 137 Mass. 277; White v. Sheldon, 35 Hun, 193; Kansas etc. R. R. Co. v. Riley, 33 Kan. 374; Hanlin v. R. R. Co., 61 Wis. 515; Murphy v. Kelly, 68 Me. 521; Barnes v. Marshall, 68 Cal. 569; Gannon v. Hargadon, 10 Allen, 106; 87 Am. Dec. 625, the court saying. "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may

common law there is no servitude imposed *jure naturæ*, in favor of any estate, respecting surface-water, and the owner of a higher estate may withhold it from a lower, or the owner of a lower estate may prevent it from coming upon his own.<sup>1</sup> One may lawfully drain his lands into a natural watercourse, even though by so doing a lower proprietor is injured by the increased flow.<sup>2</sup> The owner of a city lot may turn the rain from it to the adjacent street, although it may injure a neighboring lot below grade.<sup>3</sup> Where one, by the erection of a building upon his premises, diverts the surface-water, and thus causes it to flow upon the land of an adjoining owner, no liability therefor exists.<sup>4</sup> A railroad is not liable to a land-owner for an injury by an overflow of surface-water occasioned by the road-bed skillfully constructed.<sup>5</sup> But the owner cannot accumulate the surface-water upon his land and

accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow: *Luther v. Winnisimmet Co.*, 9 Cosh. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19. The point of these decisions is, that where there is no watercourse by grant or prescription, and no stipulation exists between coterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. *Cujus est solum, ejus est usque ad cælum*, is a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land, above, upon, and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface-water, in consequence of the lawful appropriation

of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface-water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface-water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil."

<sup>1</sup> *Gibbs v. Williams*, 25 Kan. 210; 37 Am. Rep. 241.

<sup>2</sup> *Kauffman v. Griesemer*, 26 Pa. St. 407; 67 Am. Dec. 437.

<sup>3</sup> *Phillips v. Waterhouse*, 69 Iowa, 199; 58 Am. Rep. 220.

<sup>4</sup> *Bowlsby v. Speer*, 31 N. J. L. 351. But see *Underwood v. Waldron*, 33 Mich. 232.

<sup>5</sup> *Abbott v. R. R. Co.*, 83 Mo. 271; 53 Am. Rep. 581; *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278; 38 Am. Rep. 139; *O'Connor v. R. R. Co.*, 52 Wis. 526; 38 Am. Rep. 753.

then discharge it in a body upon the lower land of his neighbor, or in any manner different from the usual flow.<sup>1</sup> Nor can the owner of the upper tract lawfully discharge the waters of a natural pond or reservoir of surface-water through an artificial channel directly over the lower land of another.<sup>2</sup> And it is a nuisance to erect a building on one's land so near to another's land that the rain or snow falling upon the eaves is discharged upon the adjoining land; and an action may be maintained therefor, but only for the special damage.<sup>3</sup>

**ILLUSTRATIONS.**—A railroad, in constructing its road-bed, filled up an artificial ditch on the land of a third person, by which the surface-water was conducted from the plaintiff's premises to a river, and thus turned back the water upon the premises of such person. *Held*, to give no ground of action: *O'Connor v. R. R. Co.*, 52 Wis. 526; 38 Am. Rep. 753. Parties owned adjacent lots on a street. Surface-water naturally and usually accumulated in the street in front of plaintiff's lot, and sometimes ran off through a natural depression over defendant's lot and other low land to a river. Defendant built a house on his lot, filling in the lot and grading it up to the level of the sidewalk on the street, thereby cutting off the flow of the surface-water, and causing it sometimes to flow on plaintiff's lot and flood his cellar. *Held*, that no action would lie therefor: *Barkley v. Wilcox*, 86 N. Y. 140; 40 Am. Rep. 519. Defendant, who owned the lands next below the defendants on a stream, planted a row of trees on his land in such a manner as to operate as a dam and set back the water, so that large quantities of drift-wood and other matter, which before had been carried off by the water, were deposited upon the land of plaintiff, when the water subsided to its usual level. *Held*, that the defendant was not liable: *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114. A railroad purchased low land near a river, having on it a wall which was part of a system adopted by adjoining

<sup>1</sup> *Wiles v. Madison*, 75 Ind. 241; *Gilison v. Charleston*, 16 W. Va. 282; 37 Am. Rep. 763; *Rylands v. Fletcher*, L. R. 3 Eng. & Ir. App. Cas. 330; *Templeton v. Voshloe*, 72 Ind. 134; 37 Am. Rep. 150; *Smith v. Kenish*, 7 Com. B. 515; *Waffle v. Connor*, 53 N. Y. 11; 13 Am. Rep. 467; *Tootle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732; *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213; *Crabtree v. Baker*, 75 Ala.

91; 51 Am. Dec. 424; *Kelly v. Deming*, 39 N. J. Eq. 482; *Knight v. Brown*, 25 W. Va. 808; *Wagner v. Chaney*, 19 Ill. App. 546.

<sup>2</sup> *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *Livingston v. McDonald*, 21 Iowa, 160; 89 Am. Dec. 563; *Foot v. Bronson*, 4 Lana. 47.

<sup>3</sup> *Wood on Nuisances*, 109; *Bellows v. Sackett*, 15 Barb. 96.

proprietors to prevent flooding. *Held*, that it was liable to one of these proprietors whose lands were flooded by reason of its neglect to keep its part of the wall in order: *Savannah etc. R. R. Co. v. Lawton*, 75 Ga. 192.

§ 2943. **Drawing off Surface-water—Drains.**—Where one, by drawing off surface-water on his land, deprives the lower proprietors of the benefit of the natural flow of such water on their lands, the latter has no remedy.<sup>1</sup> "The water belongs absolutely to the defendant, on whose lands it falls."<sup>2</sup> The owner of land has an unrestricted right to drain it for agricultural purposes when the water which it is sought to get rid of is mere surface-water, and has no definite source or channel; and even though a lower proprietor is thereby deprived of water which had previously been accustomed to come to him, he has no cause of action for the diversion.<sup>3</sup> Every owner of land has the right to clean out and tube or wall up a natural spring upon his own land, for his own use and convenience, when he does not thereby change the natural course of the flow of the water therefrom, and makes no change to the injury of another, except what may result from an increased flow of water in the natural channel or outlet of such spring.<sup>4</sup> A person has a right to lay drains or dig trenches upon his own land to carry away the water from his house or premises. But if they are not of sufficient capacity to carry off the water, or if they are not properly kept in repair, he will be liable for all damages caused thereby.<sup>5</sup> Where one properly and lawfully opens a covered drain on his own land, and it is his duty to close it again in order to prevent the water

<sup>1</sup> *Rawstron v. Taylor*, 11 Ex. 369.

<sup>2</sup> *Broadbent v. Ramabotham*, 11 Ex. 602. But the rule in New Hampshire is, that the owner has no right to obstruct or divert the water beyond what is necessary for his use of the land: *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569; 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276.

<sup>3</sup> *Waffle v. R. R. Co.*, 58 Barb. 413; *Cott v. R. R. Co.*, 36 N. Y. 217; *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Popplewell v. Hodgkinson*, 20 L. T., N. S., 578; *Goodale v. Tuttle*, 29 N. Y. 459; *Buffum v. Harris*, 5 R. I. 253; *Curtis v. Ayrault*, 47 N. Y. 73.

<sup>4</sup> *Waffle v. Porter*, 61 Barb. 130.

<sup>5</sup> *Rockwood v. Wilson*, 11 Cush. 221.

from setting back and overflowing the adjoining land, he is bound to use ordinary care and prudence in closing such drain; and if he does so, is not responsible for any damage caused to his neighbor's land by its overflow.<sup>1</sup> One is not obliged to drain his lands, even though by not so doing they may be productive of sickness.<sup>2</sup>

§ 2944. **The Civil-law Rule.**— By the rules of the civil law the lower estate is charged with a servitude for the benefit of the upper estate to permit the surface-water to flow off over it, and the owner of the lower estate has no right to dam it up and throw it back upon the higher one.<sup>3</sup> So he who has the upper ground cannot change the course of the water, either by turning it some other way or rendering it more rapid, or making any other change in it to the prejudice of the owners of the lower ground.<sup>4</sup> The civil-law rule is adopted in some states. It seems to be the law of Missouri,<sup>5</sup> though the decisions are conflicting.<sup>6</sup> It is followed in California,<sup>7</sup> and Ohio,<sup>8</sup> Louisiana,<sup>9</sup> in North Carolina,<sup>10</sup> in Illinois,<sup>11</sup> and in

<sup>1</sup> *Rockwood v. Wilson*, 11 Cush. 221.

<sup>2</sup> *Woodruff v. Fisher*, 17 Barb. 224; *Hartwell v. Armstrong*, 19 Barb. 166.

<sup>3</sup> *Vanderweile v. Taylor*, 65 N. Y. 341.

<sup>4</sup> *Domat's Civil Law*, 616.

<sup>5</sup> See *McCormick v. R. R. Co.*, 70 Mo. 359; 35 Am. Rep. 431; *McShane v. R. R. Co.*, 71 Mo. 237; 36 Am. Rep. 480.

<sup>6</sup> See *McCormick v. R. R. Co.*, 57 Mo. 433; *Mimkers v. R. R. Co.*, 72 Mo. 514.

<sup>7</sup> *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213.

<sup>8</sup> *Butler v. Peck*, 16 Ohio St. 334; 88 Am. Dec. 452; *Tootle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732.

<sup>9</sup> *Barrow v. Landry*, 15 La. Ann. 681; 77 Am. Dec. 199; *Martin v. Jett*, 12 La. 502; 32 Am. Dec. 120; *Hooper v. Wilkinson*, 15 La. Ann. 497; *Minor v. Wright*, 16 La. Ann. 151; 77 Am. Dec. 194; *Lattimore v. Davis*, 14 La. 161; 33 Am. Dec. 581; *Delahoussaye*

*v. Judice*, 13 La. Ann. 587; 71 Am. Dec. 521.

<sup>10</sup> *Porter v. Dunham*, 74 N. C. 769; *Raleigh etc. R. R. Co. v. Wickes*, 74 N. C. 220; *Overton v. Sawyer*, 1 Jones, 308; 62 Am. Dec. 170.

<sup>11</sup> *Gillham v. R. R. Co.*, 49 Ill. 484; *Laney v. Jaspar*, 39 Ill. 46; *Jacksonville etc. R. R. Co. v. Cox*, 91 Ill. 500; *City of Aurora v. Reed*, 57 Ill. 1; 11 Am. Rep. 1; *Gormley v. Sandford*, 52 Ill. 158, the court saying: "In our judgment, the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural watercourse, fed by remote springs, applies with equal force to the obstruction of a natural channel through which the surface-waters derived from the rain or snow falling on such field are wont to flow. What difference does it make, in principle, whether the water comes directly upon the field from the clouds above, or has fallen upon re-

Pennsylvania,<sup>1</sup> and Alabama.<sup>2</sup> In Iowa it has been held that if a ditch made by the defendant for the purpose of draining his lands, and which terminated within sixty feet of the line of the plaintiff's, had the effect to increase the quantity of water on the plaintiff's land to his injury, or, without increasing it, threw the water upon the land in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant would be liable for the injury, even though the ditch was constructed by the defendant in the course of the ordinary use and improvement of his farm.<sup>3</sup> In Wisconsin it has been decided that the owner of land on which there is a pond or reservoir of surface-water cannot lawfully discharge it through an artificial channel upon the land of another, or so near it that it will flow over upon such land to its injury.<sup>4</sup> In New Hampshire a land-owner may, in the reasonable use of his own land, lawfully prevent the flow of surface-water on his premises from the adjacent higher land of another, although such adjacent land is thereby injured; and the fact that such water has been wont to flow upon the inferior land for over twenty years will not amount to a prescription.<sup>5</sup> And a similar rule

mote hills, and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface-waters and running streams furnish no satisfactory reason for the distinction."

<sup>1</sup> *Kauffman v. Griesemer*, 26 Pa. St. 407; 67 Am. Dec. 437; *Miller v. Laubach*, 47 Pa. St. 154; 86 Am. Dec. 521; *Hays v. Hinkleman*, 68 Pa. St. 324; *Bentz v. Armstrong*, 8 Watts & S. 40; 42 Am. Dec. 265; *Martin v. Riddle*, 26 Pa. St. 415, the court saying: "When two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances. Hence the owner of the lower ground has no right to erect embankments whereby

the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of the water is diverted from its natural channel and a new channel made on the lower ground; nor can he collect waters usually flowing off into his neighbor's field by several channels, and thus increase the rush upon the lower fields."

<sup>2</sup> *Hughes v. Anderson*, 68 Ala. 280; 44 Am. Rep. 147; *Nininger v. Norwood*, 72 Ala. 277; 47 Am. Rep. 412.

<sup>3</sup> *Livingston v. Macdonald*, 21 Iowa, 160; 89 Am. Dec. 563.

<sup>4</sup> *Pettigrew v. Village of Evansville*, 25 Wis. 223; 3 Am. Rep. 50. But see *Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473.

<sup>5</sup> *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Bassett v. Salisbury Co.*, 43 N. H. 569; 82 Am. Dec. 179.

obtains in Vermont.<sup>1</sup> The rule is modified in its application to city lots as distinguished from agricultural districts. "Such lots are used only for building, and the owners must be permitted to improve them for building purposes. The owner of a lower lot who desires to build must be permitted to fill it up, to ditch it, to construct walls, or to build his house so as to protect his lot against the surface-water of the adjoining lot. If he thus prevents the flow of the surface-water upon his lot, the owner of the higher lot has no cause of action against him."<sup>2</sup> A railroad company may not be allowed, by building its roadway across a natural drainage of surface-water, to obstruct the customary flow to the detriment of upper proprietors, but must supply reasonable means of passing it through the road-bed, so as to save the upper proprietors harmless to the same extent as before.<sup>3</sup>

§ 2945. **Subterranean Waters — Wells.**—If one, by excavating on his own land, draws off the subterraneous waters of his neighbor to his damage, no action lies for the damage.<sup>4</sup> Thus if a well dug by one man ruins the well or spring of his neighbor by drawing off the water, it is *damnum absque injuria*.<sup>5</sup> "The percolating water belongs to the owner of the land as much as the land itself, or the rocks and stones in it; therefore, he may dig a well, and make it very large, and draw up the water, by machinery or otherwise, in such quantities as to supply aque-

<sup>1</sup> *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693; *Chatfield v. Wilson*, 28 Vt. 49.

<sup>2</sup> *Vanderweile v. Taylor*, 65 N. Y. 341.

<sup>3</sup> *Little Rock etc. R. R. Co. v. Chapman*, 39 Ark. 463; 43 Am. Rep. 280.

<sup>4</sup> *Acton v. Blundell*, 12 Mees. & W. 324; *Phelps v. Nolan*, 72 N. Y. 39; 28 Am. Dec. 93; *Ocean Grove Camp Meeting Ass'n v. Asbury Park Comm'rs*, 40 N. J. Eq. 447.

<sup>5</sup> *Wheatley v. Baugh*, 25 Pa. St. 578; 64 Am. Dec. 721; *Haldeman v. Bruck-*

*hart*, 45 Pa. St. 514; 84 Am. Dec. 511; *Greenleaf v. Francis*, 18 Pick. 117; *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352; *Morrison v. R. R. Co.*, 67 Me. 353; *Chase v. Silverstone*, 62 Me. 175; 16 Am. Rep. 419; *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conroe*, 38 Vt. 469; *New Albany etc. R. R. Co. v. Peterson*, 14 Ind. 112; 77 Am. Dec. 60; *Frazier v. Brown*, 12 Ohio St. 294; *Brown v. Illius*, 25 Conn. 594; 27 Conn. 94; 71 Am. Dec. 49; *Bloodgood v. Ayres*, 37 Hun, 356; *Delhi v. Youmans*, 45 N. Y. 362; 6 Am. Rep. 100.

ducts for a large neighborhood. He may thus take the water which would otherwise pass by natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land."<sup>1</sup> The doctrine of prescription, or presumption of a grant from lapse of time, is not applicable to the case of underground waters percolating through the earth.<sup>2</sup> As respects such waters, no rights are gained, since no one can be presumed to have granted that of the existence of which he must have been ignorant.<sup>3</sup> But where one, by unnecessary excavations upon his own lands, without interfering with any known watercourses, withdraws water from his neighbor's spring or well by percolation, he is liable for the injury, if his acts are in derogation of a grant between the parties, or in violation of a covenant contained therein.<sup>4</sup> And the general doctrine as to underground percolating water is limited to this extent, that he may not thus indirectly destroy or diminish the flow of a natural surface stream to the injury of a riparian owner thereof.<sup>5</sup> And an underground stream, the existence of which as well as its source of supply being known, and having an open outlet, is a watercourse, as much as though it was on the surface. But if its source is not known, the owner of the land may use it in any way he pleases, and if in doing so he taps the spring from which it originates, no action lies. The spring is cut off before it reaches the surface, but if it has reached the surface and discharges itself in a definite channel over it, the owner

<sup>1</sup> *Wilson v. New Bedford*, 108 Mass. 265; 11 Am. Rep. 352; *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299.

<sup>2</sup> *Chasemore v. Richards*, 7 H. L. Cas. 349; *Broadbent v. Ramsbotham*, 11 Ex. 602; *Greenleaf v. Francis*, 18 Pick. 122; *Frazier v. Brown*, 12 Ohio St. 311; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721.

<sup>3</sup> *Smith v. Kenrick*, 7 Com. B. 546;

*Roath v. Driscoll*, 20 Conn. 541; 52 Am. Dec. 352.

<sup>4</sup> *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16; 25 Am. Rep. 125; *Chealey v. King*, 74 Me. 164; 43 Am. Rep. 569.

<sup>5</sup> *City of Emporia v. Soden*, 25 Kan. 538; 37 Am. Rep. 265; *Strait v. Brown*, 16 Nev. 317; 40 Am. Rep. 497; *Burroughs v. Satterlee*, 67 Iowa, 396; 56 Am. Rep. 350.

of the land has no right to interfere therewith.<sup>1</sup> Where subterranean water emerges, and afterward sinks and re-emerges, if its entire exact course can be traced, the proprietor of the land at the latter point will be protected against a diversion of the water.<sup>2</sup>

§ 2946. **Injuries by Escape of Water — In General.** — In a leading case in New York,<sup>3</sup> the American law on this subject is thus stated: "If one builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way, and the lands of a neighbor are thus flooded, he is not liable for the damage, without proof of some fault or negligence on his part."<sup>4</sup> This rule is supported by the large majority of the decided cases in this country, which hold that where water is collected in reservoirs, behind dams, or in canals or ditches, in the ordinary manner, for the purpose of being used as a motive power, in navigation, in irrigation, or in mines, because there is nothing unlawful in collecting water for such purposes, if it escapes and does mischief, the person so collecting it can only be held liable on the ground of something unlawful in the manner in which he has built or maintained his structure.<sup>5</sup> For damages resulting from

<sup>1</sup> Dudden v. Guardians etc., 1 Hurl. & N. 630; Haldeman v. Bruckhart, 45 Pa. St. 514; 84 Am. Dec. 511; Dickinson v. Canal Co., 7 Ex. 282; Burroughs v. Satterlee, 67 Iowa, 396; 56 Am. Dec. 350; Cross v. Kitts, 69 Cal. 217; 58 Am. Dec. 558; Wheatley v. Baugh, 25 Pa. St. 528; 64 Am. Dec. 721.  
<sup>2</sup> Saddler v. Lee, 66 Ga. 45; 42 Am. Rep. 62.

<sup>3</sup> Losee v. Buchanan, 51 N. Y. 476; 10 Am. Rep. 623.

<sup>4</sup> Citing Angell on Watercourses, sec. 336; Lapham v. Curtis, 5 Vt. 371; 26 Am. Dec. 310; Todd v. Cochell, 17 Cal. 97; Everett v. Hydraulic etc. Co., 23 Cal. 225; Shrewsbury v. Smith, 12 Cush. 177; Livingston v. Adams, 8

Cow. 175; Bailey v. Mayor etc. of New York, 3 Hill, 531; 38 Am. Dec. 669; 2 Denio, 433; Pixley v. Clark, 35 N. Y. 520, 524; 91 Am. Dec. 72; Sheldon v. Sherman, 42 N. Y. 484; 1 Am. Rep. 559. See, as to the law of watercourses generally, *ante*, Title Easements.

<sup>5</sup> Lehigh Bridge Co. v. Lehigh Coal Co., 4 Rawle, 9; 26 Am. Dec. 111; Bell v. McClintock, 9 Watts, 120; 34 Am. Dec. 507; Campbell v. Bear River Co., 35 Cal. 679; Shrewsbury v. Smith, 12 Cush. 177; China v. Southwick, 12 Me. 238; Everett v. Hydraulic Flume Tunnel Co., 23 Cal. 225; Hoffman v. Tuolumne Water Co., 10 Cal. 413; Wolf v. St. Louis etc. Water Co.,

extraordinary floods, or any causes over which he had no control, and which he could not reasonably have expected, he is not responsible;<sup>1</sup> while, on the other hand, if the water escaped in consequence of his reservoir being improperly constructed, or not kept in proper repair, or because he did not use due diligence in preventing the escape or in guarding against it, he will be liable.<sup>2</sup> So

10 Cal. 541; *Lapham v. Curtis*, 5 Vt. 371; 26 Am. Dec. 310; *Higgins v. Chesapeake etc. Canal Co.*, 3 Harr. (Del.) 411; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457; *Tenney v. Miners' Ditch Co.*, 7 Cal. 336; *Richardson v. Kier*, 34 Cal. 63; 91 Am. Dec. 681; *Jones v. Robertson*, 116 Ill. 543; 56 Am. Rep. 786.

<sup>1</sup> *Livingston v. Adams*, 8 Cow. 175; *Everett v. Hydraulic etc. Co.*, 23 Cal. 225; *China v. Southwick*, 12 Me. 238.

<sup>2</sup> *Pollett v. Long*, 56 N. Y. 200. The rule in England laid down in the leading and much-discussed case of *Fletcher v. Rylands* is more strict: 3 Hurl. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. Cas. 330. And see *Hurdman v. R. R. Co.*, 3 C. P. Div. 168; *Cattle v. Stockton Water Works*, L. R. 10 Q. B. 453. In this case it was laid down that where the owner of land, without willfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbor, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal willfulness or negligence, he will be liable in damages for any mischief thereby occasioned. "If a person," as Lord Cranworth, delivering the opinion of the house of lords, tersely puts it,—"if a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." In *Fletcher v. Rylands*, the plaintiff was the lessee

of mines. The defendant was the owner of a mill standing on land adjoining that under which the mines were worked; and desiring to construct a reservoir, he employed competent persons—an engineer and a contractor—to construct it. The plaintiff had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts, which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts; and shortly after water had been introduced into the reservoir, it broke through some of the shafts, flowed through the old passage, and flooded the plaintiff's mine. The house of lords, affirming the judgment of the exchequer chamber, held that the defendant was liable for the damage. And see *Fletcher v. Smith*, L. R. 7 Ex. 305; 2 App. Cas. 781. But to the rule laid down in *Fletcher v. Rylands*, as to the escape of water, the English courts have in subsequent cases determined that there are exceptions. The first of these exceptions is, that if the water is set loose by the act of God, or *vis major*, the party is not responsible. In *Nichols v. Marshland*, L. R. 10 Ex. 255, 2 Ex. Div. 1, it appeared that on the defendant's lands were some ornamental pools containing large quantities of water. These pools had been formed by damming up with artificial banks a natural stream, which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in

in releasing water which one has accumulated, he is liable

the pools to swell, so that the artificial banks were carried away by the pressure, and the water in the pools, being thus suddenly let loose, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the maintenance or construction of the pools, and that the flood was so great that it could not reasonably have been anticipated; though if it had been anticipated, the effect might have been prevented. The court of appeals, affirming the judgment of the exchequer chamber, held that the defendant was not responsible. "It appears to us," said the court, "that we have two questions to consider: 1. The question of law, which was left undecided in *Rylands v. Fletcher*: Can the defendant excuse herself by showing that the escape of the water was owing to *vis major*, or, as it is termed in the law-books, the act of God? And 2. If she can, did she in fact make out that the escape was so occasioned? Now, with respect to the first question, the ordinary rule of law is, that, when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the king's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making of a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned

by the act of the party, without more, as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbor, the case of *Rylands v. Fletcher*, L. R. 3 H. L. Cas. 330, establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands v. Fletcher*, L. R. 3 H. L. Cas. 330, in this, that it is not the act of the defendant in keeping this reservoir, — an act in itself lawful, — which alone leads to the escape of the water, and so renders wrongful that which, but for such escape, would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the queen's enemies were the real cause of its escaping, without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God. The remaining question is, Did the defendant make out that this escape of the water was owing to the act of God? Now, the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us, in substance, a finding that the escape of the water was

for any damages caused thereby, if he has not used due

owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before, and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature which she could not anticipate. In the late case of *Nugent v. Smith*, L. R. 1 Com. P. Div. 423, we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it. It was, indeed, ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow." Another exception to the rule in *Fletcher v. Rylands* arises where the water causing the damage is released, not by the act of the defendant, but by that of a third person over whom the defendant has no control. In *Box v. Jubb*, L. R. 4 Ex. Div. 76, the defendants were the owners of a reservoir which was supplied with water from a main drain, not their property, which flowed by it. There were sluice-gates properly constructed between the reservoir and main drain at both the inlet and outlet. Owing to an obstruction in the main drain at a point below the defendants' reservoir, caused by a third party over whom the defendants had no control, and without their knowledge, the water in the drain forced open the sluice-gates and caused the reservoir to overflow on the plaintiff's land. It was attempted to bring the case within the rule in *Rylands v. Fletcher*, but the court held that the defendants

were not liable for the damages caused by the overflow. The defendants, said the court, had been in possession of this reservoir and the communications between it and the main drain for a number of years; there was no defect in their construction; moreover, the case finds that the inlet and outlet were furnished with proper doors. The question is, What was the cause of the overflow? was it anything for which the defendants were responsible? was there any act or default of theirs? Now, it is found by the case that the obstruction was caused by circumstances over which the defendants had no control, namely, by the act of a third party. I care not whether it is called *vis major*, or a wrongful act of a third party. Then, it is contended that the defendants ought to have anticipated the possibility of such a vast quantity of water pressing on these gates; but the case does not find that any amount of strengthening in the gates could have resisted the great pressure suddenly brought to bear on them. I am of opinion, for these reasons, that the defendants are entitled to our judgment. *Fletcher v. Rylands* has been criticised in several American cases (*Garland v. Towne*, 55 N. H. 57; *Marshall v. Wellwood*, 38 N. J. L. 339; 20 Am. Rep. 394; *Parrott v. Barney*, 2 Abb. 197; 1 Saw. 423; *Loose v. Buchanan*, 51 N. Y. 476; 10 Am. Rep. 623), and is contrary to the rule laid down in all the cases cited at the beginning of this section. Nevertheless, there are decisions in the American courts which adopt the stringent rule of that case. Thus in Minnesota, the defendants had dug a tunnel through Hennepin Island from a point above to a point below the Falls of St. Anthony. The water burst through it with great violence, tearing it away, and injuring property belonging to the plaintiff. It was held that the defendants were liable, irrespective of any proof of negligence or unskillfulness in the construction or maintenance of the tunnel; or of the fact that they did not own the soil through which it was dug; or that they were not the owners of the tun-

care in so releasing it.<sup>1</sup> But if the water has been unlawfully accumulated by him, he releases it at his peril, and is absolutely liable for all damage it may do.<sup>2</sup> The diligence required in all such cases is that of ordinary,<sup>3</sup> not extraordinary,<sup>4</sup> care.

§ 2947. **Water from Roofs.**—In protecting one's premises against falling water and snow, a person may construct eave-troughs or gutters upon his building to carry the water to his ground, and if he keeps them in proper order and is guilty of no negligence, the adjoining owner cannot make him liable for injuries arising from extraordinary or accidental circumstances.<sup>5</sup> But if the owner so constructs his roof and gutters as to cast water upon another's land, he is liable.<sup>6</sup> Where two buildings are so situated that the water from the roof of one can only be prevented from flowing against and injuring the other by an eaves-trough attached to both, though the consent and co-operation of the owner of the building receiving the injury may be necessary, yet the duty of affirmative action is on the owner of the other building, and he may not lie by and see the water from his roof destroy his neighbor's wall, and rely for his protection upon the passiveness of his neighbor.<sup>7</sup> The tenant of the lower portion of a building, the landlord reserving control over the roof, may maintain an action against the landlord for an injury to his goods, sustained by water descending upon

nel at the time of the injury: *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184; *St. Anthony Falls Water Power Co. v. Eastman*, 20 Minn. 277. In a Massachusetts case, where the defendants were held liable for an injury caused by the sliding of snow and ice from a roof, the court approves the rule laid down in *Fletcher v. Rylands*: *Shipley v. Fifty Associates*, 101 Mass. 251; 3 Am. Rep. 346.

<sup>1</sup> *Frye v. Moor*, 53 Me. 583.

<sup>2</sup> *Frye v. Moor*, 53 Me. 583.

<sup>3</sup> *Lapham v. Curtis*, 5 Vt. 371; 26

Am. Dec. 310; *Todd v. Cochell*, 17 Cal. 97; *Bailey v. New York*, 3 Hill, 531; *New York v. Bailey*, 2 Denio, 433.

<sup>4</sup> *Wolf v. St. Louis etc. Water Co.*, 10 Cal. 541; *Hoffman v. Tuolumne Water Co.*, 10 Cal. 413.

<sup>5</sup> *Underwood v. Waldron*, 33 Mich. 232; *Barry v. Peterson*, 48 Mich. 263.

<sup>6</sup> *Shipley v. Fifty Associates*, 106 Mass. 194; 8 Am. Rep. 318.

<sup>7</sup> *Underwood v. Waldron*, 33 Mich. 232.

them from the roof, if the injury happened through the negligence of the landlord in not keeping the roof in repair.<sup>1</sup>

**ILLUSTRATIONS.**—A permits his roof to throw water over the line between himself and B onto B's building to B's injury, when by gutters or conductors the injury could have been avoided. A is liable in damages: *Hazeltine v. Edgmand*, 35 Kan. 202; 57 Am. Rep. 157. The eaves of the defendant's building projected over plaintiff's lot, and over the wall of a building which he was erecting. On request, the defendant placed a tin conductor under the eaves, but it was found to be in the way as the wall rose, and the plaintiff removed it and cut the eaves back. The water from the roof drenched the wall in an unusual storm and caused it to fall. *Held*, 1. That formal notice of the removal of the conductor was not essential; 2. That it was not the plaintiff's duty to prevent the eaves-drip; 3. That the plaintiff was entitled to recover damages: *Copper v. Dolvin*, 68 Iowa, 757; 56 Am. Rep. 872.

**§ 2948. Water-pipes.**—One making a lawful use of water-pipes on his premises is not liable for injuries caused by their bursting, or by leakage from them, unless he is guilty of neglect or want of care.<sup>2</sup> The tenant of an upper floor of a building is not liable, in the absence of negligence, for damages caused by water escaping from his water-closet to the lower floor.<sup>3</sup> The tenant of the second floor of a building, not being guilty of negligence or malfeasance, is not responsible for damages caused to the tenant of the lower floor by water escaping from a reservoir of water, built upon the second floor, in consequence of its being suffered to get out of order.<sup>4</sup>

**§ 2949. Percolating Waters.**—One who accumulates water artificially on his own land is liable for injuries resulting to adjoining land from percolations through the

<sup>1</sup> *Toole v. Beckett*, 67 Me. 544; 24 Bosw. 591; 34 N. Y. 527; *Ortmayer v. Am. Rep. 54.* Johnson, 45 Ill. 469; *Schwab v. Cleveland*, 28 Hun, 458.

<sup>2</sup> *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Blyth v. Proprietors*, 11 Ex. 781; <sup>3</sup> *Ross v. Fedden*, L. R. 7 Q. B. 661. *Killion v. Power*, 51 Pa. St. 429; 91 <sup>4</sup> *Eakin v. Brown*, 1 E. D. Smith, Am. Dec. 127; *Moore v. Goedel*, 7 36.

soil, caused by the pressure of the accumulated mass, or from the obstruction, by that cause, of the natural passage of water through the soil.<sup>1</sup> So one who allows, by paving his yard, water to improperly accumulate on his premises, is liable for damages caused by its escaping in quantities upon his neighbor's land.<sup>2</sup> No person has the right to relieve his own land from standing water, or prevent its accumulation thereon, by discharging it through ditches or drains upon the land of his neighbor.<sup>3</sup> If one raises the water in a natural stream above its natural banks, and to prevent its overflow constructs artificial embankments, which nevertheless produce such a pressure upon the natural banks of the stream that percolation takes place upon the lands of an adjacent proprietor, an action will lie for the damage thus occasioned.<sup>4</sup>

<sup>1</sup> *Wilson v. New Bedford*, 108 Mass. 261; 11 Am. Rep. 352; *Monson etc. Co. v. Fuller*, 15 Pick. 554; *Quinn v. R. R. Co.*, 63 Iowa, 510.

<sup>2</sup> *Jutte v. Hughes*, 67 N. Y. 267.

<sup>3</sup> *Bellows v. Sackett*, 15 Barb. 96; *Foot v. Bronson*, 4 Lans. 47.

<sup>4</sup> *Pixley v. Clark*, 35 N. Y. 520; 91 Am. Dec. 72; *Emporia v. Soden*, 25 Kan. 588; 37 Am. Rep. 265; *Morse v. Marshall*, 13 Allen, 290; *Wilson v. New Bedford*, 108 Mass. 261; 11 Am. Rep. 352.

## CHAPTER CXXXVII.

## POLLUTION OF WATERS.

- § 2950. Pollution of waters — Rights of riparian proprietors — In general.
- § 2951. What pollution of water is actionable.
- § 2952. When pollution not actionable — Reasonable use.
- § 2953. When pollution will be enjoined.
- § 2954. Right to pollute — By grant, license, or prescription.
- § 2955. Other defenses.
- § 2956. Cess-pools — Sewers — Filthy percolations.

§ 2950. **Pollution of Waters — Rights of Riparian Proprietors — In General.** — A riparian owner is entitled to have the water come to him in its natural purity as well as in its natural quantity.<sup>1</sup> "Every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or corruption. The right extends to the quality, as well as to the quantity, of the water. If, therefore, an adjoining proprietor corrupts the water, an action upon the case lies for the injury."<sup>2</sup> A landlord is liable for the acts of his tenant in polluting a natural watercourse running through the premises, by discharging sink-water therein, if the building leased is intended to be used in the manner complained of, whether he retains control over the house or not.<sup>3</sup> That the stream is a navigable one does not prevent a recovery.<sup>4</sup> Nor can the legislature authorize the use of the water so as to make it unfit for

<sup>1</sup> Wood v. Waud, 3 Ex. 748; Gladfelter v. Walker, 40 Md. 1; Gardner v. Newburgh, 2 Johns. Ch. 162; 7 Am. Dec. 526; Merrifield v. Lombard, 13 Allen, 16; 90 Am. Dec. 172; Richmond Mfg. Co. v. Atlantic Co., 10 R. I. 106; 14 Am. Rep. 658.

<sup>2</sup> Holsman v. Boiling Spring Co., 14 N. J. Eq. 335; Richmond Mfg. Co. v. Atlantic Co., 10 R. I. 106; 14 Am. Rep. 658; Dwight Printing Co. v.

Boston, 122 Mass. 583; Lewis v. Stein, 16 Ala. 214; 50 Am. Dec. 177; Baltimore v. Warren Mfg. Co., 59 Md. 96; Greene v. Nunnemacher, 36 Wis. 50.

<sup>3</sup> Jackman v. Arlington Mills, 137 Mass. 277.

<sup>4</sup> Conservators of Thames v. Mayor, 12 L. T., N. S., 667; Watson v. Toronto Gas Co., 4 U. C. Q. B. 158; Philadelphia v. Gilmartin, 71 Pa. St. 140; Philadelphia v. Collins, 68 Pa. St. 120.

riparian owners without compensation, and such an authority will be of no avail to the defendant.<sup>1</sup>

§ 2951. **What Pollution of Water is Actionable.**—The pollution of water, to be actionable, is such as imparts to it such impurities as substantially impair its value for the ordinary purposes of life;<sup>2</sup> or such as cause unwholesome or offensive vapors or odors to arise from the water;<sup>3</sup> or such as, while producing no actual sensible effect upon the water, are yet of a character calculated to disgust the senses, such as the deposit of the carcasses of dead animals therein;<sup>4</sup> or the erection of privies over a stream;<sup>5</sup> or any other use calculated to produce disgust or sickness in those using the water for the ordinary purposes of life;<sup>6</sup> or such as impair its value for manufacturing purposes.<sup>7</sup>

ILLUSTRATIONS. — A throws a dead dog into a stream, which pollutes it so that the family and animals of B and lower proprietor cannot drink from it, as they have been accustomed. *Held*, that A is liable to an action: *Vedder v. Vedder*, 1 Denio, 257. The plaintiff had built several ponds for hatching and rearing trout, in a stream running through his land. The defendant dug a sewer to the stream and discharged sewage into it, whereby the trout were killed. *Held*, that the defendant would be restrained from discharging the sewage into the stream: *Seaman v. Lee*, 10 Hun, 607. The roots of a tree run into and pollute a well on the lands of an adjoining owner. *Held*, that the latter may have an action for the damage after refusal of the owner of the tree to abate the nuisance: *Buckingham v. Elliott*, 62 Miss. 296; 52 Am. Rep. 188. Defendant owned a saw-mill and other mills upon a stream above plain-

<sup>1</sup> *Carhart v. Auburn Gas Co.*, 22 Barb. 297; *Hudson etc. R. R. Co. v. Loeb*, 7 Rob. (N. Y.) 418.

<sup>2</sup> *Millar v. Marshall*, 5 Mur. 28; *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401; 27 Am. Rep. 711; *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. St. 302; 39 Am. Rep. 785; *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412; 40 Am. Rep. 118; *Red River Mills v. Wright*, 30 Minn. 249; 44 Am. Rep. 194; *Jate v. Parrish*, 7 T. B. Mon. 325.

<sup>3</sup> *Goldsmid v. Tunbridge Wells Imp. Co.*, L. R. 1 Ch. App. 349; *Woodyear*

*v. Schaefer*, 57 Md. 1; 40 Am. Rep. 419; *Butterfoss v. State*, 40 N. J. Eq. 325.

<sup>4</sup> *Vedder v. Vedder*, 1 Denio, 257; *State v. Buckman*, 8 N. H. 203; 29 Am. Dec. 646.

<sup>5</sup> *Norton v. Scholefield*, 9 Mees. & W. 665.

<sup>6</sup> *Vedder v. Vedder*, 1 Denio, 257; *Hamilton v. Columbus*, 52 Ga. 435.

<sup>7</sup> *Carhart v. Auburn Gas Light Co.*, 22 Barb. 297; *Woodyear v. Schaefer*, 57 Md. 1; 40 Am. Rep. 419; *Housee v. Hammond*, 39 Barb. 89.

tiff's lands. During the winter he deposited upon the ice in the stream refuse matter from such mills, which, during a freshet, was floated onto plaintiff's lands, doing them great injury. *Held*, that the deposit of such refuse, without care or oversight, so that it could be floated onto plaintiff's lands, rendered defendant liable for the injury done to the land thereby: *Washburn v. Gilman*, 64 Me. 163; 18 Am. Rep. 246. The plaintiff owned a grist-mill and the defendant a tannery upon the same stream. The defendant's tannery was up the stream, and he discharged the tan-bark from his tan-works into the stream, which was swept down the stream into the plaintiff's mill-pond, filling his race, and clogging the wheel used to run the mill. *Held*, an actionable nuisance: *Thomas v. Brackney*, 17 Barb. 655. The plaintiff and defendant were owners of mills upon the same stream. The defendant had a flax-mill, and allowed flax-chives to escape into the stream and float down into the plaintiff's mill-pond, where they got into his race-way and interfered with his wheel. *Held*, actionable: *O'Riley v. McChesney*, 3 Lans. 278. The defendant discharged the refuse of his tannery into the stream, whereby the water was rendered unfit for use by the plaintiff in his brewery. *Held*, actionable: *Howell v. McCoy*, 3 Rawle, 256. Plaintiff was a carpet manufacturer on a river. Defendants established their gas-works on the banks of the stream, and the refuse discharged therefrom, consisting of certain tarry and oily substances, became mingled with the water, and injured the wool and other materials used by them in the manufacture of their goods. *Held*, an actionable nuisance: *Carhart v. Auburn Gas Co.*, 22 Barb. 297. The plaintiffs were the proprietors of an upper, and the defendants of a lower, mill on a stream. The defendants discharged the refuse from their mill into the stream, polluting the water so that, when it reached the plaintiff's mill, it was greatly impaired in value for their use. *Held*, a nuisance, which would be enjoined: *Lingwood v. Stowmarket Co.*, L. R. 1 Eq. Cas. 77. The plaintiffs were carpet manufacturers on a river, and the defendants were proprietors of dye-works on the stream above. By discharging the refuse from their works into the stream they so polluted it as greatly to impair its value for use by the plaintiffs. *Held*, a nuisance, which would be restrained: *Crossley v. Lightowler*, L. R. 3 Eq. Cas. 279; L. R. 2 Ch. App. 478. A hydraulic mining company in operating its works discharges *débris* into a non-navigable stream. This *débris* was carried down into another navigable stream, so as materially to impede navigation, and to cause overflows and a deposit of *débris* on adjacent lands. *Held*, that an injunction should issue, in a proceeding instituted by the attorney-general in the name of the people, and that other persons or companies

contributing to the injury need not be joined: *People v. Gold Run Ditch etc. Co.*, 66 Cal. 138; 56 Am. Rep. 80. And see *Woodruff v. Gravel Co.*, 18 Fed. Rep. 753.

**§ 2952. When Pollution not Actionable—Reasonable Use.**—But in order to constitute the pollution a nuisance, there must be some actual right invaded; the mere fact that inconvenience is produced is not sufficient. The language of the judges to the effect that a riparian owner is entitled to have the water come to him in its natural state must be understood, says Cooley,<sup>1</sup> “merely as strong and clear declarations of the general principle in cases in which it did not become necessary to consider how far there might be exceptions, or how far one might be at liberty to complain of insignificant injuries which still left the stream to flow on in the main as it did before.”<sup>2</sup> “The reasonableness of the use,” says Judge Redfield, “must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit which might be of no account in some streams might seriously affect the usefulness of others. So, too, a kind of deposit which would affect one stream seriously would be of little importance in another.”<sup>3</sup> Whether the discharge of the sawdust from

<sup>1</sup> Cooley on Torts, 588.

<sup>2</sup> *Jacobs v. Allard*, 42 Vt. 303; 1 Am. Rep. 331; *Snow v. Parsons*, 28 Vt. 459; 67 Am. Dec. 722.

<sup>3</sup> *Snow v. Parsons*, 28 Vt. 459; 67 Am. Dec. 722; *Hayes v. Waldron*, 44 N. H. 580; 84 Am. Dec. 105; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445; *Canfield v. Andrews*, 54 Vt. 1; 41 Am. Rep. 828; *Jacobs v. Allard*, 42 Vt. 303; 1 Am. Rep. 331. In *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, it was held that a city was liable for polluting a stream by the flow from its sewers, provided it was attribut-

able to the improper construction or unreasonable use of the sewers, or to negligence or other fault in the care or management of them; the court saying that “the natural right of the plaintiff to have the water descend to him in its pure state, fit to be used for the various purposes to which he may have occasion to apply it, must yield to the equal right of those who happen to be above him. Their use of the stream for mill purposes, for irrigation, watering cattle, and the manifold purposes for which they may lawfully use it, will tend to render the water more or less impure. Cul-

a saw-mill into a running stream on which the mill stands constitutes an actionable nuisance or not, depends upon the question whether such use is reasonable or not, in view of all the circumstances, and is for the jury.<sup>1</sup> Where the water has been given up to manufacturing or other uses, so as to be wholly unfit for domestic use, the riparian owners cannot predicate a claim for damages upon the ground that it might be used for some extraordinary purpose to which it has never been applied, and to which they have no intention of applying it.<sup>2</sup> In an action by a lower against an upper riparian owner on a stream for fouling the stream by means of a hog-yard, and depriving him of its use for domestic purposes, an instruction that if the stream in its natural state was more useful to all the owners for stock purposes than for ordinary domestic uses, the upper owner had a right reasonably so to use it in spite of the injury complained of, was held correct.<sup>3</sup>

**§ 2953. When Pollution will be Enjoined.** — When the violation of the right is continuous, so as to operate as a constantly recurring grievance, and when an injunction will tend to restore the plaintiff to his former position, an injunction will be granted to restrain the nuisance, even though no actual damage ensues.<sup>4</sup> Where several riparian owners, acting independently, discharge refuse

tivating and fertilizing the lands bordering on the streams, and in which are its sources, their occupation by farm-houses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided, and their occupation and use become multifarious, these causes will be rendered more operative and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from the reasonable use of the stream in accordance with the common right, the

lower riparian proprietor has no remedy."

<sup>1</sup> *Prentice v. Geiger*, 74 N. Y. 341.

<sup>2</sup> *Wood on Nuisances*, 515.

<sup>3</sup> *Hazeltine v. Case*, 46 Wis. 391; 32 Am. Rep. 715.

<sup>4</sup> *Wood on Nuisances*, 510; *Wilts v. Swindon Water Works*, L. R. 9 Ch. App. 451; *Goodson v. Richardson*, L. R. 9 Ch. App. 224; *Holman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Richmond Mfg. Co. v. Atlantic De Laine Co.*, 10 R. I. 106; 14 Am. Rep. 658; *Merrifield v. Lombard*, 13 Allen, 16; 90 Am. Dec. 172.

from their mills into a stream, to the injury of a lower proprietor, an injunction may issue in a suit against all, and before any action at law.<sup>1</sup>

**§ 2954. Right to Pollute—By Grant, License, or Prescription.**—The defendant may acquire a right to pollute the water by license or grant.<sup>2</sup> So one who has consented that a village may discharge its sewage on his land cannot maintain an action against the village for damages sustained.<sup>3</sup> So one may, by twenty years' user in a particular manner, acquire the right to pollute the water of a stream.<sup>4</sup> But nevertheless, for an excess of such user an action will lie.<sup>5</sup> Thus in an English case, the plaintiff was granted an injunction to restrain the discharge of the sewage of a town into a stream that ran through his premises, because of the increase of the pollution of the water, arising from an increase of the sewage, in consequence of the increase in the population of the town.<sup>6</sup> But the use may be changed, provided the change in use does not increase the pollution, or produce other or different damage from that under which the right has been acquired.<sup>7</sup>

**§ 2955. Other Defenses.**—It has been held no defense or excuse that public convenience, or even the public health, requires that the sewage of a town shall be discharged into a running stream, or that the people in the

<sup>1</sup> Lockwood Co. v. Lawrence, 77 Me. 297; 52 Am. Rep. 763.

<sup>2</sup> Carlyon v. Lovering, 1 Hurl. & N. 784. An easement may be acquired by prescription by which the water collecting upon the lands of one person must be allowed to overflow the lands of an adjacent proprietor: Gregory v. Bush, 64 Mich. 37; 8 Am. St. Rep. 797.

<sup>3</sup> Searing v. Saratoga Springs, 39 Hun. 307.

<sup>4</sup> Merrifield v. Lombard, 13 Allen, 16; 90 Am. Dec. 172; Jones v. Crow, 32 Pa. St. 398; Hayes v. Waldron, 44 N. H. 585; 84 Am. Dec. 105. See

Crosby v. Bessey, 49 Me. 539; 77 Am. Dec. 271.

<sup>5</sup> Crossley v. Lightowler, L. R. 3 Eq. Cas. 279; L. R. 2 Ch. App. 478; Murgatroyd v. Robinson, 7 El. & B. 391; Hayes v. Waldron, 44 N. H. 585; 84 Am. Dec. 105; Jones v. Crow, 32 Pa. St. 398; Moore v. Webb, 1 Com. B., N. S., 673; Millar v. Marshall, 5 Mur. 32; Carlyon v. Lovering, 1 Hurl. & N. 784; Lewis v. Stein, 16 Ala. 214; 50 Am. Dec. 177.

<sup>6</sup> Goldsmid v. Tunbridge Wells Imp. Co., L. R. 1 Ch. App. 349.

<sup>7</sup> Baxendale v. McMurray, L. R. 2 Ch. App. 790.

town are many, and the riparian owners injured few in number;<sup>1</sup> nor that the expense to the defendant would be large, while to the plaintiff it could be obviated at a small expense;<sup>2</sup> nor that the works causing the pollution are a long distance from the premises of the plaintiff;<sup>3</sup> nor the usefulness of the works, their absolute necessity, nor the fact that they cannot be carried on without producing the result in question, nor the fact that the highest degree of care and skill is exercised to prevent injury;<sup>4</sup> nor that the foreign matter improves the water;<sup>5</sup> nor that the water was in some ways a benefit to the plaintiff;<sup>6</sup> nor that the nuisance was beneficial to the public;<sup>7</sup> nor that other persons are also contributing to the injury in the same way with the defendant.<sup>8</sup>

#### § 2956. Cess-pools — Sewers — Filthy Percolations.—

Every person who constructs a drain or cess-pool upon his own premises, and uses it for his own purposes, is bound to keep the filth collected there from becoming a nuisance to his neighbors.<sup>9</sup> If filthy matter from a privy or vault percolates through the soil of the adjacent premises, or breaks through into a neighbor's cellar or into his well, the proprietor is liable for the nuisance,<sup>10</sup> even with-

<sup>1</sup> *Attorney-General v. Colney Hatch Asylum*, L. R. 4 Ch. App. 147; *Attorney-General v. Leeds*, L. R. 5 Ch. App. 589.

<sup>2</sup> *Attorney-General v. Colney Hatch Asylum*, L. R. 4 Ch. App. 147; *Lockwood Co. v. Lawrence*, 77 Me. 297; 52 Am. Rep. 763.

<sup>3</sup> *Norton v. Scholesfield*, 9 Mees. & W. 665.

<sup>4</sup> *Wood on Nuisances*, 507.

<sup>5</sup> *Holsman v. Boiling Spring Co.*, 14 N. J. Eq. 335.

<sup>6</sup> *Gile v. Stevens*, 13 Gray, 146; *Francis v. Schoelkoff*, 53 N. Y. 152.

<sup>7</sup> *Stockfort Water Works Co. v. Potter*, 7 Hurl. & N. 160.

<sup>8</sup> *Woodyear v. Schaefer*, 57 Md. 1; 40 Am. Rep. 419; *Hill v. Smith*, 32 Cal. 166; *Crossley v. Lightowler*, L. R. 3 Eq. Cas. 279; *Holsman v. Boiling*

*Spring Co.*, 14 N. J. Eq. 335; *McKeon v. See*, 51 N. Y. 300; 10 Am. Rep. 659. But this may go in mitigation of damages: *Id.*

<sup>9</sup> *Marshall v. Cohen*, 44 Ga. 489; 9 Am. Rep. 170; *Alston v. Grant*, 3 El. & B. 128.

<sup>10</sup> *Tenant v. Goldwin*, 1 Salk. 360; *Baird v. Williamson*, 15 Com. B., N. S., 376; *Columbus Gas Co. v. Free-land*, 12 Ohio St. 392; *Marshall v. Cohen*, 44 Ga. 489; 9 Am. Rep. 170; *Tate v. Parrish*, 7 T. B. Mon. 325; *Greene v. Nunnemacher*, 36 Wis. 50; *Portstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Hough's Appeal*, 102 Pa. St. 442; 48 Am. Rep. 193. The erection of a cess-pool near a well so as to injure the water therein and impair its value is an actionable nuisance, and so is any noxious trade carried on

out proving actual negligence on his part,<sup>1</sup> and unless the escape was due to some sudden and unavoidable cause which he could not foresee.<sup>2</sup> One is liable for polluting water of his neighbor's well by negligently leaving noxious substances on his land, whether such substances are carried by the rain along the surface of the ground or by water spreading and diffusing itself according to natural laws under the surface so as to penetrate the adjoining land and thus reach the well.<sup>3</sup> But he is not liable where the noxious substances are carried by stream or currents, even when they are subterranean.<sup>4</sup> An occupier of premises whose sewage escapes into a neighbor's premises through his sewer being out of repair is liable for the damage.<sup>5</sup> So the throwing of bad-smelling slops and filth by defendant on plaintiff's premises gives a cause of action.<sup>6</sup>

**ILLUSTRATIONS.**—The owner of land laid it off into lots and streets, sewered the streets, and sold the lots with an easement in the sewers, retaining no control. The grantees and others connected their premises with the sewers and thus created a nuisance. *Held*, that the grantor was not liable therefor: *Moore v. Langdon*, 2 Mackey, 127; 47 Am. Rep. 262. The owner of a lot on a declivity had no control over property lying above his, on the same declivity, nor over the persons occupying it, and foul and offensive water was, without any fault of his, thrown upon the upper lot, which flowed naturally across his premises onto the lot below. *Held*, that he was not responsible to the owner of the lower lot for the damage resulting therefrom: *Brown v. McAllister*, 39 Cal. 573.

upon adjoining premises which impregnates the earth with noxious matter that destroys the water of a well: *Norton v. Scholefield*, 9 Mees. & W. 665.

<sup>1</sup> *Ball v. Nye*, 99 Mass. 582; 97 Am. Dec. 56. "To suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually, and to the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such circumstances the reasonable precau-

tion which the law requires is effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence."

<sup>2</sup> *Underwood v. Waldron*, 33 Mich. 232.

<sup>3</sup> *Brown v. Illius*, 27 Conn. 84; 71 Am. Dec. 49; *Gantry v. Leland*, 31 N. J. Eq. 38.

<sup>4</sup> *Id.*

<sup>5</sup> *Humphreys v. Cousins*, L. R. 2 Com. P. Div. 239; *Hawkesworth v. Thompson*, 98 Mass. 77; 93 Am. Dec. 137. But see *Wilson v. Newberry*, L. R. 7 Q. B. 31.

<sup>6</sup> *Beckley v. Skroh*, 19 Mo. App. 75.

## CHAPTER CXXXVIII.

FERRIES.<sup>1</sup>

§ 2957. Rights and liabilities as to.

§ 2958. Remedies for interference with.

§ 2957. **Rights and Liabilities as to.**—The right to set up a ferry to be used by the public for hire is at common law a franchise which cannot be exercised without a public grant.<sup>2</sup> It is an incorporeal hereditament.<sup>3</sup> A grant of a public ferry is not exclusive, but subject to such further grants as public convenience may require.<sup>4</sup> The franchise is subject to the control of the legislature, which may prevent the erection of a rival ferry or bridge within a certain fixed distance.<sup>5</sup> As the franchise consists in the right to transport persons, etc., for hire, the property in the waters may be in one, and the right of ferry

<sup>1</sup> As to ferry-men as common carriers, see Bailments.

<sup>2</sup> Binghamton Bridge Co., 3 Wall. 51; Bell v. Clegg, 25 Ark. 26; Chenango Bridge Co. v. Paige, 83 N. Y. 178; 38 Am. Rep. 407; Sullivan v. Lafayette County, 58 Miss. 790; Munroe v. Thomas, 5 Cal. 470; Laredo v. Martin, 52 Tex. 548; Day v. Stetson, 8 Me. 367; Haithcock v. Swift Island Mfg. Co., 72 N. C. 410; State v. Wilson, 42 Me. 9; McGowen v. Stark, 1 Nott & McC. 387; 9 Am. Dec. 713; Sullivan v. Supervisors, 58 Miss. 790. A presumption of a grant may be raised by prescription: Milton v. Haden, 32 Ala. 30; 70 Am. Dec. 323. Thirty years' use by the public of a river crossing authorizes the presumption of a grant: Hudson v. Cuero Land etc. Co., 47 Tex. 56; 26 Am. Rep. 289.

<sup>3</sup> Rees v. Lawless, Litt. Sel. Cas. 184; 12 Am. Dec. 295. *Aliter* in South Carolina: Morse v. Garner, 1 Strob. 514; 47 Am. Dec. 565. See Haynes v. Wells, 28 Ark. 464. And passes to the grantee's representatives:

Lippencott v. Allander, 27 Iowa, 460; 1 Am. Rep. 299. See Knott v. Ferry Co., 9 Or. 530. The state cannot deprive him thereof, except by a constitutional exercise of its power to use private property for public purposes: Bowman v. Wathen, 2 McLean, 376; Jeffersonville v. Louisville etc. Ferry Co., 27 Ind. 100; 89 Am. Dec. 495; Pipkin v. Wynns, 2 Dev. 402; Lippencott v. Allander, 27 Iowa, 460; 1 Am. Rep. 299.

<sup>4</sup> Bush v. Penn. etc. Co., 3 Ind. 21; Sullivan v. Lafayette Co., 58 Miss. 790; Boston etc. R. R. Co. v. R. R. Co., 2 Gray, 1. But *aliter*, where it is expressly or impliedly made exclusive: Montgomery v. R. R. Co., 11 Or. 344.

<sup>5</sup> Binghamton Bridge Co., 3 Wall. 51; Haynes v. Wells, 28 Ark. 464; Hudson v. Cuero Land etc. Co., 47 Tex. 56; 26 Am. Rep. 289; Chenango Bridge Co. v. Paige, 83 N. Y. 178; 38 Am. Rep. 407. And see Newburgh Turnp. Co. v. Miller, 5 Johns. Ch. 100; 9 Am. Dec. 274; Townsend v. Blemott, 6 Miss. 503.

in another,<sup>1</sup> or the right may be limited to operate from one side of a river only.<sup>2</sup> Although by statute in some states a preference is usually given, in granting a ferry franchise, to the riparian owner at the place in question, yet this is not a matter of absolute right by reason of such riparian ownership.<sup>3</sup> A person owning land on both sides of a fresh-water river may, without legislative authority, and even in defiance of legislative prohibition, maintain a ferry for his own use, providing he does not interfere with the public easement.<sup>4</sup> So one may lawfully transport his own goods or guests habitually in his own boat, where another has an exclusive right to ferry.<sup>5</sup> An exclusive right to maintain a ferry across a navigable river is not interfered with by one who uses the river as a highway for the conveyance of freight up and down.<sup>6</sup> If the proprietor of a ferry misuse or abuse the franchise, the government may repeal the grant and deprive him of it.<sup>7</sup> And the right to the franchise is held to be forfeited by an unreasonable delay in putting the ferry in use,<sup>8</sup> or in non-user for a length of time.<sup>9</sup> In view of the similarity between a ferry and a pontoon bridge, a legislative grant to one of the privilege of establishing the latter impliedly repeals a former grant to another of a privilege of establishing the former.<sup>10</sup>

<sup>1</sup> *Fay*, Petitioner, 15 Pick. 253; *State v. Wilson*, 42 Me. 9; *Mills v. County Comm'rs*, 3 Scam. 53; *Alexandria etc. Ferry Co. v. Wisch*, 73 Mo. 655; 39 Am. Rep. 535; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 38 Am. Rep. 407; *Peter v. Kendal*, 6 Barn. & C. 703. Compare *Pipkin v. Wynns*, 2 Dev. 402.

<sup>2</sup> *Power v. Athens*, 99 N. Y. 592.

<sup>3</sup> *Hudson v. Cuero Land etc. Co.*, 47 Tex. 56; 26 Am. Rep. 289.

<sup>4</sup> *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 38 Am. Rep. 407. A ferry-man is one who has an exclusive right to transport over a certain route at fixed rates. One who voluntarily runs a ferry-boat without any such

rights is not a ferry-man: *Clarke v. State*, 2 McCord, 47; 13 Am. Dec. 701.

<sup>5</sup> *Alexandria, Warsaw, and Keokuk Ferry Co. v. Wisch*, 73 Mo. 655; 39 Am. Rep. 535; *Hunter v. Moore*, 44 Ark. 184; 51 Am. Rep. 589.

<sup>6</sup> *Broadnax v. Baker*, 94 N. C. 675; 55 Am. Rep. 633.

<sup>7</sup> *Greenl. Cruise*, 65; *Peter v. Kendal*, 6 Barn. & C. 703.

<sup>8</sup> *Clarke v. Calloway*, 1 Sneed, 46; 2 Am. Dec. 706.

<sup>9</sup> *Smith v. Harkins*, 3 Ired. Eq. 613; 44 Am. Dec. 83.

<sup>10</sup> *Hudson v. Cuero Land etc. Co.*, 47 Tex. 56; 26 Am. Rep. 289.

§ 2958. **Remedies for Interference with.**—At common law, an action on the case will lie for the disturbance of or interference with a ferry,<sup>1</sup> as by erecting a new ferry so near an old one on the same stream as to draw away its custom,<sup>2</sup> or by obstructions in the river diminishing the profits of the ferry and subjecting the owner to increased labor and expense.<sup>3</sup> Sometimes statutory penalties are imposed for interfering with ferries, in which case they are considered as cumulative, and not to destroy the common-law remedies.<sup>4</sup> But any interference with a ferry franchise is a nuisance which will be prevented by injunction.<sup>5</sup> The clear gains of the defendant may be made the measure of damages.<sup>6</sup> The income derived by the plaintiff from tolls received in preceding years is relevant to show the value of the franchise.<sup>7</sup> Neither forcible entry and detainer, nor ejectment, will lie for wrongfully taking possession of a ferry.<sup>8</sup>

<sup>1</sup> *Ferry Co. v. Barker*, 2 Ex. 136; *Taylor v. R. R. Co.*, 4 Jones, 277; *Newport v. Taylor*, 16 B. Mon. 699.

<sup>2</sup> *Smith v. Harkins*, 3 Ired. Eq. 613; 44 Am. Dec. 83; *Norris v. Farmers' etc. Co.*, 6 Cal. 590; 65 Am. Dec. 535. There is no general rule of law prescribing the distance within which the keeper of a public ferry is secured against the establishment of any other public ferry: *O'Neill v. Caddo*, 21 La. Ann. 586.

<sup>3</sup> *Patrick v. Ruffners*, 2 Rob. (Va.) 209; 40 Am. Dec. 741; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 38 Am. Rep. 407; *Pittsburgh etc. R. Co. v. Jones*, 111 Pa. St. 204; 56 Am. Rep. 260.

<sup>4</sup> *Ward v. Severance*, 7 Cal. 126; *Newport v. Taylor*, 16 B. Mon. 779.

<sup>5</sup> *Ogden v. Gibbons*, 4 Johns. Ch. 160; *Ward v. Severance*, 7 Cal. 126;

*McRoberts v. Washburne*, 10 Minn. 23; *Collins v. Ewing*, 51 Ala. 101; *Newport v. Taylor*, 16 B. Mon. 781; *Midland etc. Co. v. Wilson*, 28 N. J. Eq. 537; *Newburgh Turnp. Co. v. Miller*, 5 Johns. Ch. 100; 9 Am. Dec. 274; *East Hartford v. Hartford Bridge Co.*, 16 Conn. 171; 10 How. 511; *McGowen v. Stark*, 1 Nott & McC. 387; 9 Am. Dec. 712; *Smith v. Harkins*, 3 Ired. Eq. 613; 44 Am. Dec. 83; *New York v. Longstreet*, 64 How. Pr. 30. Equity will not interfere to restrain one from maintaining a ferry without a license, at the instance of one having a license: *Levisay v. Delp*, 9 Baxt. 415.

<sup>6</sup> *McGowen v. Stark*, 1 Nott & McC. 387; 9 Am. Dec. 712.

<sup>7</sup> *Columbia D. B. Co. v. Geisse*, 38 N. J. L. 39.

<sup>8</sup> *Rees v. Lawless*, Litt. Sel. Cas. 184; 12 Am. Dec. 235.



**TITLE XXXI.**  
**NUISANCES.**



# TITLE XXXI.

## NUISANCES.

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### CHAPTER CXXXIX.

#### NUISANCES.

- § 2959. Nuisance defined — The different kinds of nuisances.
- § 2960. Use of property must be unlawful — Legislative legalization.
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**§ 2959. Nuisance Defined — The Different Kinds.**—A nuisance is "whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property."<sup>1</sup> Nuisances are either public, private, or mixed. A public nuisance is one which results from the violation of public rights; which have a common effect and injure one citizen no more than another.<sup>2</sup> These are punishable by indictment, and are not the subject of a civil action. A private nuisance is one which results from the violation of a private right; which injures one or a few persons, and

<sup>1</sup> *State v. Taylor*, 29 Ind. 517; *Hackney v. State*, 8 Ind. 494; *Norcross v. Thoms*, 51 Me. 503; 81 Am. Dec. 588. Nuisance is anything that worketh hurt, inconvenience, or damage to another: *Coker v. Birge*, 9 Ga. 425; 54 Am. Dec. 347. That a city ordinance declares a particular use of property a nuisance does not make it such unless it be a nuisance in fact: *Tissot v. G. S. Tel. Co.*, 39 La. Ann.

996; 4 Am. St. Rep. 248; *Ison v. Manley*, 76 Ga. 804. Municipal corporation may not declare that to be a nuisance which in fact is not, though it is by law empowered to declare what shall be a nuisance: *Des Plaines v. Poyer*, 123 Ill. 548; 5 Am. St. Rep. 524. But see *Brophy v. Hyatt*, 10 Col. 223; *St. Paul v. Gilfillan*, 36 Minn. 298.

<sup>2</sup> *King v. R. R. Co.*, 18 N. J. Eq. 397; *Works v. R. R. Co.*, 5 McLean, 425.

not the public at large. Here the special sufferers have a remedy in a civil action. Mixed nuisances are such as are both public and private in their effect: "public, in that they produce injury to many persons, or all the public; and private, because at the same time they produce a special and particular injury to private rights, which subjects the wrong-doer to indictment by the public, and to damages at the suit of persons injured. Of this class are obstructions placed in a highway, which produce a special injury to one person, by injuring his horse, carriage, or himself, while others of the public are only hindered, inconvenienced, or delayed. Also, establishments which, by reason of the nature of the business carried on, produce such noxious smells and vapors as to annoy the whole community, and at the same time are a special injury to those residing or doing business in their immediate vicinity, by rendering their houses untenable, or their enjoyment so uncomfortable that they sustain a special and particular damage apart from and beyond the rest of the public."<sup>1</sup> A complaint against a public nuisance, to form a basis of action, must allege a special damage peculiar to the plaintiff, and resulting from an injury of a different character from that suffered by the rest of the public.<sup>2</sup> And the requirement of proof of a common nuisance is not met by evidence that one peculiarly susceptible person suffered lead-poisoning from the existence of the lead-works charged to be a nuisance.<sup>3</sup>

**§ 2960. Use of Property must be Unlawful—Legislative Legalization.**—A nuisance arises always from an unlawful act; it cannot arise from a lawful one. While a person has a right to use and enjoy his own property as he chooses, this right is subject to the qualification that in so doing he must not interfere with the rights of others.

<sup>1</sup> Wood on Nuisances, 25.

<sup>2</sup> Price v. Grants, 118 Pa. St. 402; 4

<sup>3</sup> Clark v. R. R. Co., 70 Wis. 593; 5 Am. St. Rep. 601.  
Am. St. Rep. 187.

If he does so, then his use or enjoyment of his own becomes unlawful, and therefore a nuisance. Therefore, where the legislature authorizes an act to be done which would otherwise be a nuisance, the act is made lawful, and is not a nuisance, so far as the public are concerned, unless the power given by the legislature is exceeded.<sup>1</sup> For example, it would be a nuisance to carry fire through the streets of a city to the danger of the property situated thereon. But if the legislature grants a right—as in the case of railroads—to operate engines in the street, the use of fire is not a nuisance, unless it be negligently used.<sup>2</sup> So if a railroad is not built or operated negligently, and the charter authorizes the laying of the track on a street, the soot, obstructions, jarring, danger, etc., do not constitute a nuisance.<sup>3</sup> Works of internal improvement, erected by the state for the benefit of citizens at large, cannot be regarded as a public nuisance because they render the neighborhood unhealthy by obstructing running water and overflowing adjacent lands, and their character is not changed by placing them in the hands of a private corporation with a requirement that they be kept up for the purposes for which they were constructed.<sup>4</sup> The ringing of mill-bells at a certain hour having been enjoined as a nuisance, the legislature may authorize the ringing at that hour.<sup>5</sup> But for negligence in the carrying out of the particular work, or for acts outside the authority, the party is liable, and the legislative permission is no defense.<sup>6</sup> So if one do an act of itself lawful, which, being

<sup>1</sup> *Miller v. New York*, 109 U. S. 385; *Hinchman v. R. R. Co.*, 17 N. J. Eq. 75; 36 Am. Dec. 252; *Chope v. Plank Road Co.*, 37 Mich. 195; 26 Am. Rep. 512; *Leigh v. Westervelt*, 2 Duer, 618; *Williams v. R. R. Co.*, 18 Barb. 222; *Renwick v. Morris*, 7 Hill, 575. An injunction cannot be granted upon the ground of nuisance to restrain acts done in the lawful exercise of authority: *Masterson v. Short*, 3 Abb. Pr., N. S., 154; 33 How. Pr. 481. The state cannot prosecute as a nuisance

that which it has authorized: *People v. Detroit etc. Plank Road Co.*, 37 Mich. 195.

<sup>2</sup> See Title Personal Property—Fires.

<sup>3</sup> *Randle v. R. R. Co.*, 65 Mo. 325.

<sup>4</sup> *Commonwealth v. Reed*, 34 Pa. St. 275; 75 Am. Dec. 661.

<sup>5</sup> *Sawyer v. Davis*, 136 Mass. 239; 49 Am. Rep. 27.

<sup>6</sup> *Cogswell v. R. R. Co.*, 103 N. Y. 10; 56 Am. Rep. 6; *Ryan v. Copea*, 11 Rich. 217; 73 Am. Dec. 106; *Com.*

done in a particular place, necessarily tends to the damage of another's property, it is a nuisance.<sup>1</sup> Where a nuisance is a public one, no degree of care will relieve the person maintaining it from liability for injuries caused by it.<sup>2</sup>

**§ 2961. Injury must be Tangible — Diminution of Value of Property Insufficient.** — Mere diminution of value of adjoining property, or that it does not rent or will not sell as well, does not create an actionable nuisance. It is essential that the use is such as to work a tangible injury to the person or property of another, or to render the enjoyment of property essentially uncomfortable.<sup>3</sup> Thus it is not enough that it is offensive to the eye or the taste of a person,<sup>4</sup> or that, if by obstructing a view, or by presenting an ugly or unpleasant appearance, it may lessen the value of the adjoining property.<sup>5</sup> So the operation, by night and day, of a manufactory in a city will not be enjoined because residents are disturbed by its noise and vibration, unless a substantial and un-

*v. R. R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471; *Com. v. Kidder*, 107 Mass. 188; *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316; 56 Am. Rep. 201; *Givens v. Van Studdiford*, 86 Mo. 149; 56 Am. Rep. 421; *Quinn v. Lowell Electric Light Co.*, 140 Mass. 106. An act legalizing an existing nuisance in the street of a city is a mere license for its continuance, and is revocable at pleasure, where there is no consideration for it: *Reading v. Commonwealth*, 11 Pa. St. 196; 51 Am. Dec. 534.

<sup>1</sup> *Coker v. Birge*, 9 Ga. 425; 54 Am. Dec. 347.

<sup>2</sup> *McAndrews v. Collier*, 42 N. J. L. 189; 36 Am. Rep. 508.

<sup>3</sup> *Tipping v. St. Helen Smelting Co.*, 11 Jur. 785; *Gibson v. Douk*, 7 Mo. App. 37; *Sparhawk v. R. R. Co.*, 54 Pa. St. 401; *McKeon v. See*, 4 Robt. 449; 51 N. Y. 300; 10 Am. Rep. 659; *Bergein v. Anderson*, 28 Ind. 79; *Chatfield v. Wilson*, 28 Vt. 49; *Ryan v. Copes*, 11 Rich. 217; 73 Am. Dec. 106. Whether a thing is or is not a nuisance does not depend on the no-

tions of people living in a designated locality: *Owen v. Phillips*, 73 Ind. 284.

<sup>4</sup> The rule that equity will not enjoin against merely fanciful inconveniences, which do not interfere with the ordinary physical comfort of human existence, applied where a citizen sought to restrain an abutter on the same street from constructing a bay-window: *Blanchard v. Reyburn*, 10 Phila. 427. See *Sargent v. George*, 56 Vt. 627.

<sup>5</sup> *Wood on Nuisances*, 6; *Rhodes v. Dunbar*, 57 Pa. St. 274; 98 Am. Dec. 221. Matters that are an annoyance by being merely disagreeable or unsightly, as a well-kept butchers' shop, or a green-grocery, near a costly dwelling-house, or any other business that attracts crowds of orderly persons, or numbers of carts and carriages, are not nuisances, even should they affect seriously the value of the property by driving away tenants, and prevent its being let to any one who pays high rent: *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654.

justifiable nuisance is shown to exist.<sup>1</sup> The danger of explosion is not adequate cause for enjoining the erection of a gas manufactory, where the danger does not appear very great, and the complainant's buildings are not sufficiently near to be seriously endangered by one should it take place.<sup>2</sup>

The criterion for determining whether a court of equity will restrain by injunction an existing or threatened nuisance is, whether the nuisance complained of does or will produce such a condition of things as in the judgment of reasonable men is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as in view of the circumstances of the case is unreasonable and in derogation of the rights of the complainant.<sup>3</sup> Thus an injury to vegetation as by poisonous fumes or smoke is sufficient.<sup>4</sup> So is a use of premises that renders the enjoyment of life uncomfortable, though it does not injure property at all; as noises;<sup>5</sup> or noxious smells;<sup>6</sup> or apprehension of injury to persons, as from powder magazines or factories.<sup>7</sup> Equity will interfere, by injunction, to restrain a public nuisance which causes special damage to the property of individuals; e. g., to restrain the owner of an adjoining house from its contemplated use as a brothel.<sup>8</sup>

**§ 2962. Nuisance by Omission.** — A nuisance may arise by omission to perform a legal duty, as well as by

<sup>1</sup> *McCaffrey's Appeal*, 105 Pa. St. 253.

<sup>2</sup> *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201.

<sup>3</sup> *Dittman v. Repp*, 50 Md. 516; 33 Am. Rep. 325.

<sup>4</sup> *Tipping v. St. Helen Smelting Co.*, 4 Best & S. 608; *Campbell v. Seaman*, 63 N. Y. 568; 20 Am. Rep. 567.

<sup>5</sup> *Mulligan v. Elias*, 12 Abb. Pr., N. S., 29; *Brill v. Flagler*, 23 Wend. 354; *Elliottson v. Feetham*, 2 Bing. N. C. 134; *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254; *Dennis v. Eckhardt*, 3 Grant Cas. 390; *Allen v. Lloyd*, 4 Esp. 200.

<sup>6</sup> *Campbell v. Seaman*, 63 N. Y. 568; 20 Am. Rep. 567; *Pickard v. Collins*, 23 Barb. 444; *Catlin v. Valentine*, 9 Paige, 575; 38 Am. Dec. 567; *Walter v. Selfe*, 4 De Gex & S. 323.

<sup>7</sup> *Weir's Appeal*, 74 Pa. St. 230; *Cheatham v. Shearon*, 1 Swan, 213; *Myers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744; *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654; *McAndrews v. Collard*, 42 N. J. L. 189; 36 Am. Rep. 508; *Emory v. Hazard Powder Co.*, 22 S. C. 476; 53 Am. Rep. 730.

<sup>8</sup> *Hamilton v. Whitridge*, 11 Md. 128; 69 Am. Dec. 184.

commission of an illegal act. Thus it is an actionable nuisance to suffer one's buildings to remain in a dilapidated condition, whereby another's property is endangered;<sup>1</sup> or to let one's fence get out of repair;<sup>2</sup> or to leave the walls of a burned building standing in a perilous condition.<sup>3</sup>

**§ 2963. Damage Inferred from Proof of Legal Injury.**

—From an injury to a legal right, damage will be presumed.<sup>4</sup>

**§ 2964. Reasonable Use—As Depending on Situation of Property.**—What is a reasonable use of property depends upon the circumstances of the particular case. What would be a reasonable use of property in one locality would be a nuisance in another.<sup>5</sup> Certain occupations, deemed lawful and harmless in the country, may become nuisances in the city.<sup>6</sup> But the fact that the place is a manufacturing place does not justify an extraordinary use of property, introducing a serious annoyance, in addition to those arising from the ordinary uses of property there.<sup>7</sup> Whenever a locality loses its character as a place suitable for a place of residence, and becomes essentially a manufacturing neighborhood, where the business generally carried on is hostile to and

<sup>1</sup> *Center v. Davis*, 39 Ga. 260.

<sup>2</sup> *Rooth v. Wilson*, 1 Barn. & Adol. 59.

<sup>3</sup> *Church of Ascension v. Buckhart*, 3 Hill, 193.

<sup>4</sup> *Casebeer v. Mowry*, 55 Pa. St. 419; 93 Am. Dec. 766; *Fry v. Prentice*, 14 L. J., N. S., 298. See *ante*, Title Torts—*Damnum absque Injuria*.

<sup>5</sup> *Brady v. Weeks*, 3 Barb. 157; *Peck v. Elder*, 3 Sand. 126; *Walter v. Selfe*, 4 De Gex & S. 323; *Bamford v. Turnley*, 3 Best & S. 62; *Tipping v. St. Helen Smelting Co.*, 4 Best & S. 608; *Barnes v. Hathorn*, 54 Me. 124; *Dargan v. Waddill*, 9 Ired. 244; *Rhodes v. Dunbar*, 57 Pa. St. 274; 98 Am. Dec. 221; *Weir's Appeal*, 74 Pa. St. 230.

In deciding whether an act constitutes a nuisance or not, it is not necessary to inquire into the intention of the party doing the act: *Bonnell v. Smith*, 53 Iowa, 281.

<sup>6</sup> *Fowler v. Sanders*, Cro. Jac. 446; *Regina v. Wigg*, 2 Salk. 460; *Aldred's Case*, 9 Coke, 57 b; *Jones v. Powell*, Hut. 135; *Morley v. Pragnell*, Cro. Car. 410; *Rex v. White*, 1 Burr. 333; *Fish v. Dodge*, 4 Denio, 312; 47 Am. Dec. 254; *Meeker v. Van Rensselaer*, 15 Wend. 398; *First Baptist Church v. R. R. Co.*, 5 Barb. 79; *Hay v. Cohoes Co.*, 2 N. Y. 159; 51 Am. Dec. 279; *Whitney v. Bartholomew*, 21 Conn. 213.

<sup>7</sup> *Mulligan v. Elias*, 12 Abb. Pr., N. S., 259.

inconsistent with its use as a place of residence, a court of equity will not interfere to prevent the carrying on of the business of manufacturing, even though the trembling, motion, and noise thereby occasioned renders it impossible to use adjoining premises as a dwelling.<sup>1</sup>

ILLUSTRATIONS.—A and B occupied apartments in a class of building known as French flats, those of B being immediately over A's. B's child being sick and fretful at night, he was accustomed, whenever it could not be soothed to sleep in any other way, to draw it about in a small carriage, which was made to run over the carpet, having two small wheels and a movable caster. The noise caused by the running of this vehicle over the carpet annoyed A and his wife, who lived below, and he applied for an injunction to restrain the use of the baby-carriage, as being a nuisance. No more noise was made in running the carriage than was necessary. *Held*, that the injunction must be refused: *Pool v. Higginson*, 8 Daly, 113.<sup>2</sup>

§ 2965. **Statutory Rights and Wrongs.**—A use of property that at common law is held to be a nuisance does not cease to be so because the same act is made an offense by statute, and a different punishment provided;

<sup>1</sup> *Gilbert v. Showerman*, 2 Mich. N. P. 158; *Doellner v. Tynan*, 38 How. Pr. 176.

<sup>2</sup> The court saying: "If the rocking of a cradle, the wheeling of a carriage, the whirling of a sewing-machine, or the discord of ill-played music, disturb the inmates of an apartment-house, no relief by injunction can be obtained, unless the proof be clear that the noise is unreasonable, and made without due regard to the rights and comforts of other occupants. The situation of dwellers in apartments, whilst it has its advantages, must be in some respects less agreeable than that of those who occupy a whole house. They cannot expect the same quiet and repose. The man who lives in a hotel must not be surprised if roused from sleep by the heavy foot of some guest passing by his door at an unseasonable hour. Nor ought the plaintiff to have been surprised by the use of any ordinary means which the defendant might employ to lull

his sick child to sleep. No man has a right to such immunity from noise that a neighbor cannot stir in his own room. There is nothing in the affidavits to lead me to the conclusion that defendant, in having this carriage instead of a cradle, made use of his apartments, which, in view of the plaintiff's right to quiet and repose, was unreasonable. It is probable that a cradle swinging upon pivots in stationary standards would have answered the purpose as well as the carriage; and as it would make no noise, good neighborhood might suggest the use of it. As matter of law, however, if the defendant himself was taken sick, and obliged to walk the floor all night through pain, the plaintiff would have no right to insist that he should put on india-rubbers. As has been said, each case must stand by itself, and where people indulge their inclination to be gregarious, they must not expect the quietude that belongs to solitude."

the party creating the nuisance may be pursued under either the common-law or statutory remedy.<sup>1</sup> Where a statute creates certain rights, and imposes a penalty for their violation, the violation of such a right does not give a common-law remedy for a nuisance, but redress can only be had in the way provided for by the statute.<sup>2</sup> But when the statute creates a right, and provides no remedy for its violation, the violation of the right thus created will be regarded as a nuisance, and the party injured may have a remedy therefor as for a nuisance, either by action or otherwise.<sup>3</sup> A statute defining what are nuisances, and prescribing a remedy by action, does not take away any common-law remedy in the abatement of nuisances that the statute does not embrace.<sup>4</sup>

§ 2966. Nuisances *per se*—The Old Doctrine.—In early times, in England, the doctrine was that all trades and uses of property which, by experience, had been demonstrated to be of a noxious and hurtful character were nuisances *per se*.<sup>5</sup> Thus in the old cases the following have been held nuisances *per se*, viz.: A beer-house;<sup>6</sup> a privy;<sup>7</sup> a glass-house;<sup>8</sup> a tannery;<sup>9</sup> a tobacco-mill;<sup>10</sup> a swine-stye;<sup>11</sup> a lime-kiln;<sup>12</sup> a candle factory;<sup>13</sup> a smith's

<sup>1</sup> Wetmore v. Tracy, 14 Wend. 250; 28 Am. Dec. 525; People v. Sands, 1 Johns. 78; 3 Am. Dec. 296; Heeg v. Licht, 80 N. Y. 579; 36 Am. Rep. 654; Dygert v. Schenck, 23 Wend. 445; 35 Am. Dec. 575. Where a new offense is created by statute, and a penalty is given for its violation, the penalty or remedy is confined to that given by statute; but giving a superadded penalty for the erection or continuance of a nuisance does not take away the common-law right of the public to have it indicted and removed as such. Nor does it prevent its being abated in the usual way by individuals, at the peril of showing that it was a nuisance, and that they did no unnecessary damage in removing it: Renwick v. Morris, 7 Hill, 575.

<sup>2</sup> Dudley v. Mahew, 3 N. Y. 15; Smith v. Lockwood, 13 Barb. 217;

Renwick v. Morris, 7 Hill, 575; Andover Tp. Co. v. Gould, 6 Mass. 43; 4 Am. Dec. 80; Franklin Glass Co. v. White, 14 Mass. 286; Bassett v. Carleton, 32 Me. 533; 54 Am. Dec. 605.

<sup>3</sup> Wood on Nuisances, 23.

<sup>4</sup> Stiles v. Laird, 5 Cal. 120; 63 Am. Dec. 110.

<sup>5</sup> 1 Hawk. P. C. 363.

<sup>6</sup> Jones v. Powell, Palmer, 537; Hut. 136.

<sup>7</sup> Stynan v. Hutchinson, 2 Selw. 1047.

<sup>8</sup> 1 Hawk. P. C. 363; Queen v. Wilcox, 2 Salk. 458.

<sup>9</sup> Rex v. Pappineau, 2 Strange, 686.

<sup>10</sup> Jones v. Powell, Hut. 136.

<sup>11</sup> Aldred's Case, 9 Coke, 59.

<sup>12</sup> Id.

<sup>13</sup> Tohale's Case, Cro. Car. 510; Rankett's Case, Pasch. 2.

forge;<sup>1</sup> a smelting-house for lead;<sup>2</sup> a smelting-house for copper.<sup>3</sup>

§ 2967. **The Modern Doctrine.**—The only uses of property that are now held to be nuisances *per se* are such as affect the morals of society or public rights, or are dangerous to life.<sup>4</sup> Overhanging another's land is also one of the cases of nuisance *per se*.<sup>5</sup> Where a particular use of property is a nuisance *per se*, no proof of hurtful results is necessary in an action founded on it.<sup>6</sup>

§ 2968. **Prima Facie Nuisances—In Equity.**—But courts of equity recognize that there are certain trades and uses of property that are *prima facie* nuisances, because they have been demonstrated to be productive of ill results generally. Therefore in a court of equity when a party is seeking to restrain the exercise of a trade upon the ground of nuisance, the court recognizes the distinction between a trade or use of property that has been held a nuisance, and whose results are generally ill, and one which has not been so held, or about whose effects little is generally known,<sup>7</sup> and the court in such cases will restrain the use of such property until the question of nuisance or no nuisance can be tried.<sup>8</sup>

<sup>1</sup> Bradley v. Gill, Lutw. 69.

<sup>2</sup> Poynton v. Gill, 2 Roll. Abr. 140.

<sup>3</sup> David v. Grenfell, 6 Car. & P. 624.

<sup>4</sup> Wood on Nuisances, 650.

<sup>5</sup> Pendraddock's Case, 5 Coke, 101; Baten's Case, 9 Coke, 54.

<sup>6</sup> Wood on Nuisances, 651.

<sup>7</sup> Att'y-Gen. v. Steward, 20 N. J. Eq. 415; Peck v. Elder, 3 Sand. 126.

<sup>8</sup> Catlin v. Valentine, 9 Paige, 575; 38 Am. Dec. 567; the court saying: "The situation of the defendant's building, in reference to the dwellings of the complainants, would *prima facie* render the occupation of such building for the purpose of slaughtering cattle there a nuisance. And as there is no real necessity that such an offensive business should be carried on in this part of the city, where many

valuable dwelling-houses of the best kind are already erected, and are continuing to be built, the vice-chancellor was right in retaining the injunction until final hearing. The answer of the defendant that a slaughter-house would not be offensive to the plaintiffs is matter of opinion merely, and is not such a denial of the whole equity of the bill as to entitle the defendant to a dissolution of the injunction as a matter of course. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. It is, perhaps, possible to carry on the business of slaughtering

§ 2969. **At Law.** — A court of law, on the other hand, does not recognize this distinction, but imposes upon every person seeking a recovery for damages resulting from a noxious trade the burden of proving clearly that the trade is a nuisance in fact, and that he has been injured thereby. The fact that a similar use of property has a thousand times been held a nuisance in other cases is not material. He must establish the fact of actual nuisance as much as though the trade was new and its effects unknown.<sup>1</sup>

§ 2970. **No Civil Action for Common or Public Nuisance.** — A civil action will not lie at the suit of a private person for damages sustained from a public or common nuisance, where the injury and damage are common to all. The plaintiff cannot succeed, unless he can show some injury sustained by him different from that which the whole public affected by the same nuisance have sustained.<sup>2</sup> By common injury is meant an injury of the

cattle, to a limited extent, in such a manner as not to be a nuisance. But it is wholly improbable that any one will subject himself to the necessary expense to enable him to do it in that part of the city, when the business can be carried on in the unsettled parts of New York, or in parts of the city where property is less valuable, without the great cost and labor which would be requisite to carry it on where the defendant's buildings were being erected when this bill was filed. . . . In this case, the defendant, upon final hearing, will have the opportunity to produce proofs to show that the slaughtering of cattle at the place proposed will not be offensive to the neighboring inhabitants, and injurious to them in the enjoyment of their property."

<sup>1</sup> Wood on Nuisances, 654; Dawson v. Moore, 7 Car. & P. 25.

<sup>2</sup> Lansing v. Smith, 8 Cow. 152; Pierce v. Dart, 7 Cow. 609; Baker v. Boston, 12 Pick. 184; 22 Am. Dec. 421; Low v. Knowlton, 26 Me. 128; 45 Am.

Dec. 100; Mayor v. Marriott, 9 Md. 160; 66 Am. Dec. 326; South. Car. R. Co. v. Philpot, 28 Ga. 398; 73 Am. Dec. 778; Brown v. Watson, 47 Me. 161; 74 Am. Dec. 482; Gordon v. Baxter, 74 N. C. 470; Jarvis v. R. R. Co., 52 Cal. 438; Bigley v. Nunan, 53 Cal. 403; Payne v. McKinley, 54 Cal. 532; Parrott v. Floyd, 54 Cal. 534; Corning v. Lowerre, 6 Johns. Ch. 439; Allen v. Freeholders, 13 N. J. Eq. 68; Zabriskie v. R. R. Co., 13 N. J. Eq. 314; Milhau v. Sharp, 27 N. Y. 614; 84 Am. Dec. 314; 28 Barb. 228; Smith v. Lockwood, 13 Barb. 209; Wetmore v. Story, 22 Barb. 414; Peniman v. New York Balance Co., 13 How. Pr. 40; Manhattan etc. Co. v. Barker, 36 How. Pr. 233; Parrish v. Stephens, 1 Or. 73; Smith v. Cummings, 2 Pars. Sel. Cas. 92; Walker v. Shepherdson, 2 Wis. 38; 60 Am. Dec. 423; Mayor of Georgetown v. Alexandria Canal Co., 12 Pet. 91; Nottingham v. R. R. Co., 3 McAr. 31; Yolo County v. Sacramento, 36 Cal. 193; Crommelin v. Cox, 30 Ala. 318; 68 Am. Dec. 120;

same kind and character, and such as naturally and necessarily arises from a given cause, but not necessarily similar in degree, or equal in amount. If the injury is the same in kind to all, it is a common injury, although one may actually be injured or damaged more than another.<sup>1</sup>

• § 2971. **Aliter where Plaintiff Suffers a Special Injury.**

— But nevertheless a nuisance may be at the same time a public and a private one; public in its general effects upon the public, and private in its special effects on the plaintiff. In such case the person suffering the special injury may have his remedy in a civil action.<sup>2</sup> Where a

*Gates v. Blincoe*, 2 Dana, 158; 26 Am. Dec. 440; *Seeley v. Bishop*, 19 Conn. 128; *Cole v. Sproul*, 35 Me. 161; 56 Am. Dec. 696; *Harrison v. Sterett*, 4 Har. & M. 540; *Stetson v. Faxon*, 19 Pick. 147; 31 Am. Dec. 123; *Barden v. Crocker*, 10 Pick. 388; *Runyon v. Bordine*, 14 N. J. L. 472; *Dougherty v. Bunting*, 1 Sand. 1; *Mechling v. Kittingbridge Co.*, 1 Grant Cas. 416; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Abbott v. Mills*, 3 Vt. 529; 23 Am. Dec. 222; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114; 52 Am. Dec. 84; *Hatch v. R. R. Co.*, 28 Vt. 142. The provision of the Oregon code, section 330, that "any person whose property is affected by a private nuisance" may maintain an action therefor, requires allegation and proof of some special damage beyond that occasioned to the public generally; *Roseburg v. Abraham*, 8 Or. 509. As to obstructing rivers, see *Watercourses*.

<sup>1</sup> *Wood on Nuisances*, 736; *Shaubut v. R. R. Co.*, 21 Minn. 502; *Blanc v. Murray*, 36 La. Ann. 162; 51 Am. Rep. 7. It does not follow because five neighbors unite in a suit to enjoin a nuisance that the nuisance is of such a public nature that an indictment only will lie on account of it; *Seifried v. Hays*, 81 Ky. 377; 50 Am. Rep. 167.

<sup>2</sup> *Weason v. Washburn Iron Co.*, 13 Allen, 95; 90 Am. Dec. 181; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Att'y-Gen. v. Lonsdale*, L. R. 7 Eq. 390; *Sampson v. Smith*, 8 Sim. 272;

*Soltan v. De Held*, 9 Eng. L. & Eq. 102; *Stetson v. Faxon*, 19 Pick. 147; 31 Am. Dec. 123; *Rosser v. Randolph*, 7 Port. 238; 31 Am. Dec. 712; *Crommelin v. Coxe*, 30 Ala. 318; 68 Am. Dec. 120; *Miss. etc. R. R. Co. v. Ward*, 2 Black, 485; see note in 31 Am. Dec. 132-135; *Georgia Chem. Co. v. Colquitt*, 72 Ga. 172. Mr. Wood (*Nuisances*, 736) illustrates the distinction in a terse manner. "Take," says he, "the case of a slaughter-house erected upon a public street. To all who come within the sphere of its operation or effects it is a nuisance, and offends the senses by its noxious smells. It is a common nuisance in such a locality, and in its general effects produces a common injury. But to those living upon the street, and within its immediate sphere, it is both a common and a private nuisance. Common in its general effects, but private in its special effects upon those living there. To the public generally it produces no injury except such as is common to all; but to those owning property in its neighborhood, or residing there, it produces a special injury, in that it detracts from the enjoyment of their habitations, produces intolerable physical discomfort, and diminishes the value of their premises for the purposes to which they have been devoted. Therefore, while those residing beyond its sphere, and owning no property there that is impaired in value, can have no private remedy, either at law or in equity, yet those

person sustains a special damage from a public nuisance, — whether from noise, smoke, noxious vapors, or smells, — he may maintain an action therefor, no matter how many persons may have sustained a like injury.<sup>1</sup> A party whose house is rendered uncomfortable for habitation by the odors and smoke of a gas-house may maintain an action as for a private nuisance.<sup>2</sup> One who is the owner of medicinal springs, and uses them as a source of revenue, by furnishing houses, board, lodgings, and entertainment to those who resort to them, is entitled to sue in that character for damage done to him in the construction of a nuisance by which the public are deterred from visiting his springs, and his profits are thereby reduced.<sup>3</sup> The

who live in the neighborhood, or who own property there that is impaired in value by reason of the nuisance, may have their private actions to recover their special damage or protect their special interests." The common-law remedy against a private nuisance was either by action on the case for damages or by assize of nuisance or by the writ *quod permittit prosternere*. In the first-named action, relief was limited to the recovery of damages; in the two latter, the plaintiff could recover damages and also have the nuisance abated or removed: *Waggoner v. Jermaine*, 3 Denio, 306; 45 Am. Dec. 474.

<sup>1</sup> *Peck v. Elder*, 3 Sand. 126; *Soltan v. De Held*, 9 Eng. L. & Eq. 104; *Wesson v. Washburn Iron Co.*, 13 Allen, 96; 90 Am. Dec. 181; *Catlin v. Valentine*, 9 Paige, 575; 38 Am. Dec. 567; *Ottawa Gas Co. v. Thompson*, 39 Ill. 598; *Biddle v. Ash*, 2 Ashm. 211; *Norcross v. Thoma*, 51 Me. 503; 81 Am. Dec. 588; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Greene v. Nunnemacher*, 36 Wis. 50; *Fay v. Whitman*, 100 Mass. 76; *Brady v. Weeks*, 3 Barb. 157; *Dubois v. Budlong*, 10 Bosw. 700; *Meigs v. Lister*, 23 N. J. Eq. 199; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Thebault v. Canova*, 11 Fla. 143; *Cartwright v. Gray*, 12 Grant (U. C.), 399; *Rhodes v. Dunbar*, 57 Pa. St. 274; 98

Am. Dec. 221; *Francis v. Schoellkopf*, 53 N. Y. 152; the court saying: "The idea that if, by a wrongful act, a serious injury is inflicted upon a single individual, a recovery may be had therefor against the wrong-doer, and that if, by the same act, numbers are so injured, no recovery can be had by any one, is absurd. This, stripped of verbiage, is the ground of the motion. It is said that holding the defendant liable to respond in an action to each one injured will lead to a multiplicity of actions. This is true; but it is no defense to a wrong-doer, when called upon to compensate for the damages sustained by his wrongful act, to show that he, by the same act, inflicted a like injury upon a large number of persons. The position is unsustained by any authority. . . . The rule is, that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom, except such as is common to the entire community, yet he is liable at the suit of one who has sustained damage peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury."

<sup>2</sup> *Ottawa Gas Light etc. Co., v. Thompson*, 39 Ill. 598; *Carhart v. Auburn etc. Co.*, 22 Barb. 297.

<sup>3</sup> *Bonner v. Welborn*, 7 Ga. 296.

special damage, if it exists, need not be considerable, to enable him who suffers it to have an injunction against a nuisance.<sup>1</sup> Erecting a building out into the street, whereby plaintiff's warehouse is obstructed from view, free communication therewith cut off, causing tenants to desert it, and necessitating reducing rents, is a sufficient statement of a nuisance occasioning particular injury, for which an action will lie.<sup>2</sup>

ILLUSTRATIONS.—The plaintiff brought an action to recover damages sustained by reason of sickness produced in his family, in consequence of the setting back of the waters of a stream by defendant's mill-dam so as to render the atmosphere of the neighborhood unwholesome, and to breed sickness therein. *Held*, that the action would lie: *Mills v. Hall*, 9 Wend. 315; 24 Am. Dec. 160.

### § 2972. Remedy by Injunction—Public Nuisance.—

In addition to the remedy by indictment for a public nuisance, an injunction will also lie against the offenders, at the suit of the state or the public authorities.<sup>3</sup> The principles upon which equity entertains an information to restrain the exercise of a public nuisance, or to abate it, are,—1. To prevent irreparable injury before a court of law could act definitely; 2. To prevent a protracted and expensive litigation, where there are many persons to defend.<sup>4</sup> A court of equity has jurisdiction, on the application of the state government, to restrain the placing of an obstruction in or upon the public highways, streets, bridges, public grounds, and navigable waters; and the legislature having committed a portion of its sovereignty to municipalities, such as cities, towns, and villages, in respect to streets, highways, and public

<sup>1</sup> *Forty-second Street etc. R. R. Co. v. R. R. Co.*, 52 N. Y. Sup. Ct. 252.

<sup>2</sup> *Stetson v. Faxon*, 19 Pick. 147; 31 Am. Dec. 123.

<sup>3</sup> *Attorney-General v. Cleaver*, 18 Ves. 217; *Mayor of London v. Bolt*, 5 Ves. 129; *Attorney-General v. Nichol*,

16 Ves. 438; *People v. Vanderbilt*, 26 N. Y. 287; *Attorney-General v. Richards*, 2 Anstr. 603; *Attorney-General v. Johnson*, 2 Wils. Ch. 87; *People v. Metropolitan Tel. Co.*, 64 How. Pr. 120; 11 Abb. N. C. 120.

<sup>4</sup> *State v. Mobile*, 5 Port. 279; 30 Am. Dec. 564.

grounds, within their limits, they are invested with the authority of the state in this respect, and may maintain a bill in equity to restrain an obstruction of streets, etc., in their limits.<sup>1</sup> In Nebraska a petition running in the name of S. and M., "for themselves, and at the request and in behalf of two thousand others, having a common interest in the subject-matter of this suit," praying injunction against a public nuisance, was held not to be the proper remedy, the same being by indictment or presentment by the grand jury.<sup>2</sup> When a private person suffers a special and peculiar injury, distinct from that of the public in general, in consequence of a public nuisance, he will be entitled to an injunction and relief in equity.<sup>3</sup>

§ 2973. **Private Nuisance.**—In regard to private nuisances, the interference of courts of equity by way of injunction is founded upon the ground of restraining irreparable mischief, or of suppressing vexatious and interminable litigation, or of preventing multiplicity of suits.<sup>4</sup> The case, it is said, must be a strong and mischie-

<sup>1</sup> R. R. Co. v. Chicago, 96 Ill. 620.

<sup>2</sup> Shed v. Hawthorne, 3 Neb. 179.

<sup>3</sup> Snell's Equity, 496; Corning v. Lowerre, 6 Johns. Ch. 437.

<sup>4</sup> Snell's Equity, 496; Coker v. Birge, 9 Ga. 425; 54 Am. Dec. 347; Silliman v. Hudson River Bridge Co., 4 Blatchf. 395; Parker v. Winnipiseogee Lake etc. Co., 1 Cliff. 247; Middleton v. Franklin, 3 Cal. 238; Thebaut v. Canova, 11 Fla. 143; Fort v. Groves, 29 Md. 188; Hinchman v. R. R. Co., 17 N. J. Eq. 75. A court of equity has jurisdiction and should grant a perpetual injunction when it is established by a trial that the defendant has created a private nuisance to the serious injury of the plaintiff, and that nuisance is permanent in its character, so that the injury continues, where complete and ample remuneration cannot be awarded in damages; or where the court can see that to obtain complete and ultimate redress at law several suits may become neces-

sary; or where the injury is otherwise irreparable: Davis v. Lamberston, 56 Barb. 480. Equity may abate as well as prevent erection of nuisances: Earl v. De Hart, 12 N. J. Eq. 280; 72 Am. Dec. 395. The abatement of a nuisance is accomplished in equity by an injunction adapted to the facts of the case: Sullivan v. Royer, 72 Cal. 248; 1 Am. St. Rep. 51. The prayer of a complaint for the abatement of a nuisance warrants a decree for an injunction against the continuance of such nuisance: Id. If the nuisance against which an injunction is asked is partly abated before the hearing, the injunction should conform to the facts existing at the time of the hearing, there being nothing to indicate that the former state of things will be resumed: Trulock v. Merte, 72 Iowa, 510. A preliminary injunction should be refused if the nuisance has been abated so that it no longer exists: Shear v. Brinkman, 72 Iowa, 698.

vous one, of pressing necessity, or the right must have been previously established by law, to authorize equity to interfere.<sup>1</sup> And the existence of the nuisance must always be established by clear and satisfactory evidence.<sup>2</sup> It is not, therefore, every nuisance that will justify the interposition of a court of equity. There must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance, or permanently or increasingly mischievous character, must occasion a constantly recurring grievance, which cannot be otherwise prevented save by an injunction;<sup>3</sup> nor will equity interfere where the nuisance is only dubious or contingent,<sup>4</sup> or where the thing complained of may possibly prove a nuisance and possibly not.<sup>5</sup> The danger to the residents in the vicinity of a powder-house which is properly constructed and managed is not so impending or probable as to authorize the chancellor to enjoin the erection or decree the abatement of such house as a nuisance.<sup>6</sup> But an injunction will sometimes be granted in case of mere apprehended danger;

<sup>1</sup> *White v. Forbes*, Walk. Ch. 112; *Gardner v. Newburgh*, 2 Johns. Ch. 162; 7 Am. Dec. 526; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272; *Fisk v. Wilber*, 7 Barb. 395; *Bradsher v. Lea*, 3 Ired. Eq. 301; *Rhea v. Forsyth*, 37 Pa. St. 503; 78 Am. Dec. 441; *Clack v. White*, 2 Swan, 540.

<sup>2</sup> *Hahn v. Thornberry*, 7 Bush, 403; *Wolcott v. Melick*, 11 N. J. Eq. 204; 66 Am. Dec. 790.

<sup>3</sup> *Dana v. Valentine*, 5 Met. 8; *Mitford's Pleadings* (Jeremy), 444; *New York v. Mapes*, 6 Johns. Ch. 46; *Porter v. Witham*, 17 Me. 292; *McCord v. Iker*, 12 Ohio, 387; *Arnold v. Klepper*, 24 Mo. 273; *Rhea v. Forsyth*, 37 Pa. St. 503; 78 Am. Dec. 441; *McHawk R. R. Co. v. Artcher*, 6 Paige, 83; *Earl of Ripon v. Hobart*, Coop. 343; 3 Mylne & K. 169; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Norris v. Hill*, 1 Mich. 202; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Brown v. R. R. Co.*, 83 N. C. 128; *Wahle v. Reinbach*, 76 Ill. 322; *Wingfield v. Crenshaw*, 4

*Hen. & M.* 474; *Wolcott v. Melick*, 11 N. J. Eq. 204; 66 Am. Dec. 790; *City of Rochester v. Curtiss*, 1 Clarke Ch. 336; *Vanwinkle v. Curtis*, 3 N. J. Eq. 422; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Curtis v. Winalow*, 28 Vt. 690.

<sup>4</sup> *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Barnes v. Calhoun*, 2 Ired. Eq. 199; *Ellison v. Commissioners*, 5 Jones Eq. 57; 75 Am. Dec. 431; *Beveridge v. Lacey*, 3 Rand. 63.

<sup>5</sup> *Ramsay v. Riddle*, 1 Cranch C. C. 399; *St. James's Church v. Arrington*, 36 Ala. 546; 76 Am. Dec. 332; *Lake View v. Letz*, 44 Ill. 81; *Butler v. Rogers*, 9 N. J. Eq. 487; *Hudson etc. Co. v. R. R. Co.*, 9 Paige, 323; *Phoenix v. Commissioners etc.*, 1 Abb. Pr. 466; *Kirkman v. Handy*, 11 Humph. 406; 54 Am. Dec. 45; *Duncan v. Hayes*, 22 N. J. Eq. 25.

<sup>6</sup> *Dumesnil v. Dupont*, 18 B. Mon. 800; 68 Am. Dec. 750; *Dilworth's Appeal*, 91 Pa. St. 247.

as to prevent the erection of a hospital or of a gunpowder magazine in the neighborhood of a town, and near to dwelling-houses, on the ground of the reasonable fears and apprehensions which such erections excite.<sup>1</sup> To justify an injunction to restrain an existing or threatened nuisance to a dwelling-house, the injury must be shown to be of such a character as to diminish materially the value of the property as a dwelling, and to seriously interfere with the ordinary comfort and enjoyment of it; and the application must set forth the facts and circumstances, from which the court may determine whether such injury is likely to result.<sup>2</sup> Equity will not enjoin, at suit of private persons, a bill to restrain a business establishment in a city which is not a nuisance *per se*, but has become one only by the annoying and noxious manner in which it is carried on, if the grievances can be remedied by scientific and skillful appliances, but will rather require such appliances to be used.<sup>3</sup> So an injunction to restrain the erection of a proposed abattoir and slaughtering-house will not be granted where the affidavits do not establish the fact that they will be a nuisance, proper filters, basins, or equivalent appliances being used.<sup>4</sup> So where the erection of a mill will cause the overflow of a spring from which plaintiff obtains his drinking-water, an injunction will not be granted, where it does not appear but that water might be obtained elsewhere, and where it does appear that by a slight expenditure of time and labor the spring could be protected from overflow.<sup>5</sup> On a question of restraining a lawful business, a court of equity will consider the customs of the people, the characteristics of their business, the common uses of property, and the peculiar circumstances of the place.<sup>6</sup>

<sup>1</sup> *Wolcott v. Melick*, 11 N. J. Eq. 204; 66 Am. Dec. 790.

<sup>2</sup> *Adams v. Michael*, 38 Md. 123; 17 Am. Rep. 516.

<sup>3</sup> *Green v. Lake*, 54 Miss. 540; 23 Am. Rep. 378.

<sup>4</sup> *Sellers v. R. R. Co.*, 10 Phila. 319.

<sup>5</sup> *Rosser v. Randolph*, 7 Port. 238; 31 Am. Dec. 712.

<sup>6</sup> *Huckenstine's Appeal*, 70 Pa. St. 102; 10 Am. Rep. 669.

A court of equity will not enjoin until after a verdict at law, where the thing complained of is not in itself a nuisance.<sup>1</sup> But where the injury is manifest and continuous, or the mischief is irreparable, and incapable of compensation in damages, the party injured will not be required to establish his right at law before asking for an injunction.<sup>2</sup> In New Jersey it is held that the English doctrine that a court of equity will not grant relief against a private nuisance until the legal rights of the complainant have been established in a court of law has been somewhat relaxed. Mere denial in the defendant's answer will not oust the court of its jurisdiction by injunction. So when the complainant has been for a long time in undisputed possession of the property which has been injured, or enjoyment of the right which has been invaded, and the acts which constitute the injury to such property or the invasion of such right have been done recently before the filing of the bill, a court of equity may entertain jurisdiction to decide and dispose of the entire litigation, if the evidence does not raise any serious question as to the fact of the existence of a legal right in the complainant at the time when the bill was filed.<sup>3</sup> Equity may enjoin the carrying on of a slaughter-house before it had

<sup>1</sup> *Kirkman v. Handy*, 11 Humph. 406; 54 Am. Dec. 45; *Flint v. Russell*, 5 Dill. 150; *Rosser v. Randolph*, 7 Port. 238; 31 Am. Dec. 712; *St. James's Church v. Arrington*, 36 Ala. 546; 76 Am. Dec. 332; *Rhea v. Forsyth*, 37 Pa. St. 503; 78 Am. Dec. 441. "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the mean time continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circum-

stances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question": *Earl of Ripon v. Hobart*, 3 Mylne & K. 169.

<sup>2</sup> *Learned v. Hunt*, 63 Miss. 373; *Kennerty v. Phosphate Co.*, 17 S. C. 411; 43 Am. Rep. 607.

<sup>3</sup> *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Stanford v. Lyon*, 37 N. J. Eq. 94. It is proper, where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain the erection: *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201.

been pronounced a nuisance at law, where the business creates an unhealthful, offensive, and dangerous stench near the dwelling-house of the complainant.<sup>1</sup>

**ILLUSTRATIONS.**—A bill praying abatement of a nuisance consisting of fertilizer works alleged that they emitted sickening odors, and that the gases therefrom injured his crops and fruit-trees. The defendants answered, denying injury, and averring that he had operated the works over two years, had invested twenty thousand dollars therein, and did a business of fifty thousand dollars per annum, which would be ruined if enjoined; but admitted that a process lasting not over twenty-four days in a year might cause annoyance during an easterly storm. *Held*, that a preliminary injunction should not be granted: *Sellers v. Parvis etc. Co.*, 30 Fed. Rep. 164.

**§ 2974. When Injunction Granted after Verdict at Law.**—"After the right has been established at law, a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case."<sup>2</sup> In deciding the question of an injunction, after a verdict at law, the court will consider the relative loss to either party, the character of the property for which protection is sought, the character of the locality in which the nuisance exists, and whether the injury is properly compensable in damages.<sup>3</sup> Where the damage is small, or merely nominal, yet if the injury is of a continuous nature, so as to operate as a constantly recurring grievance, the courts will restrain it to avoid a multiplicity of actions;<sup>4</sup> but if the damage is small, and the

<sup>1</sup> *Minke v. Hofeman*, 87 Ill. 450; 29 Am. Rep. 63.

<sup>2</sup> *Swayne, J.*, in *Parker v. Catton Co.*, 2 Black, 653.

<sup>3</sup> *Curtis v. Winslow*, 38 Vt. 690; *Sprague v. Rhodes*, 4 R. I. 301.

<sup>4</sup> *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191; *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 217; *Coulson v. White*, 3 Atk. 21; *Wood v. Waud*, 18 Jur. 472; *Attorney-General v. Nichol*, 16 Ves. 338; *Elmhirst v. Spencer*, 2 Maon. &

G. 45; *Ripon v. Hobart*, 3 Mylne & K. 178; *Parker v. Lake Co.*, 2 Blackf. 545; *Norris v. Hill*, 1 Mich. 202; *Clack v. White*, 2 Swan, 540; *Milhan v. Sharp*, 28 Barb. 228; *Bemis v. Upham*, 13 Pick. 171; *Hayden v. Tucker*, 37 Mo. 214; *Wilson v. Townsend*, 1 Drew. & S. 327; *Attorney-General v. Sheffield Gas Co.*, 3 De Gex, M. & G. 319; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Holsman v. Boiling Spring Co.*, 14 N. J. Eq. 335.

injury only occasional, accidental, rather than a probable and necessary consequence, an injunction will be denied.<sup>1</sup> It is not the duty of a court to make provision in its final judgment for a reopening or renewal of a controversy which it closes by its judgment. Therefore, where it was adjudged that a plaintiff was entitled to a perpetual injunction restraining certain acts of defendant which amounted to a nuisance, it was erroneous for the court to provide in its judgment for the annulling and setting aside of the decree when it should appear that defendant had provided means for abating such nuisance.<sup>2</sup> A court of equity may enjoin the maintenance of a nuisance in spite of the previous acquittal of its promoter upon an indictment therefor.<sup>3</sup>

**§ 2975. Rights by Prescription—Public Nuisance—Private Nuisance.**—A right to maintain a public nuisance cannot be obtained by prescription.<sup>4</sup> An adverse user which is known to have originated without right within the memory of persons now living will not, alone and of itself, legitimate a public nuisance, or bar the

<sup>1</sup> *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 217.

<sup>2</sup> *People v. Gold Run etc. Co.*, 66 Cal. 155.

<sup>3</sup> *Minke v. Hofeman*, 87 Ill. 450; 29 Am. Rep. 63.

<sup>4</sup> *Rhodes v. Whitehead*, 27 Tex. 304; 84 Am. Dec. 631; *Rung v. Shoneberger*, 3 Watts, 23; 26 Am. Dec. 95; *Dygert v. Schenck*, 23 Wend. 445; 35 Am. Dec. 575; *Lewis v. Stein*, 16 Ala. 214; 50 Am. Dec. 177; *Wright v. Moore*, 38 Ala. 593; 82 Am. Dec. 731; *Pettis v. Johnson*, 56 Ind. 139; *Mills v. Hall*, 9 Wend. 315; 24 Am. Dec. 160; the court saying: "There is no such thing as a prescriptive right, or any other right, to maintain a public nuisance. Admitting that the defendant's dam has been erected and maintained more than twenty years, and that during the whole of that period it has rendered the adjacent country unhealthy, such

length of time can be no defense to a proceeding on the part of the public to abate it, or to an action by any individual for the special and peculiar injury which he may have suffered from it. If defendants have, for twenty years, been permitted to overflow the plaintiff's land with their mill-dam, so far as the injury to the land is concerned, they have, by that length of possession, acquired a right to use it in that manner, and are not responsible in damages to the plaintiff. So a man may overflow his own land; if such overflow spreads disease and death through the neighborhood, it may be abated, and he must respond in damages for the special injury which any individual may have sustained from it, and it would seem to be very absurd to contend that the defendants, in a case like this, would have greater rights or immunities."

public of their rights.<sup>1</sup> But a right to maintain a private nuisance may be obtained by prescription.<sup>2</sup>

§ 2976. **Who may Sue.**—Every person who suffers actual damage, direct or consequential, from a nuisance may sue for his particular injury.<sup>3</sup> If the injury complained of is to the comfortable enjoyment of property, by smoke, noxious vapors, noisome smells, noise, or the interruption of any easement or right incident to the estate, and affecting its present use or enjoyment, the tenant may maintain an action in his own name, and he need not allege or prove any title in himself to the property, beyond that of bare possession.<sup>4</sup> When the nuisance is of a permanent character, or produces a permanent injury to the estate, the reversioner may maintain an action therefor.<sup>5</sup> If the nuisance is not of a permanent character, or does not produce a permanent injury to the property, the owner of the fee, as a general rule, cannot maintain an action, when the property or estate is in the possession of a tenant under a lease for a term, whether long or short.<sup>6</sup> But if, in consequence of the nuisance, the landlord is prevented from renting his premises,<sup>7</sup> or if he is compelled to rent them at a less price than he could but for the existence of the nuisance,<sup>8</sup> or if the actual value of the property is thereby impaired, or if the

<sup>1</sup> *State v. Franklin Falls Co.*, 49 N. H. 240; 6 Am. Rep. 513.

<sup>2</sup> *Dana v. Valentine*, 5 Met. 8; *Campbell v. Seaman*, 63 N. Y. 568; 20 Am. Rep. 567; *Mills v. Hall*, 9 Wend. 315; 24 Am. Dec. 160. See also *Watercourses — Easements*.

<sup>3</sup> *Crommelin v. Cox*, 30 Ala. 318; 68 Am. Dec. 120. Before one can recover damages for a nuisance, he must show a substantial injury: *Stadler v. Grieben*, 61 Wis. 500.

<sup>4</sup> *Villers v. Ball*, 1 Show. 7; *Graham v. Peat*, 1 East, 244; *Simpson v. Savage*, 1 Com. B., N. S., 347; *Mumford v. R. R. Co.*, 1 Hurl. & N. 35. A bill in equity to enjoin a nuisance averred plaintiff to be a "tenant and occupier"

of the land. Held, that this averment implied a tenancy from month to month, and that such tenant could not maintain such an action: *Clarke v. Thatcher*, 9 Mo. App. 436.

<sup>5</sup> *Grant v. Lyman*, 4 Met. 477; *Atkins v. Bordman*, 2 Met. 469; 37 Am. Dec. 100; *Bolivar Manufacturing Co. v. Neponsett Mfg. Co.*, 16 Pick. 241.

<sup>6</sup> *Simpson v. Savage*, 1 Com. B., N. S., 347; *Metropolitan Association v. Petch*, 5 Com. B., N. S., 504; *Jackson v. Pesked*, 1 Maule & S. 234; *Brown v. Mallett*, 5 Com. B. 599.

<sup>7</sup> *Potter v. Froment*, 47 Cal. 165.

<sup>8</sup> *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Francis v. Schoellkopf*, 53 N. Y. 154.

nuisance is of such a character and the situation of the parties are such that if the right is not asserted a servitude will be imposed upon the estate, the landlord may bring an action for the injury to the estate.<sup>1</sup> Tenants in common may join in an action for a nuisance affecting their estate,<sup>2</sup> but persons having distinct interests affected by the same nuisance must bring separate actions.<sup>3</sup> But the joinder of several persons in a bill to restrain a nuisance is permissible when such nuisance is a common injury to their several tenements.<sup>4</sup> Several persons may unite as plaintiffs, although they are the owners of different, but adjacent, lots and buildings, to restrain the building of a street-railroad not authorized by the city, where such threatened injury or nuisance is common to all, and the injury would be special and peculiar to the plaintiffs, independent of and different from the general injury to the public.<sup>5</sup>

**ILLUSTRATIONS.**—A nuisance was created near a house, whereby the house was made unwholesome and the tenant's wife sick. *Held*, that, although the tenant had a right of action therefor, and could recover damages for the injury to his wife's health, yet such action accrued to him solely as occupier of the house, and therefore that after his death the wife could maintain no action: *Ellis v. R. R. Co.*, 63 Mo. 131; 21 Am. Rep. 436.

**§ 2977. Who Liable—Erector and Continuer.**—A person erecting a nuisance continues liable as long as it exists, and cannot divest himself of such liability by

<sup>1</sup> *Tucker v. Newman*, 11 Ad. & E. 40.

<sup>2</sup> *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Ludlow v. R. R. Co.*, 6 Lans. 128; *Smith v. Thackerah*, L. R. 1 Com. P. 564; *Webb v. Bird*, 13 Com. B., N. S., 843.

<sup>3</sup> *Wood on Nuisances*, 966; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Tate v. R. R. Co.*, 10 Ind. 174; 71 Am. Dec. 309.

<sup>4</sup> *Murray v. Hay*, 1 Barb. Ch. 59; 43

Am. Dec. 773; *Demarest v. Hardham*, 34 N. J. Eq. 467; *Watertown v. Cowen*, 4 Paige, 510; 27 Am. Dec. 80; *Brady v. Weeks*, 3 Barb. 157; *Peck v. Elder*, 3 Sand. 126. Several owners whose property is affected by a nuisance may bring a joint action for damages; but can recover in it only for injury common to the property of all: *Grant v. Schmidt*, 22 Minn. 1.

<sup>5</sup> *Atchison S. R. Co. v. Nave*, 38 Kan. 744; 5 Am. St. Rep. 800.

conveying the premises to another person.<sup>1</sup> But this liability ceases with his death, and a cause of action does not survive against his legal representatives for damages arising from the continuance of the nuisance subsequent to his death.<sup>2</sup> In New York the erector is not liable where the premises have been conveyed by quitclaim deed.<sup>3</sup> So it is held, that, in order to make him answerable for its continuance after he has parted with the possession of the lands, it must appear that he derives some benefit from its continuance, as where he has demised the land and receives rent therefor,<sup>4</sup> or has conveyed the premises with covenants for its continuance.<sup>5</sup> A mere conveyance of the land with the ordinary covenants of warranty does not make him liable.<sup>6</sup> The lessor of premises for the purpose of carrying on a business necessarily injurious to the adjacent owners is liable as the author of the nuisance.<sup>7</sup>

<sup>1</sup> *Cobb v. Smith*, 38 Wis. 21; *Jordan v. Helwig*, 1 Wils. (Ind.) 477; *Dorman v. Ames*, 12 Minn. 451; *Conhocton Stone Co. v. R. R. Co.*, 52 Barb. 390; *Curtice v. Thompson*, 19 N. H. 471; *Plumer v. Harper*, 3 N. H. 88; 14 Am. Dec. 333; *Eastman v. Amoskeag Co.*, 44 N. H. 143; 82 Am. Dec. 201; *Staple v. Spring*, 10 Mass. 72; *Beavers v. Trimmer*, 25 N. J. L. 97; *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254. "Surely this action is well brought against the creator, for before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over, and more especially here, where he grants over, reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz., the rent for the same; for thereby, when one erects a nuisance, and grants it over in that manner, he is a continuer with an interest": *Roswell v. Prior*, 12 Mod. 635. See note to *Plumer v. Harper*, 3 N. H. 88, in 14 Am. Dec. 336-341.

<sup>2</sup> *Sloggy v. Dilworth*, 38 Minn. 179; 8 Am. St. Rep. 656. On the death of the

ancestor, the right of possession is in the heir or devisee until the personal representatives assert their rights and take possession by virtue of the statute. And the heir or other person succeeding to the possession can only be made liable after notice and request to abate a nuisance existing on the premises, unless, with knowledge of its character, he has actively interfered, or contributed to injuries resulting therefrom: *Sloggy v. Dilworth*, 38 Minn. 179; 8 Am. St. Rep. 656.

<sup>3</sup> *Waggoner v. Jermaine*, 3 Denio, 306; 45 Am. Dec. 475; *Hause v. Cowing*, 1 Lans. 288.

<sup>4</sup> *Mayor v. Cunliff*, 2 N. Y. 174.

<sup>5</sup> *Waggoner v. Jermaine*, 3 Denio, 306; 45 Am. Dec. 475; *Hause v. Cowing*, 1 Lans. 288.

<sup>6</sup> *Hause v. Cowing*, 1 Lans. 288. But see *Lolmiller v. Water Co.*, 51 Wis. 683.

<sup>7</sup> *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254; *Brady v. Weeks*, 3 Barb. 157; *Kint v. McNeal*, 1 Denio, 436. The lessor of property used as a licensed bawdy-house is not liable for a consequent injury to the adjoining proprietors, unless he leased it know-

The continuer of a nuisance is liable as well as the erector.<sup>1</sup> A party in whose possession and control a railroad is placed, with power to continue its use, is equally liable with the original owner for a nuisance arising from the manner of its construction.<sup>2</sup> The purchaser of a reversionary interest in real estate upon which a nuisance exists, and of which he has full knowledge, and who thereafter receives the rents thereof from the tenant in possession, is answerable for damages arising from such nuisance subsequent to his purchase.<sup>3</sup> The action lies for the continuance of the nuisance, although the plaintiff has accepted money paid into court in full satisfaction of the original erection.<sup>4</sup> It is no defense to an action for continuing a nuisance on the land of a stranger that the defendant cannot enter to abate it without rendering himself liable to the owner of the land.<sup>5</sup> But before the continuer can be sued, he must be notified of the nuisance, and requested to remove it.<sup>6</sup> To render a party liable to an action for damages resulting from a nuisance upon his land, where the nuisance was created by a previous owner of the land before the conveyance to the defendant, the proof must

ing of the intended use, or continued the leasing after he had acquired knowledge of such use, and knew that it had become a nuisance, notwithstanding the license: *Givens v. Van Studdiford*, 86 Mo. 149; 56 Am. Rep. 421.

<sup>1</sup> *Brown v. Woodworth*, 5 Barb. 550; *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; *Rogers v. Stewart*, 5 Vt. 215; 26 Am. Dec. 296; *Staple v. Spring*, 10 Mass. 72; *Cobb v. Smith*, 38 Wis. 21; *Plumer v. Harper*, 3 N. H. 88; 14 Am. Dec. 333; *Conchocton Stone Co. v. R. R. Co.*, 52 Barb. 390; *Portland v. Richardson*, 54 Me. 46; 89 Am. Dec. 720; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *Beckley v. Skooh*, 19 Mo. App. 95.

<sup>2</sup> *Tate v. R. R. Co.*, 64 Mo. 149.

<sup>3</sup> *Pierce v. German etc. Savings Society*, 72 Cal. 180; 1 Am. St. Rep. 45.

<sup>4</sup> *Holmes v. Wilson*, 10 Ad. & E. 503.

<sup>5</sup> *Smith v. Elliott*, 9 Pa. St. 345; *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254.

<sup>6</sup> *Groff v. Ankenbrandt*, 19 Ill. App. 148; 124 Ill. 51; 7 Am. St. Rep. 342; *Beavers v. Trimmer*, 25 N. J. L. 97; *Brown v. R. R. Co.*, 12 N. Y. 486; *Ray v. Sellers*, 1 Duvall, 254; *Pierson v. Glean*, 14 N. J. L. 36; 25 Am. Dec. 497; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *McDonough v. Gilman*, 3 Allen, 264; 80 Am. Dec. 72; *Waller v. Wicomico Co.*, 35 Md. 285; *Nichols v. Boston*, 98 Mass. 37; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457; *Pickett v. Condon*, 18 Md. 412; *Hubbard v. Russell*, 24 Barb. 404; *Caldwell v. Gale*, 11 Mich. 77; *Crommelin v. Cox*, 30 Ala. 318; 68 Am. Dec. 120; *Perruddock's Case*, 5 Coke, 100; *Winsmore v. Greenbank*, Willes, 583; *Woodman v. Tufts*, 9 N. H. 92; *Johnson v. Lewis*, 13 Conn. 303; 33 Am. Dec. 405.

show notice to, or knowledge on the part of, the defendant of the existence of the nuisance. Proof of the mere continuance of the nuisance on the land of the defendant, without such knowledge or notice of its existence as to charge him with fault for such continuance, is not sufficient to maintain the action.<sup>1</sup> But to maintain an action against a lessee for continuing a nuisance begun by his lessor before the lease, it is sufficient that the lessee knew of the existence of the nuisance.<sup>2</sup> If one purchase land from another, on which the vendor has erected or maintained a nuisance, while not liable for the erection of the nuisance, he is liable, after knowledge thereof, for all damages sustained by another. But if a former owner has erected a nuisance on land not his own, one purchasing from him is not liable, either for the erection or maintenance of such nuisance.<sup>3</sup>

Where the grantee continues and uses that which in its erection is a nuisance, no notice or previous request is necessary.<sup>4</sup> Where the nuisance results from the use, rather than from the erection itself, it is unnecessary to allege who erected it, or that notice had been given to remove it.<sup>5</sup> Neither is notice necessary where a grantee or even a tenant for years restores a structure which is in itself a nuisance,—as an obstruction in a highway,—and which has been abated, although the structure existed before his tenancy. But merely refitting it after it has been injured, but not abated, is held not to be such an act as dispenses with notice.<sup>6</sup> Mere complaints and attempts forcibly to abate the nuisance are not equivalent to the direct and unequivocal notice which the law requires.<sup>7</sup> The continuer of a nuisance waives his right to insist upon the notice preliminary to suit, when he joins in an

<sup>1</sup> *Conhocton Stone Road v. R. R. Co.*, 51 N. Y. 573; 10 Am. Rep. 646.

<sup>2</sup> *Dickson v. R. R. Co.*, 71 Mo. 575.

<sup>3</sup> *Wayland v. R. R. Co.*, 75 Mo. 548.

<sup>4</sup> *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457.

<sup>5</sup> *Beavers v. Trimmer*, 25 N. J. L. 97.

<sup>6</sup> *McDonough v. Gilman*, 3 Allen, 264; 80 Am. Dec. 72.

<sup>7</sup> *McDonough v. Gilman*, 3 Allen, 264; 80 Am. Dec. 72.

answer with one who cannot claim it, and distinctly bases his defense solely upon grounds other than the want of notice.<sup>1</sup> The notice is good if left on the premises, and need not be given personally; one notice binds all future occupiers.<sup>2</sup> The remedy is concurrent. If the owner of land on which a nuisance is created lets the land, or if a tenant, after creating a nuisance, underlets, and the nuisance is continued, an action lies at the option of the party injured, against either landlord or tenant.<sup>3</sup> For continuing a nuisance, lessor, assignees of lease, lessees, and sublessees are jointly liable.<sup>4</sup> There can be but one action for the erection of a nuisance. All subsequent actions must be for the continuance of the same nuisance, and the damages recoverable are simply those which have arisen between the actions.<sup>5</sup> In an action of nuisance against several acting independently in polluting a stream by the discharge of sewage from the premises of each, each is liable only to the extent of the separate injury committed by him.<sup>6</sup>

ILLUSTRATIONS.—More than twenty years before suit was brought the defendant had constructed a sewer or watercourse through property owned and occupied by him. In 1845, he let a house, shop, and cellar to the plaintiff (which he had previously occupied with the property). In 1851 the watercourse burst, damaging the plaintiff's cellar and goods. In an action for negligently and improperly constructing the sewer, and keeping and continuing it in that state, the jury found that it was not originally constructed with proper care, and it was proved that it had been continued in the same state. *Held*, the action was maintainable: *Alston v. Grant*, 24 Eng. L. & Eq. 122. The owner of land laid it off into lots and streets, sewered the streets, and sold the lots with an easement in the sewers, retaining no control. The grantees and others connected their premises with the sewers, and thus created a nuisance. *Held*, that the grantor was not liable therefor: *Moore v. Langdon*, 2 Mackey, 127; 47 Am. Rep. 262. Defendant, being the owner

<sup>1</sup> *Bartlett v. Siman*, 24 Minn. 248.

<sup>2</sup> *Salmon v. Bensley*, Ry. & M. 189.

<sup>3</sup> *Rex v. Pedly*, 1 Ad. & E. 822;

*Staple v. Spring*, 10 Mass. 72; *Plumer v. Harper*, 3 N. H. 88; 14 Am. Dec. 333.

<sup>4</sup> *Rogers v. Stewart*, 5 Vt. 215; 26 Am. Dec. 296.

<sup>5</sup> *Staple v. Spring*, 10 Mass. 72.

<sup>6</sup> *Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566.

of land on which was a kiln for drying lumber, leased the same, knowing that the kiln would be used by the lessee for drying lumber, and knowing, or having reason to know, that such use would be dangerous to plaintiff's adjoining property. *Held*, that defendant was liable to plaintiff for injury occasioned to his adjoining property by the kiln: *Helwig v. Jordan*, 53 Ind. 21; 21 Am. Rep. 189.

§ 2978. **Damages.** — The actual damage sustained is in general the limit of recovery in cases of nuisance,<sup>1</sup> and what these damages are is a question for the jury.<sup>2</sup> The damage need not be direct; it is sufficient if it is consequential.<sup>3</sup> Where a nuisance is proved, the law imports damage, and nominal damages are recoverable without proof.<sup>4</sup> Where the damages are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action.<sup>5</sup> Where the nuisance is not necessarily a permanent one, but may be abated at any time by the defendants, the measure of damages is a depreciation of rental value while the nuisance existed.<sup>6</sup> One is entitled to damages for continuance of a nuisance, established by a former verdict and judgment, although the continuance of the obstructions causing the nuisance did not materially injure him.<sup>7</sup> Whenever a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character that will continue without change from any cause but human labor, then the damage

<sup>1</sup> *Thayer v. Brooks*, 10 Ohio, 161; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Francis v. Schoelkopf*, 53 N. Y. 152; *Peck v. Elder*, 3 Sand. 126; *Dana v. Valentine*, 5 Met. 8; *Wesson v. Iron Co.*, 13 Allen, 95; 90 Am. Dec. 181; *Thayer v. Brooks*, 17 Ohio, 489; 49 Am. Dec. 474; *Shaw v. Cuminsky*, 7 Pick. 76; *Hatch v. Dwight*, 17 Mass. 289; 9 Am. Dec. 145; *McKnight v. Ratcliffe*, 44 Pa. St. 156.

<sup>2</sup> *Pierce v. Dart*, 7 Cow. 609; *O'Mara v. R. R. Co.*, 38 N. Y. 445; 98 Am. Dec. 61; *Frank v. R. R. Co.*, 20 La. Ann. 25; *Pike v. Doyle*, 19 La. Ann. 362.

<sup>3</sup> *Hughes v. Heiser*, 1 Binn. 463; 2 Am. Dec. 459.

<sup>4</sup> *Freudenstein v. Heine*, 6 Mo. App. 287.

<sup>5</sup> *Troy v. R. R. Co.*, 23 N. H. 101; 55 Am. Dec. 177; *Cheshire Turnpike Co. v. Stevens*, 13 N. H. 28; *Parks v. City of Boston*, 15 Pick. 198; *Blunt v. McCormick*, 3 Denio, 283; *Thayer v. Brooks*, 17 Ohio, 489; 49 Am. Dec. 474; *Anonymous*, 4 Dall. 147; *Powers v. Council Bluffs*, 45 Iowa, 652; 24 Am. Rep. 792; *Bizer v. Ottumwa Works*, 70 Iowa, 145.

<sup>6</sup> *Shively v. R. R. Co.*, 74 Iowa, 169; 7 Am. St. Rep. 471.

<sup>7</sup> *Ellis v. American Academy*, 120 Pa. St. 608; 6 Am. St. Rep. 739.

is an original damage, and may be at once fully compensated; and the statute of limitations begins at once to run on an action for damages.<sup>1</sup> Where the extent of a wrong may be apportioned from time to time, and does not go to the entire destruction of the estate, or its beneficial use, separate actions must be brought to recover the damages sustained.<sup>2</sup>

Where the owner of the premises occupies them, the measure of damages is the extent of the damage he personally suffers, together with the injury to the value of his property.<sup>3</sup> But the rental value cannot be considered or given in evidence.<sup>4</sup> When the premises are in the possession of tenants, the owner cannot recover, unless there is an actual injury to the reversion.<sup>5</sup> If the premises, because of the nuisance, cannot be rented, the measure of damage is the difference between the rental value if no nuisance existed, and the rental value with the nuisance there.<sup>6</sup> If the premises are not let at all, but have a dwelling upon them which is unoccupied in consequence of the nuisance, the entire rental value is the measure.<sup>7</sup> Where there are no buildings upon the premises, but the land is laid out into building-lots, which by reason of the nuisance are reduced in value, a recovery may be had for the difference between the value of the lots with the nuisance there and their value if no nuisance existed.<sup>8</sup>

<sup>1</sup> *Powers v. Council Bluffs*, 45 Iowa, 652; 24 Am. Rep. 792.

<sup>2</sup> *Plumer v. Harper*, 3 N. H. 88; 14 Am. Dec. 333; *Cheshire Turnpike Co. v. Stevens*, 13 N. H. 28. Where a railroad company builds its tracks along a street, and improperly allows cars to remain on the track and obstruct ingress, each day's continuance of the obstruction gives a new cause of action in favor of an abutting lot-owner: *Frankle v. Jackson*, 30 Fed. Rep. 398. A new action may be brought for the continuance of a nuisance while the first is pending, and judgment for the defendant in the second action will conclude the plaintiff in the first: *Hazel-tine v. Case*, 46 Wis. 391.

<sup>3</sup> *Walter v. Selfe*, 4 De Gex & S. 323; *Blandmore v. Tredwell*, 7 L. T., N. S., 207.

<sup>4</sup> *Potter v. Fremont*, 47 Cal. 165.

<sup>5</sup> *Rich v. Basterfield*, 2 Car. & K. 257; *Simpson v. Savage*, 37 Eng. L. & Eq. 374; *Bennett v. Thompson*, 37 Eng. L. & Eq. 51.

<sup>6</sup> *Houghton v. Bankard*, 3 L. T., N. S., 266; *Francis v. Schoellkopf*, 53 N. Y. 152; *Wiel v. Stewart*, 19 Hun, 272; *Givens v. Van Studdiford*, 4 Mo. App. 498.

<sup>7</sup> *Houghton v. Bankard*, 3 L. T., N. S., 266.

<sup>8</sup> *Peck v. Elder*, 3 Sand. 126; *Dana v. Valentine*, 5 Met. 8.

**ILLUSTRATIONS.**—Plaintiff kept a boarding-house, and defendants manufactured soap in a laundry near by, and discharged the foul water therefrom so that it ran under plaintiff's building and produced offensive stenches, so that the plaintiff's boarders left. *Held*, that plaintiff's recovery must be restricted to the difference between the rental value of the premises without the nuisance, and its rental value with it, and that the circumstance of the boarders having left because of the nuisance could not be considered: *Wiel v. Stewart*, 19 Hun, 272. Stones were thrown against plaintiff's shop by a blast carelessly set off by a contractor employed on a neighboring public work, and his workmen left his shop in fear, and his business was consequently suspended. *Held*, that he might recover for the interruption of his business, and the measure of damages was the value of the work thus prevented from being done: *Hunter v. Farren*, 127 Mass. 481; 34 Am. Rep. 423.

§ 2979. **Exemplary Damages.**—Where the nuisance is continued after a verdict, exemplary damages are recoverable, and are given for the purpose of abating the nuisance.<sup>1</sup> Damages such as will punish defendant, and compel him to abate the nuisance, are bound to be awarded to the plaintiff in a suit for the continuance of the nuisance after a recovery in a former action, notwithstanding the erection complained of was of great value to the defendant, and the injury to the plaintiff was insignificant.<sup>2</sup>

§ 2980. **Illustrations of Nuisances.**—The following have been decided in particular cases to constitute private nuisances,<sup>3</sup> viz.: Keeping gunpowder in quantities in a

<sup>1</sup> *Bradley v. Annis*, 2 Hayw. (N. C.) 371; *New Orleans etc. R. R. Co. v. Stat-ham*, 42 Miss. 607; 97 Am. Dec. 478; *Ellis v. American Academy*, 120 Pa. St. 608; 6 Am. St. Rep. 739.

<sup>2</sup> *McCoy v. Danley*, 20 Pa. St. 85; 57 Am. Dec. 681.

<sup>3</sup> The following among others are held to be public nuisances, viz.: A public gaming-house: *United States v. Ismenard*, 1 Cranch C. C. 150; *State v. Doon*, R. M. Charlt. 1. A bowling-alley, kept for gain and common use, where great noises are made at night, to the disturbance of the neighborhood: *State*

*v. Haines*, 30 Me. 65; *Tanner v. Albion*, 5 Hill, 121; 40 Am. Dec. 337. Making great noise, clamor, and outcry in the public streets, by which people are drawn together and the highway obstructed: *Commonwealth v. Spratt*, 14 Phila. 365. A liquor-store in a town, in and about which dissolute persons are permitted to remain at night and in the daytime, drinking, tippling, and carousing: *State v. Bertheol*, 6 Blackf. 474; 39 Am. Dec. 442; *Bloomhuff v. State*, 8 Blackf. 205; *State v. Buckley*, 5 Harr. (Del.) 508; *People v. Cutler*, 28 Hun, 465; *Hackney v. State*, 8 Ind.

wooden building near dwellings;<sup>1</sup> or upon private premises, when in case of explosion it would be liable to injure the persons or property of those residing in the neighborhood, although it should be carefully stored or kept;<sup>2</sup> a pest-house in a city;<sup>3</sup> burying a dead cow on adjacent

494. Keeping of a house in which offenses punishable by fine are practiced, as a bawdy-house: *Smith v. Commonwealth*, 6 R. Mon. 21; *State v. Bailey*, 21 N. H. 343. Selling unwholesome provisions, not fit to be eaten by man: *State v. Smith*, 3 Hawks, 378; 14 Am. Dec. 594. Profane cursing and swearing in public: *State v. Graham*, 3 Sneed, 134; *State v. Chrisp*, 85 N. C. 528; 39 Am. Rep. 713; *State v. Powell*, 70 N. C. 67. Spring-guns, although justifiably placed to protect life or property, if they cause actual danger to passers-by in the street: *State v. Moore*, 31 Conn. 479; 83 Am. Dec. 159. Any erection in a public river: *People v. Vanderbilt*, 26 N. Y. 287, 298; 25 How. Pr. 139; 24 How. Pr. 301. The occupation of a street by railroad tracks: *Attorney-General v. R. R. Co.*, 10 Phila. 352. Leaving of a hand-car on a public road, at a railroad crossing, and hanging buckets and clothing thereon, whereby the road was obstructed and horses frightened: *Cincinnati R. R. Co. v. Commonwealth*, 80 Ky. 137. Crossing a turnpike by trains, at the rate of from fifteen to twenty miles an hour, without warning: *Louisville etc. R. R. Co. v. Commonwealth*, 80 Ky. 143; 44 Am. Rep. 468. Keeping the iron rails of a railroad six or eight inches above the level of the highway at a public crossing: *Paducah etc. R. R. Co. v. Commonwealth*, 80 Ky. 147. Erecting a market-house in the center of a street or highway of a city by a city corporation, which interferes with a commodious passage through such street: *State v. Mobile*, 5 Port. 279; 30 Am. Dec. 564. The publication of an advertisement calculated to alarm the public mind unnecessarily: *State v. Cassidy*, 6 Phila. 82. A fruit-stand, a permanent structure, materially encroaching on a sidewalk of a public street in a thickly inhabited part of

the city: *State v. Berdette*, 73 Ind. 185; 38 Am. Rep. 117. A bay-window in the second story of a house, sixteen feet above the sidewalk, and projecting three and one half feet beyond the building line: *Reimer's Appeal*, 100 Pa. St. 182; 45 Am. Rep. 373. The attorney-general cannot maintain an action to restrain the prosecution of actions arising out of controversies between different claimants of the directorship or management of a railroad corporation, for cancellation of stock, to restrain town commissioners from voting on stock, those claiming to be directors from acting as such, etc., in which actions injunctions have been issued and receivers appointed, and which have given rise to conflict of authority between public officers in the attempted execution of conflicting processes from different judicial officers, in such a manner as to endanger the public peace. Such proceedings, and the disorders arising therefrom, do not constitute a public nuisance: *People v. R. R. Co.*, 5 Lans. 25; 57 N. Y. 161. But compare *Crane v. McCoy*, 1 Bond, 422. The sale of adulterated teas will not be restrained by injunction unless it appears to threaten serious danger to human life or serious detriment to health: *Health Dep't of New York v. Purdon*, 99 N. Y. 237; 52 Am. Rep. 22.

<sup>1</sup> *Myers v. Malcolm*, 6 Hill, 41; 41 Am. Dec. 744; *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654; *Emory v. Hazard Powder Co.*, 22 S. C. 476; 53 Am. Rep. 730; *Bradley v. People*, 55 Barb. 73; *Cheatham v. Shearon*, 1 Swan, 213; 55 Am. Dec. 754.

<sup>2</sup> *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654.

<sup>3</sup> *Haag v. Vanderburgh Co.*, 60 Ind. 511; 28 Am. Rep. 654. A hospital is not *prima facie* or *per se* a nuisance, though it might, under some circumstances, become such: *Beasonies v. Indianapolis*, 71 Ind. 189.

premises;<sup>1</sup> a tomb erected on the defendant's own land;<sup>2</sup> keeping jacks and stallions for service within sight of private houses;<sup>3</sup> the bleating of calves kept overnight at a slaughter-house, to be slaughtered in the morning, to the serious annoyance of a family dwelling near;<sup>4</sup> a horse at large on a highway;<sup>5</sup> the unauthorized use of premises for the deposit of garbage;<sup>6</sup> a coal-hole or other unguarded opening in a sidewalk;<sup>7</sup> the placing of skids across a sidewalk in front of one's premises;<sup>8</sup> keeping or storing a wagon in the public street perpetually or habitually;<sup>9</sup> shutting up an old highway,<sup>10</sup> or obstructing any highway;<sup>11</sup> a livery-stable in a city, erected within sixty-five feet of a hotel;<sup>12</sup> a gate erected upon an existing highway, by a turnpike corporation, unless specially authorized by the legislature;<sup>13</sup> the use of a street as a market-place;<sup>14</sup> the erection of a building in the center of a street sixty feet wide, to be used for a market for meat, fish, etc., and as a pound for confining swine and other animals, and as a jail, in front of places of business

<sup>1</sup> *Jarvis v. R. R. Co.*, 26 Mo. App. 253.

<sup>2</sup> *Barnes v. Hathorn*, 54 Me. 124. A burial-ground near dwellings is not a nuisance *per se*. *Monk v. Packard*, 71 Me. 309; 36 Am. Rep. 315. A private burial-ground near dwellings is not necessarily a nuisance, and its use can only be enjoined on clear proof of probable injury: *Kingsbury v. Flowers*, 65 Ala. 479; 39 Am. Rep. 14. Burying dead in public cemeteries is not a nuisance, but might become so by careless and improvident modes of interment: *Ellison v. Commissioners*, 5 Jones Eq. 57; 75 Am. Dec. 430. Equity will grant injunctive relief whenever it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere or the water of wells or springs: *Clark v. Lawrence*, 6 Jones Eq. 83; 78 Am. Dec. 241.

<sup>3</sup> *Hayden v. Tucker*, 37 Mo. 214; *Farrell v. Cook*, 16 Neb. 483; 49 Am. Rep. 721.

<sup>4</sup> *Bishop v. Banks*, 33 Conn. 118; 87 Am. Dec. 197.

<sup>5</sup> *Baldwin v. Ensign*, 49 Conn. 113; 44 Am. Rep. 205.

<sup>6</sup> *Lowe v. Holbrook*, 71 Ga. 563.

<sup>7</sup> *Clifford v. Dam*, 37 Hun. 391; 81 N. Y. 52; *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459.

<sup>8</sup> *Callanan v. Gilman*, 67 How. Pr. 464; 107 N. Y. 360; 1 Am. St. Rep. 831.

<sup>9</sup> *Cohen v. New York*, 113 N. Y. 532; 10 Am. St. Rep. 506.

<sup>10</sup> *Allen v. Lyon*, 2 Root, 213.

<sup>11</sup> *Columbus v. Jaques*, 30 Ga. 506; *Gerrish v. Brown*, 51 Me. 256; 81 Am. Dec. 569; *Morton v. Moore*, 15 Gray, 573; *State v. Spainhour*, 2 Dev. & B. 547; *State v. Mobley*, 1 McMull. 44; *State v. Atkinson*, 24 Vt. 448; *Dimmett v. Eskridge*, 6 Munf. 308.

<sup>12</sup> *Coker v. Birge*, 10 Ga. 336.

<sup>13</sup> *Wales v. Stetson*, 2 Mass. 143; 3 Am. Dec. 39.

<sup>14</sup> *McDonald v. Newark*, 42 N. J. Eq. 136.

or private residence;<sup>1</sup> a brick wall which projects over an adjoining lot;<sup>2</sup> the cornice of a building which projects over a sidewalk in a city, and which is being constructed in such a manner as to be dangerous to persons using the sidewalk;<sup>3</sup> the unauthorized construction and use of a spur-track in a public way in front of the plaintiff's premises;<sup>4</sup> a stage-coach stopping for an unreasonable time on a public highway, in front of and obstructing the entrance of a camp-meeting ground;<sup>5</sup> show-cases erected by a shop-keeper which encroach upon the sidewalk and injure a neighbor by having his show windows cut off from view;<sup>6</sup> a Chinese laundry in a basement, so conducted as to injure the trade of a tradesman in the next story;<sup>7</sup> renting a house to be used as a bawdy-house, or knowingly allowing it to be so used;<sup>8</sup> a dwelling-house divided into small apartments, and thickly inhabited.<sup>9</sup>

And the following have been held not nuisances, viz.: Telegraph or telephone poles and wires in a public street;<sup>10</sup> the working of a city's streets by hired convicts;<sup>11</sup> the erec-

<sup>1</sup> *Lutterloh v. Mayor etc. of Cedar Keys*, 15 Fla. 306.

<sup>2</sup> *Meyer v. Metzler*, 51 Cal. 142.

<sup>3</sup> *Grove v. City of Fort Wayne*, 45 Ind. 429. But see *Jenks v. Williams*, 115 Mass. 211.

<sup>4</sup> *Bell v. Edwards*, 37 La. Ann. 475.

<sup>5</sup> *Turner v. Holtzman*, 54 Md. 148; 39 Am. Rep. 361.

<sup>6</sup> *People v. New York*, 18 Abb. N. C. 123. And in a New York case, the "Seven Sutherland Sisters" were enjoined, at the instance of one similarly sustaining special damage, from combing their hair in a shop-window, crowds thus being drawn there, to the obstruction of access to plaintiff's store: *Elias v. Sutherland*, 18 Abb. N. C. 126. The approaches to A's store and the sidewalks were blocked up frequently each day by a puppet-show given by way of advertisement in the windows of B's store, opposite. Held, that an injunction should be granted: *Jaques v. National Exhibit*

Co., 15 Abb. N. C. 250. And see *Gilbert v. Mickle*, 4 Sand. Ch. 357.

<sup>7</sup> *Warwick v. Wah Lee*, 10 Phila. 160.

<sup>8</sup> *Givens v. Van Studdiford*, 4 Mo. App. 498; *Marsan v. French*, 61 Tex. 173; 48 Am. Rep. 272. See *Anderson v. Doty*, 33 Hun, 160.

<sup>9</sup> *Meeker v. Van Rensselaer*, 15 Wend. 397.

<sup>10</sup> *McCormick v. District of Columbia*, 4 Mackey, 396; 54 Am. Rep. 285; *Julia Building Ass'n v. Telephone Co.*, 88 Mo. 258; 57 Am. Rep. 398; *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63. A telephone company is liable for an injury to a traveler caused by the fall of wires on a street, although the fall was occasioned by ice produced by water thrown upon them by the fire department: *Nichols v. City of Minneapolis*, 33 Minn. 430; 53 Am. Rep. 56.

<sup>11</sup> *Ward v. Little Rock*, 41 Ark. 526; 48 Am. Rep. 46.

tion of a jail;<sup>1</sup> making a speech in a public street;<sup>2</sup> a liberty-pole in a city street;<sup>3</sup> a basement staircase opening on a sidewalk;<sup>4</sup> a platform in an alley at the rear of a store;<sup>5</sup> the temporary moving of a building onto the sidewalk of a city for the purpose of erecting another on its site;<sup>6</sup> a pipe discharging water from the roof of a city building upon the sidewalk, and there forming ice, but not itself extending upon the sidewalk, and properly constructed;<sup>7</sup> shade-trees standing within the curbing of the sidewalk on a public street;<sup>8</sup> a shooting-gallery in a tent in a city;<sup>9</sup> a ditch dug in a street to lay a pipe from a spring to a dwelling-house by municipal authority;<sup>10</sup> the business of an undertaker, pursued in the usual way.<sup>11</sup>

When a statute pronounces saloons in which intoxicating liquor is sold nuisances, and provides that they may be shut up and abated, equity will not enjoin their maintenance.<sup>12</sup> The owner of land has the right to erect small, cheap, and movable tenement-houses thereon close to the line of an adjacent owner, and let them to orderly colored tenants, although his avowed purpose is to punish the adjacent owner for refusing to sell him his land at an inadequate price, and to compel him to do so.<sup>13</sup>

**ILLUSTRATIONS.**—Defendant erected in his house, adjoining plaintiff's premises, a cooking-range, so near to the partition wall that the ordinary use of it injured plaintiff's goods, and rendered his premises uncomfortable and disagreeable. *Held*, that the use of the range was a nuisance, and that an action on the case would lie against the defendant, although he had leased

<sup>1</sup> *Burwell v. Vance County Comm'rs*, 93 N. C. 73; 53 Am. Rep. 454.

<sup>2</sup> *Fairbanks v. Kerr*, 70 Pa. St. 86; 10 Am. Rep. 664.

<sup>3</sup> *City of Allegheny v. Zimmerman*, 95 Pa. St. 287; 40 Am. Rep. 619.

<sup>4</sup> *Everett v. Marquette*, 53 Mich. 450.

<sup>5</sup> *Bagley v. People*, 43 Mich. 355; 38 Am. Rep. 192.

<sup>6</sup> *State v. Omaha*, 14 Neb. 265; 45 Am. Rep. 108.

<sup>7</sup> *Wenzlick v. McCotter*, 87 N. Y. 122; 41 Am. Rep. 358.

<sup>8</sup> *Everett v. Council Bluffs*, 46 Iowa, 66; *Graves v. Shattuck*, 35 N. H. 257; 70 Am. Dec. 536.

<sup>9</sup> *Hubbell v. Viroqua*, 67 Wis. 343; 58 Am. Rep. 866.

<sup>10</sup> *Smith v. Simmons*, 103 Pa. St. 32; 49 Am. Rep. 113.

<sup>11</sup> *Westcott v. Middleton*, 43 N. J. Eq. 478.

<sup>12</sup> *State v. Crawford*, 28 Kan. 726; 42 Am. Rep. 182.

<sup>13</sup> *Falloon v. Schilling*, 29 Kan. 292; 44 Am. Rep. 642.

the premises containing the range to a tenant, who built the fires: *Grady v. Wolsner*, 46 Ala. 381; 7 Am. Rep. 593. The cornice of a building standing fifteen feet back from a city street needing repairs, a scaffold was erected with proper care, and a high wind blew a plank to the street, striking a passer-by. *Held*, that the scaffold was not a nuisance: *Hexamer v. Webb*, 101 N. Y. 377; 54 Am. Rep. 703. Defendants were carriers of merchandise in a city. While not so employed they would spend their time with their horses and wagons in the public street, in front of complainant's dwelling, and to such an extent that unpleasant and noxious odors were created, which were, at certain times, carried into the dwelling of complainant, making his home uncomfortable. *Held*, an unlawful use of a public street, and that complainant was entitled to the aid of this court because he suffered special injury, and that his motives in filing his bill or in prosecuting his suit cannot be inquired into: *Lippincott v. Lasher*, 44 N. J. Eq. 120.

**§ 2981. Right to Pure Air — Limitations.** — Every person has a right to have the air diffused over his premises in its natural state, free from all artificial impurities;<sup>1</sup> and every use of property which unwarrantably interferes with that right is an actionable nuisance.<sup>2</sup> But this right is not an absolute one; it must give way to some extent to the necessities of society and business. As well put by Mr. Wood,<sup>3</sup> the law "does not recognize every business or use of property as a nuisance that imparts a degree of impurity to the air; for if such was the case, towns could not be built, nor life in compact communities be tolerated, and even the ordinary uses of property would be seriously interfered with; for in proportion to the sparseness or compactness of population is the air pure or impure. One cannot reasonably occupy a dwelling-house or place of business, and use any kind of fuel therein, without imparting more or less of impurity to the atmosphere, and in proportion as these are aggregated in one locality are

<sup>1</sup> *Walter v. Selfe*, 4 Eng. L. & Eq. N. J. Eq. 26; *Rhodes v. Dunbar*, 57 Pa. St. 276; 98 Am. Dec. 221; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257.

<sup>2</sup> *Tipping v. St. Helens Smelting Co.*, 257.

<sup>4</sup> *Best & S.* 603; *Duncan v. Hayes*, 22

<sup>3</sup> *Wood on Nuisances*, 577.

these impurities increased; but as these are among the common necessities of life, and absolutely indispensable to its reasonable enjoyment, the law does not recognize them as being actionable interferences with the rights of others, unless exercised in an unreasonable manner, so as to inflict injury upon another unnecessarily."<sup>1</sup> Hence the question as to what degree of impurity is actionable, and as to what test is to be applied, becomes a somewhat difficult one, to be decided in each case as a question of fact.<sup>2</sup> If the nuisance interferes with the enjoyment of property, it must be such as renders the occupancy of the premises physically uncomfortable to a person of ordinary susceptibilities for the purposes to which the occupier or owner chooses to devote it.<sup>3</sup> A trade or occupation which fills the air with dust, to the injury of another, is a nuisance.<sup>4</sup>

**§ 2982. Smoke—When a Nuisance.**—Smoke alone, and unaccompanied with fire or cinders, is an actionable nuisance, whenever it is discharged in such quantities as to interfere (within the limitations already stated) with the enjoyment of neighboring property.<sup>5</sup> Thus smoke is

<sup>1</sup> In *Galbraith v. Oliver*, 3 Pittsb. Rep. 79, the court said: "Some discomforts must be endured as compensation for the conveniences of city life. No public interest deserves protection and encouragement more than manufacturing industry. I yield to none in my friendship for productive labor, or in my contempt for the snobbery that undervalues it. When the world gets too populous to accommodate all, it will be time enough to consider the question of preference. At present the law awards to all, equally, their rights of person and property. Yielding to this rule of equal rights, I cannot find authority in the law for saying that a thing which fills the atmosphere that others have a right to live in with offensive smoke and odors, stifles the breath, produces nausea and headache, drives children from their playgrounds and men from their

gardens, prevents the drying of clothes and ventilation of houses, darkens the sunlight, and converts pleasant residences into prison-houses in dog-days, and defiles carpets, curtains, and dinner-plates with deposits of soot and dirt, is not a nuisance, even though such results are only occasional."

<sup>2</sup> *People v. Davidson*, 30 Cal. 379; *Requena v. Los Angeles*, 45 Cal. 55.

<sup>3</sup> *Walter v. Selfe*, 4 Eng. L. & Eq. 15; *Ruff v. Phillips*, 50 Ga. 130.

<sup>4</sup> *Cooper v. Randall*, 53 Ill. 24; *Hutchins v. Smith*, 63 Barb. 252.

<sup>5</sup> *Rhodes v. Dunbar*, 57 Pa. St. 275; 98 Am. Dec. 221; *Richards v. Phoenix Iron Co.*, 57 Pa. St. 105; *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Walter v. Selfe*, 4 Eng. L. & Eq. 15; 4 De Gex & S. 322; *Savile v. Kilner*, 26 L. T., N. S., 277; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; 90 Am. Dec. 181; *Galbraith v. Oliver*,

an actionable nuisance where its effect is to discolor buildings,<sup>1</sup> or the furniture inside;<sup>2</sup> to injure vegetation;<sup>3</sup> to soil or discolor clothes hung out to dry;<sup>4</sup> or injure other property of any kind.<sup>5</sup> Smoke may also be an actionable nuisance where it produces an unpleasant taste in the mouths of neighbors,<sup>6</sup> or renders the air unpleasant to breathe.<sup>7</sup>

**ILLUSTRATIONS.**—A railroad had authority to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road. It erected an engine-house and repair-shop close by the church edifice of a religious corporation. The business of the railroad was conducted as carefully and quietly as was possible, and the smoke-stacks of the engine-house were higher than the city regulations demanded. Nevertheless, smoke and cinders entered the windows of the church, and the worshippers were greatly inconvenienced and harassed by the noise and smoke. *Held*, that the church corporation could recover damages in an action on the case: *Baltimore and Potomac R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317.

**§ 2983. Chimneys.**—One has a perfect right to erect buildings with chimneys, and build fires therein; this is

3 Pittsb. Rep. 79; *Whitney v. Bartholomew*, 21 Conn. 213; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Duncan v. Hayes*, 22 N. J. Eq. 26; *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 209; *Hutchins v. Smith*, 63 Barb. 252; *Attorney-General v. Steward*, 20 N. J. Eq. 415; *Crump v. Lambert*, L. R. 3 Eq. Cas. 409. The mere escape of smoke and gases from a pumping-engine of a city's water-works, to "the damage, detriment, inconvenience, and annoyance" of certain citizens, but not to the injury of their health, destruction of property, or any other irreparable injury, held not to justify abating the works as a nuisance: *Daniels v. Keokuk Water-works*, 61 Iowa, 549. But a dense smoke laden with cinders, caused by the burning of pine wood, and continued for twelve hours twice in each month, falling upon and penetrating

houses at a distance of from forty to two hundred feet, although the inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke, and cinders: *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654.

<sup>1</sup> *Wesson v. Iron Co.*, 13 Allen, 95; 90 Am. Dec. 181; *Cooper v. R. R. Co.*, 36 Jur. 169.

<sup>2</sup> *Wood on Nuisances*, 591.

<sup>3</sup> *St. Helens Smelting Co. v. Tipping*, 4 Beat & S. 608; *Salvin v. Coal Co.*, 31 L. T., N. S., 154; *Wesson v. Iron Co.*, 13 Allen, 95; 90 Am. Dec. 181; *Pollock v. Lester*, 11 Hare, 266.

<sup>4</sup> *Hutchins v. Smith*, 63 Barb. 252; *Cartwright v. Gray*, 12 Grant (U. C.), 400.

<sup>5</sup> *Hutchins v. Smith*, 63 Barb. 252.

<sup>6</sup> *Savile v. Kilner*, 26 L. T., N. S., 277.

<sup>7</sup> *Hutchins v. Smith*, 63 Barb. 252.

a proper use of his property.<sup>1</sup> But one may be restrained from so using his smoke-stack in a populous city as to permit the soot to be a disturbance, annoyance, and source of injury.<sup>2</sup> A person must not build his chimneys so as to send the smoke therefrom into his neighbor's house.<sup>3</sup> If one building is several stories high, and the other only one story, this does not warrant the owner of the low building in building a low chimney so as to send the smoke into the higher building.<sup>4</sup> In an English case the defendant erected a chimney in his stable for the purpose of having a fire in his saddle-room. The chimney was much lower than the surrounding buildings, and when a fire was built, the smoke escaping through the chimney entered the plaintiff's dwelling, some fifty yards distant, injuring the plaintiff's furniture by covering the same with soot, and discoloring it, and annoying the plaintiff and his family. It was held that this was an actionable nuisance, and that if the plaintiff would have a fire in his stable he must construct his chimney so as not to injure his neighbor's property or impair its comfortable enjoyment.<sup>5</sup> It is no defense that the owner of the high building has opened windows upon the sides of his building when there was no necessity therefor, and that except for the windows the smoke would be no annoyance to him;<sup>6</sup> nor that the owner would not have been affected by the smoke if he had erected low buildings instead of high ones.<sup>7</sup>

§ 2984. **Fuel.**—One has no right to burn fuel which develops unusual quantities of smoke, and thereby injures his neighbors.<sup>8</sup> An injunction will lie to prevent a party

<sup>1</sup> *Embrey v. Owen*, 4 Eng. L. & Eq. 478.

<sup>2</sup> *Sullivan v. Royer*, 72 Cal. 248; 1 Am. St. Rep. 51.

<sup>3</sup> *Lord Colchester v. Ellis*, 2 Stark. Ev. 538; *Sampson v. Smith*, 8 Sim. 272.

<sup>4</sup> *Lord Colchester v. Ellis*, 2 Stark. Ev. 538.

<sup>5</sup> *Lord Colchester v. Ellis*, 2 Stark. Ev. 538.

<sup>6</sup> *Wood on Nuisances*, 586.

<sup>7</sup> *Savile v. Kilner*, 26 L. T., N. S., 277.

<sup>8</sup> *Galbraith v. Oliver*, 3 Pittab. Rep. 78; *Campbell v. Seaman*, 63 N. Y. 568; 20 Am. Rep. 567; *Duncan v. Hayes*, 22

from burning bituminous coal for generating steam in his mill so near to dwellings as to cover them with soot and noxious vapors.<sup>1</sup> In a Pennsylvania case,<sup>2</sup> it was held that equity would not enjoin the use of a particular species of fuel when it was essential to the carrying on of a useful business, and when the fuel was such as is ordinarily used in similar establishments, and the damages to the party enjoined from the injunction would be greater than those resulting from its refusal, and the damages are susceptible of compensation at law, but would leave the parties to their remedy at law.

**§ 2985. Noxious Vapors.**—The rules applicable to smoke apply also to noxious vapors. The right to a pure and uncontaminated atmosphere extends not only to an atmosphere sufficiently pure for all the purposes of breath and life, but also to an atmosphere free from noxious mixtures that are deleterious to animal or vegetable life.<sup>3</sup> The operation of lead-smelting works may be restrained by injunction when they emit poisonous and offensive

N. J. Eq. 26; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Rhodes v. Dunbar*, 57 Pa. St. 275; 98 Am. Dec. 221; the court saying: "The complaint in reference to the old mill was on account mainly of the fuel, chips, shavings, and saw-dust used; and that is the foundation of the complaint against the contemplated re-erection. If no other species of fuel would answer the purpose or could be used, I grant there would be more in the point. But this is not pretended. If, therefore, when the mill shall be put into operation, and by its use it becomes a nuisance from this cause, the remedy is well known. Equity will enjoin against the use of such fuel, and the mischief will be at once cured."

<sup>1</sup> *Galbraith v. Oliver*, 3 Pittsb. Rep. 78.

<sup>2</sup> *Richard v. Phenix Iron Co.*, 57 Pa. St. 105.

<sup>3</sup> *Wood on Nuisances*, 621; citing *Campbell v. Seaman*, 63 N. Y. 568; 20 Am. Rep. 567; *Savile v. Kilner*, 26

L. T., N. S., 277; *Salvin v. North Brancepeth Coal Co.*, 31 L. T., N. S., 154; *Tipping v. St. Helens Smelting Co.*, 4 Best & S. 608; 11 H. L. Cas. 642; 116 Eng. Com. L. 608; 12 L. T., N. S., 776; *Smith v. Phillips*, 8 Phila. 10; *Huckenstine's Appeal*, 70 Pa. St. 102; 10 Am. Rep. 669; *Bankart v. Houghton*, 27 Beav. 425; *Houghton v. Bankart*, 3 L. T., N. S., 266; *Ward v. Lang*, 35 Jur. 408; *Cooper v. R. R. Co.*, 2 Macph. 117; *Roberts v. Clarke*, 18 L. T., N. S., 49; *Mulligan v. Elias*, 12 Abb. Pr., N. S., 259; *Jones v. Powell*, Palmer, 536; *Poynton v. Gill*, 2 Roll. Abr. 140; *Aldred's Case*, 5 Coke, 58 a; *Hutchins v. Smith*, 63 Barb. 251; *Walter v. Selfe*, 4 Eng. L. & Eq. 15; *Rex v. White*, 1 Burr. 333; *Beardmore v. Tredwell*, 7 L. T., N. S., 207; 3 Giff. 683; *Tennant v. Hamilton*, 7 Clark & F. 122; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Crump v. Lambert*, L. R. 3 Eq. 409.

fumes and vapors, causing danger to health, and injury to adjoining property.<sup>1</sup> One who, by reason of a distillery erected near his farm, suffers from poisoning of air and water, is not precluded from maintaining an action because others also suffer from the nuisance.<sup>2</sup>

§ 2986. **Brick-yards.** — Brick-burning is a nuisance where its results are to injure the property or impair the comfortable enjoyment of neighbors.<sup>3</sup> Where one manufacturing brick upon his lands uses a process in burning by which noxious gases are generated, which are borne by the winds upon the adjacent lands of his neighbor, injuring and destroying trees and vegetation, this is a nuisance; and the party injured may maintain an action to recover damages, and to restrain the use of the process complained of.<sup>4</sup> It is not a nuisance *per se*.<sup>5</sup>

§ 2987. **Blacksmith's Shop.** — A blacksmith's shop is not a nuisance *per se*,<sup>6</sup> and a decree declaring a shop a nuisance, and restraining its further use, should not restrain the further use for that purpose of the lot on which the shop is situated.<sup>7</sup>

**ILLUSTRATIONS.** — The defendant erected a carriage factory and blacksmith-shop in the immediate vicinity of the plaintiff's dwelling-house, and carried on the business of blacksmithing therein. Owing to the location of the shop, the cinders, ashes, and smoke issuing from the chimneys were thrown in large quantities upon the plaintiff's house and land, so that the water in her well became colored and unfit for use. When the wind blew in a certain direction from the defendant's premises it was impossible for the plaintiff's tenants to dry their clothes with-

<sup>1</sup> Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116; 42 Am. Rep. 534.

<sup>2</sup> Corley v. Lancaster, 81 Ky. 171.

<sup>3</sup> Wood on Nuisances, 603; Barwell v. Brooks, 1 L. T. 75, 454; Walter v. Selfe, 15 Jur. 416; Pollock v. Lester, 11 Hare, 266; Beardmore v. Tredwell, 31 L. J., N. S., 893; Bamford v. Tumley, 31 L. J., N. S., 286; Badham v. Hall, 22 L. T., N. S., 116; Cavey v. Ledbitter, 13 Com. B., N. S., 470;

Campbell v. Seaman, 2 Thomp. & C. 237; 63 N. Y. 568; 20 Am. Rep. 567; Fuselier v. Spalding, 2 La. 773.

<sup>4</sup> Campbell v. Seaman, 63 N. Y. 568; 20 Am. Rep. 567.

<sup>5</sup> Donald v. Humphrey, 14 Fount. 1206; Huckenstine's Appeal, 70 Pa. St. 102; 10 Am. Rep. 669.

<sup>6</sup> Whitney v. Bartholomew, 21 Conn. 213.

<sup>7</sup> Faucher v. Grass, 60 Iowa, 505.

out having them soiled and injured by the smoke, ashes, and cinders thrown upon them from the defendant's shop, and when their windows were open the house would be filled with smoke and ashes proceeding from the defendant's shop. In consequence of these annoyances, the plaintiff's tenants had left the house, and it had stood empty a year, by reason of which she had lost the rent thereon during that period. A verdict for the plaintiff was affirmed on appeal: *Whitney v. Bartholomew*, 21 Conn. 213.

§ 2988. **Defenses.**—The fact that the trade producing smoke to an extent to become a nuisance is a lawful trade, or that it was carried on for purposes that are necessary and useful to the community, or that it is carried on in a reasonable and proper manner, or in a proper place, will not operate to relieve the owner from liability, if the trade in fact is productive of such ill results to others as to make it a nuisance.<sup>1</sup> It is no defense that the plaintiff was in a delicate state of health, and therefore more susceptible to the effects of the nuisance;<sup>2</sup> nor that the plaintiff's property is of a delicate character, and therefore more susceptible to injury than ordinary property;<sup>3</sup> nor that vegetation injured by noxious vapors is of a delicate kind, or that it is a foreign, and not a domestic, product;<sup>4</sup> nor that the discomfort arising from the nuisance, or the actual tangible injury to property itself therefrom, is in no measure commensurate with the pecuniary loss to the owner of the works producing the injury, by having his works declared a nuisance;<sup>5</sup> nor that the rental value of the property has been increased by the construction and

<sup>1</sup> *Pinckney v. Ewens*, 4 L. T., N. S., 741; *Stockport Water Works Co. v. Potter*, 7 Hurl. & N. 160; *Respublica v. Caldwell*, 1 Dall. 161; *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Beardmore v. Tredwell*, 7 L. T., N. S., 207; *Bamford v. Turnley*, 6 L. T., N. S., 721.

<sup>2</sup> *Walter v. Selfe*, 15 Jur. 416.

<sup>3</sup> *Cooke v. Forbes*, L. R. 5 Eq. 166.

<sup>4</sup> *Cooke v. Forbes*, L. R. 5 Eq. 166; *Campbell v. Seaman*, 63 N. Y. 568; 20 Am. Rep. 567.

<sup>5</sup> *Attorney-General v. Leeds*, L. R. 5 Ch. App. 589; *Attorney-General v. Cambridge Gas Co.*, L. R. 6 Eq. 282; *Casebeer v. Mowry*, 55 Pa. St. 423; 93 Am. Dec. 766; *Reg. v. Longton Gas Co.*, 29 L. J. M. C. 118; *Cooke v. Forbes*, L. R. 5 Eq. 166; *Tipping v. St. Helens Smelting Co.*, 4 Best & S. 608; *Salvin v. No. Brancepeth Coal Co.*, 31 L. T., N. S., 154; *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 147.

maintenance of the defendant's works, nor that they could not be rented at all if the plaintiff's works were to stop, nor will evidence of that character be admitted either as a defense or in mitigation of damages;<sup>1</sup> nor that the property of the plaintiff, injury to which is complained of, is in part devoted to uses that are also nuisances;<sup>2</sup> nor is it a defense that the injury is only occasional.<sup>3</sup>

§ 2989. **Smells and Stenches.**—Any use of property which corrupts the atmosphere and fills it with stenches and smells is a nuisance, whether it arises from the exercise of a trade or business or any other use.<sup>4</sup> To amount to a nuisance, the smells must be either offensive to the senses, or such as to produce actual physical discomfort and interfere with the comfortable enjoyment of one's property.<sup>5</sup> It is not necessary that the smells should be hurtful or unwholesome; it is sufficient if they are so offensive or produce such annoyance, inconvenience, or discomfort as to impair the comfortable enjoyment of property by persons of ordinary sensibilities.<sup>6</sup> A smell

<sup>1</sup> *Francis v. Schoellkopf*, 53 N. Y. 152; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; 90 Am. Dec. 181.

<sup>2</sup> *McKeon v. Lee*, 4 Robt. 469; the court saying: "The defendant undertook to show that the whole vicinity was of such an inferior character, such a nest of nuisances, that one more or less would not affect it; and that even the plaintiff herself, before she had sustained any injury from the defendant's acts, had converted her own premises into one. Certain occupations, trades, or manufactures may become a nuisance in a populous city, that would not be so in the country, or among a scattered population. But I know of no principle which outlaws premises upon which a nuisance exists, so as to prevent the owner from being protected against other nuisances on other premises."

<sup>3</sup> *Campbell v. Seaman*, 63 N. Y. 568; 20 Am. Rep. 567.

<sup>4</sup> *Wood on Nuisances*, 648.

<sup>5</sup> *Catlin v. Valentine*, 9 Paige, 576; 38 Am. Dec. 567; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392; *Kirkman v. Handy*, 11 Humph. 406; 54 Am. Dec. 45; *Com. v. Brown*, 13 Met. 365; *Wolcott v. Melick*, 11 N. J. Eq. 204; 66 Am. Dec. 790; *Cleveland v. Gas-light Co.*, 20 N. J. Eq. 201.

<sup>6</sup> *Meigs v. Lester*, 23 N. J. Eq. 199; *Pickard v. Collins*, 23 Barb. 444; *Story v. Hammond*, 4 Ohio, 376; *Peck v. Elder*, 3 Sand. 126; *Cropsey v. Murphy*, 1 Hilt. 126; *Francis v. Schoellkopf*, 53 N. Y. 152; *Knight v. Gardner*, 19 L. T., N. S., 673; *State v. Wetherall*, 5 Harr. (Del.) 487; *Brady v. Weeks*, 3 Barb. 157; *Manhattan Gas-light Co. v. Barker*, 36 How. Pr. 233; *Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251; *Eames v. N. E. Worsted Co.*, 11 Met. 570.

simply disagreeable is actionable.<sup>1</sup> It need not endanger the health of the neighborhood.<sup>2</sup>

**ILLUSTRATIONS.** — An animal was killed upon the defendant's railroad, near the plaintiff's dwelling-house, by one of its locomotives, and the defendants did not remove it, and the stench therefrom became so unwholesome as to cause the plaintiff's wife to become sick. *Held*, that the defendants were guilty of an actionable nuisance: *Ellis v. R. R. Co.*, 63 Mo. 131; 21 Am. Rep. 436.

§ 2990. **Bone-boiling Works.** — A bone-boiling establishment, the vapors and stenches from which are annoying to the neighborhood, is a nuisance.<sup>3</sup>

§ 2991. **Cattle-yards.** — Cattle yards and pens, when suffered to remain in an unclean or filthy condition, are nuisances, when they impair the comfortable enjoyment of property by the stenches emanating therefrom, or when, by reason of excessive noise, they disturb the quiet of the neighborhood.<sup>4</sup>

§ 2992. **Dairies.** — The keeping of a dairy in a public place, which creates offensive smells, is a nuisance, though kept as clean as possible.<sup>5</sup>

§ 2993. **Hog-styes.** — The keeping of hogs in pens in a city or town is *prima facie* a nuisance; and is only excused when the pens are kept in so clean a condition as not to emit smells and stenches.<sup>6</sup> Occupying real property in

<sup>1</sup> *Walter v. Selfe*, 4 De Gex & S. 321; *Smith v. McConathy*, 11 Mo. 517; *Taylor v. People*, 6 Parker, 347; *McCredie v. McBrau*, 32 Jur. 184; *Pickard v. Collins*, 23 Barb. 444; *Broadbent v. Imperial Gas Co.*, 7 De Gex, M. & G. 426; *Stowe v. Mills*, 39 Conn. 426; *Smith v. Humbert*, 2 Kerr, 602.

<sup>2</sup> *Catlin v. Valentine*, 9 Paige, 575; 38 Am. Dec. 567.

<sup>3</sup> *Meigs v. Lister*, 23 N. J. Eq. 199; *Smith v. Cummings*, 2 Pars. Cas. 92.

<sup>4</sup> *Illinois Cent. R. R. Co. v. Grabill*, 50 Ill. 241; *Babcock v. Stock Yard Co.*,

20 N. J. Eq. 296; *Bishop v. Banks*, 33 Conn. 118; 87 Am. Dec. 197.

<sup>5</sup> *State v. Boll*, 59 Mo. 321.

<sup>6</sup> *State v. Payson*, 37 Me. 361; *Smith v. McConathy*, 11 Mo. 517; *McCreadie v. McBrau*, 32 Jur. 184; *Aldred's Case*, 9 Coke, 58; *Rex v. White*, 1 Burr. 333; *Everett v. Grapes*, 3 L. T., N. S., 669; *Chelsea Vestry v. King*, 34 L. J. M. C. 9; *Illinois Cent. R. R. Co. v. Grabill*, 50 Ill. 241; *Bishop v. Banks*, 33 Conn. 118; 87 Am. Dec. 197; *State v. Koster*, 35 Iowa, 221; *State v. Holcomb*, 68 Iowa, 107; 56 Am. Rep. 853.

cities, as a hog-yard, slaughter-house, and fat and offal boiling-house, is a nuisance; but the presumption may be rebutted by showing that the business is so conducted and carried on as not to endanger the health or interfere with the comfort of the neighboring inhabitants.<sup>1</sup>

**ILLUSTRATIONS.**—The plaintiff was proprietor of a hotel, and the defendant maintained, adjoining thereto, cattle-pens, containing hogs and cattle, which, by their noises, and the filthy condition of the pens, and the sickening and fetid matter therein, and the unhealthy effluvia therefrom, were annoying to the senses, and injurious to the health of the plaintiff and his family and guests, and destroyed his business, and the use and enjoyment of his premises. *Held*, an actionable nuisance: *Ohio etc. R. R. Co. v. Simon*, 40 Ind. 278.

**§ 2994. Livery-stables.**—A livery-stable is not a nuisance *per se*.<sup>2</sup> But when located near dwellings in city or town, they are *prima facie* nuisances.<sup>3</sup> The erection of a stable in such close proximity to a hotel as to work injury,

<sup>1</sup> *Dubois v. Budlong*, 10 Bosw. 700. See also *State v. Wetherall*, 5 Harr. (Del.) 487; *Ashbrook v. Commonwealth*, 1 Bush, 139; 89 Am. Dec. 616; *Dubois v. Budlong*, 15 Abb. Pr. 445.

<sup>2</sup> *Dargan v. Waddill*, 9 Ired. 244; 49 Am. Dec. 421; *Shiras v. Olinger*, 50 Iowa, 571; 33 Am. Rep. 138; *Flint v. Russell*, 5 Dill. 151; the court saying: "Counsel have referred to a number of adjudications in which the legal rights of the proprietors of livery-stables and those of the adjoining or near proprietors have been considered by the courts. The principal cases are the following: *Aldrich v. Howard*, 7 R. I. 87; 80 Am. Dec. 636; 8 R. I. 246; *Burditt v. Swenson*, 17 Tex. 489; 67 Am. Dec. 665; *Dargan v. Waddill*, 9 Ired. 244; 49 Am. Dec. 421; *Kirkman v. Handy*, 11 Humph. 406; 54 Am. Dec. 45; *Coker v. Birge*, 10 Ga. 336; *Harrison v. Brooks*, 20 Ga. 537; *Morris v. Brown*, Anth. 368. The judgments in these cases concur in establishing this doctrine, viz., that a livery-stable in a town or city is not *per se*, that is, necessarily and unavoidably, a nuisance, but it may be or become a nuisance, and this depends upon its location, as respects

the property near by and the manner in which it is built, kept, and used. The foregoing observations are well illustrated by *Aldrich v. Howard*, 8 R. I. 246, where it was decided that a livery-stable may be a nuisance notwithstanding it was properly built, properly kept, and was in a location as fit as any in that part of the city. The court say: "It has been held in other cases that a stable in a town is not necessarily and *per se* a nuisance; yet if it is so built or so used as that it destroys the comfort of persons owning and occupying adjoining premises, creating such an annoyance as to render life uncomfortable, then it is none the less a nuisance that it is well kept, carefully built, and as favorably located as the town will admit."

<sup>3</sup> *Dargan v. Waddill*, 9 Ired. 244; 49 Am. Dec. 421; the court saying that a livery-stable is not *per se* a nuisance; but if so built, so kept, and so used as to destroy the comforts of persons occupying adjoining premises, and impair their value as places of habitation, or if the adjacent proprietors are annoyed by it in any way that could be avoided, it becomes an actionable nuisance.

inconvenience, prejudice, and damage to the proprietor of the hotel property will be deemed a nuisance.<sup>1</sup> A perpetual injunction against keeping a livery-stable upon a lot adjacent to plaintiff's store in a town will be awarded, where it appears that it is kept in a filthy and unsafe condition, so as to be offensive and dangerous to the plaintiff, and the owners thereof insist that it is well kept, and do not propose to keep it differently; and the injunction will not be limited to restraining the manner of keeping it.<sup>2</sup> A livery-stable is a nuisance when, being located near dwellings, it emits offensive stenches;<sup>3</sup> or the noise from the horses disturb the slumber and quiet of the neighbors;<sup>4</sup> or it attracts large numbers of flies, to the annoyance of residents.<sup>5</sup>

§ 2995. **Privies.**—Privies are *prima facie* nuisances.<sup>6</sup> Equity will enjoin the erection of a privy about to be built near plaintiff's house in violation of a city ordinance.<sup>7</sup>

§ 2996. **Slaughter-houses.**—A slaughter-house is *prima facie* a nuisance;<sup>8</sup> it is not, however, *per se* a nuisance, but it will be enjoined where it is offensive.<sup>9</sup>

§ 2997. **Soap and Candle Factories.**—Soap and candle factories are *prima facie* nuisances.<sup>10</sup>

<sup>1</sup> Coker v. Birge, 9 Ga. 425; 54 Am. Dec. 347.

<sup>2</sup> Burditt v. Swenson, 17 Tex. 489; 67 Am. Dec. 665.

<sup>3</sup> Aldrich v. Howard, 8 R. I. 246.

<sup>4</sup> Dargau v. Waddill, 9 Ired. 244; 49 Am. Dec. 421.

<sup>5</sup> Kirkman v. Handy, 11 Humph. 406; 54 Am. Dec. 45; Aldrich v. Howard, 8 R. I. 246.

<sup>6</sup> Wahle v. Reinbach, 76 Ill. 322; Marshall v. Cohen, 44 Ga. 489; 9 Am. Rep. 170; Tenant v. Goldwin, 6 Mod. 311; Perrine v. Taylor, 43 N. J. Eq. 128. But see Trulock v. Merte, 72 Iowa, 510.

<sup>7</sup> Rand v. Wilber, 19 Ill. App. 395.

<sup>8</sup> Catlin v. Valentine, 9 Paige, 575; 38 Am. Dec. 567; Brady v. Weeks, 3 Barb. 156; Woodyear v. Schaefer, 57 Md. 1; 40 Am. Rep. 419; Seifried v. Hays, 81 Ky. 377; 50 Am. Rep. 167; Reichert v. Geers, 98 Ind. 73; 49 Am. Rep. 738.

<sup>9</sup> Primer v. Pendleton, 75 Va. 516; 40 Am. Rep. 738; Minke v. Hofeman, 87 Ill. 450; 29 Am. Rep. 63.

<sup>10</sup> Howard v. Lee, 3 Sand. 281; Dana v. Valentine, 5 Met. 8; Radenhurst v. Coates, 6 Grant (U. C.), 140.

§ 2998. **Stables and Barns.**—A private stable or barn may be so located with reference to the dwellings or places of business of others, and be so improperly kept and conducted, as to become an actionable nuisance.<sup>1</sup> The building of a private stable on one's lot is not *per se* a nuisance to be enjoined at the instance of one who has built his own house within nine feet of his neighbor's line. Such a stable may or may not be a nuisance, according to how it is managed.<sup>2</sup> The erection of a private stable near a church-building will not be enjoined.<sup>3</sup> But one has no right to erect a barn for the keeping of horses and cattle so near to his neighbor's dwelling as to disturb the rest of those residing there, by the noises produced by the animals kept there at night,<sup>4</sup> or to manage it in such a way as to permit offensive stenches to emanate therefrom and float over his neighbor's premises, to his serious annoyance and discomfort.<sup>5</sup>

§ 2999. **Tallow Factories and Melting-houses.**—Tallow factories and melting-houses are *prima facie* nuisances if erected and maintained in public places or near dwellings.<sup>6</sup>

<sup>1</sup> Packard v. Collins, 23 Barb. 444; Rounsaville v. Kohlheim, 68 Ga. 668; 45 Am. Rep. 505.

<sup>2</sup> In refusing the injunction in this case the chief-justice said that "if one who has sufficient room, and can, without injury to himself, locate a stable elsewhere than in immediate proximity to his neighbor's premises, where it will be offensive to the latter, equity will restrain him from so locating it. I concur in the decision, on the ground that it does not appear that the defendant could locate the stable elsewhere as well as where he was proceeding to place it": Rounsaville v. Kohlheim, 68 Ga. 668; 45 Am. Rep. 505. And see Keiser v. Lovett, 85 Ind. 240; 44 Am. Rep. 10.

<sup>3</sup> St. James's Church v. Arrington, 36 Ala. 546; 76 Am. Dec. 332.

<sup>4</sup> Pickard v. Collins, 23 Barb. 444; Dargan v. Waddill, 9 Ired. 244; 49 Am. Dec. 421.

<sup>5</sup> Pickard v. Collins, 23 Barb. 444. The owner of a stable neglecting to have it cleaned at proper times, and suffering the filth to accumulate and become noisome, is liable to a party injured: Dargan v. Waddill, 9 Ired. 244; 49 Am. Dec. 422.

<sup>6</sup> Morley v. Pragnell, Cro. Car. 510; 1 Hawk. P. C. 323; Downie v. Oliphant, 17 Fac. Col. 491; Peck v. Elder, 3 Sand. 126; Allen v. State, 34 Tex. 230; Dubois v. Budlong, 15 Abb. Fr. 445; Tohayle's Case, Cro. Car. 510; Radenhurst v. Coate, 6 Grant (U. C.), 140; Cropsey v. Murphy, 1 Hilt. 126; Bliss v. Hall, 5 Scott, 500; Blunt v. Hay, 4 Sand. Ch. 363.

§ 3000. **Tanneries.**—Tanneries are, on account of their liability to pollute the air, *prima facie* nuisances.<sup>1</sup> It has been held that a tannery is not *per se* a nuisance so as to warrant its abatement as such by the street commissioner or board of health until it is adjudged to be inimical to health.<sup>2</sup>

§ 3001. **Other Trades.**—So many other trades and occupations have been held to be nuisances, the rule applied to each particular case being that any use of property or any trade that corrupts the atmosphere with smoke, noxious vapors, noisome smells, dust, or other substances, or gases producing injury to property or to health, or impairing the comfortable enjoyment of property, is a nuisance, and it is immaterial whether it has ever been held a nuisance before or not; if it amounts to an actual invasion of another's right, it is actionable, even if it has never previously been the subject-matter of an action.<sup>3</sup> Thus the following have been held, in the particular facts of the case, to be actionable nuisances, viz.: Blacksmith-shops;<sup>4</sup> breweries;<sup>5</sup> chemical works;<sup>6</sup> deodorizing works;<sup>7</sup> distilleries;<sup>8</sup> dye-houses;<sup>9</sup> gas-works;<sup>10</sup> glue-works;<sup>11</sup> petroleum refineries;<sup>12</sup> tripe factories.<sup>13</sup>

§ 3002. **Nuisance by Noise—Test.**—A noise alone may amount to a nuisance actionable at the suit of the person injured.<sup>14</sup> The ordinary noises which are incident

<sup>1</sup> Francis v. Schoellkopf, 53 N. Y. 153; Pinckney v. Ewens, 4 L. T., N. S., 741; Thomas v. Brackney, 17 Barb. 654; Ellis v. State, 7 Blackf. 534; Rex v. Pappineau, 1 Strange, 686; Fisher v. Clark, 41 Barb. 332; Jones v. Powell, Hut. 136.

<sup>2</sup> State v. Trenton, 36 N. J. L. 283.

<sup>3</sup> Wood on Nuisances, 683.

<sup>4</sup> Whitney v. Bartholomew, 21 Conn. 213.

<sup>5</sup> Jones v. Powell, Palmer, 537.

<sup>6</sup> Com. v. Rumford Chemical Works, 16 Gray, 231.

<sup>7</sup> Knight v. Gardner, 19 L. T., N. S., 673.

<sup>8</sup> Smiths v. McConathy, 11 Mo. 517.

<sup>9</sup> Aldred's Case, 9 Coke, 59.

<sup>10</sup> Broadbent v. Imp. Gas Co., 7 De Gex, M. & G. 436.

<sup>11</sup> Charity v. Riddel, 14 Fac. Col. 237; Colville v. Middleton, 19 Fac. Col. 327.

<sup>12</sup> Com. v. Kidder, 107 Mass. 188.

<sup>13</sup> Farquhar v. Watson, 17 Fac. Col. 69.

<sup>14</sup> Crump v. Lambert, L. R. 3 Eq. Cas. 409; Davidson v. Isham, 9 N. J.

to the every-day use of property are not actionable nuisances.<sup>1</sup> The test is, whether the noise is of such a character as to be physically annoying to a person of ordinary sensibilities.<sup>2</sup> But if a lawful trade, productive of noise that is not a nuisance if confined to proper hours of the day, is exercised so near to dwellings, and at such unusual and unseasonable hours, as to disturb the rest of those dwelling there, it is a nuisance.<sup>3</sup> One has no right to devote his residence or any part of it to an unusual use, which will be injurious to the enjoyment of his premises by his neighbor.<sup>4</sup> He must not convert the whole or part of his house into a smith's forge or a printing-office, or other noisy or offensive trade, whereby the comfortable enjoyment of the neighboring premises is disturbed;<sup>5</sup> nor can he turn part of his premises into a stable.<sup>6</sup> In passing upon the question of nuisance or no nuisance by noise, it is essential to consider the locality,<sup>7</sup> the nature

Eq. 186; *Soltan v. De Held*, 9 Eng. L. & Eq. 104; *Rhodes v. Dunbar*, 57 Pa. St. 274; 98 Am. Dec. 221; *Dennis v. Eckhardt*, 3 Grant Cas. 390; *Sparhawk v. R. R. Co.*, 54 Pa. St. 401.

<sup>1</sup> *Duncan v. Hayes*, 22 N. J. Eq. 26.

<sup>2</sup> *Davidson v. Iaham*, 9 N. J. Eq. 186.

<sup>3</sup> *Fish v. Dodge*, 4 Denio, 311; *Dargan v. Waddill*, 9 Ired. 244; 49 Am. Dec. 421; *Martin v. Nutkin*, 2 P. Wms. 266; *Roskell v. Whitworth*, 17 Week. Rep. 804; *White v. Cohen*, 19 Eng. L. & Eq. 146; *Burditt v. Swenson*, 17 Tex. 489; 67 Am. Dec. 665; *Baptist Church v. R. R. Co.*, 5 Barb. 79; *Baptist Church v. R. R. Co.*, 6 Barb. 313; *Soltan v. De Held*, 9 Eng. L. & Eq. 104; *Dennis v. Eckhardt*, 3 Grant Cas. 390; *Davidson v. Iaham*, 9 N. J. Eq. 186.

<sup>4</sup> *Ball v. Ray*, L. R. 8 Ch. App. 467; *Dawson v. Moore*, 7 Car. & P. 25; *Dennis v. Eckhardt*, 3 Grant Cas. 390.

<sup>5</sup> *Gullick v. Tremlett*, 20 Week. Rep. 358.

<sup>6</sup> *Ball v. Ray*, L. R. 8 Ch. App. 467; the chancellor saying: "If the houses adjoining each other are so built that

from the commencement of their existence it is manifest that each adjoining inhabitant intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, so long as the house is so used, there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But on the other hand, if either party turns his house or any portion of it to unusual purposes in such a manner as to produce substantial injury to his neighbor, it appears to me that that is not, according to principle or authority, a reasonable use of his own property, and his neighbor, showing substantial injury, is entitled to protection. I do not regard it as a usual or as a reasonable manner of using the front portion of a dwelling-house in such a street as Green Street, that it should be turned into stables for horses, and if it is so used, then the proprietor is bound to take care that it is so used as not to be a substantial annoyance detrimental to the comfort and the value of the neighbor's property."

<sup>7</sup> *Cleveland v. Citizens' Gas Co.*, 20 N. J. Eq. 201.

of the trade or use of the property producing it,<sup>1</sup> the time or period during which it exists,<sup>2</sup> the intensity of the noise,<sup>3</sup> and the effects which it produces.<sup>4</sup> The quality of the noise, as well as its quantity, is also to be considered.<sup>5</sup>

§ 3003. **Jarring of Machinery.**—Where manufacturing operations are carried on with heavy machinery in the part of a city mainly occupied by residences, the jar of machinery will constitute a serious nuisance, injurious not to comfort merely, but to health.<sup>6</sup> An injunction will issue to restrain the operation of steam-machinery which jars and shakes the complainant's house so as to render it unsafe or unfit for habitation.<sup>7</sup> An electric-light engine which might be so arranged as to confine its noise and jar to the premises of the person maintaining it may be enjoined as a nuisance by the occupant of a neighboring house, the noise and jar interfering with conversation and sleep, and making some of the occupants sick.<sup>8</sup> The maintaining and use on property adjoining plaintiff's of a steam-engine for the purpose of propelling cars by means of a cable, by which use plaintiff's adjoining building was constantly shaken, plaster cracked, and premises covered with soot, besides a loud and continuous noise being produced, was held, in California, to constitute a nuisance, for which the street-car company was liable; and a license from the municipality to operate such road, and all machinery necessary thereto, was not a justification of such nuisance.<sup>9</sup> An injunction will not issue to restrain one

<sup>1</sup> *Dennis v. Eckhardt*, 3 Grant Cas. 390.

<sup>2</sup> *Inchbald v. Barrington*, L. R. 4 Ch. App. 388; *Ross v. Butler*, 19 N. J. L. 294; 97 Am. Dec. 634.

<sup>3</sup> *Dennis v. Eckhardt*, 3 Grant Cas. 390.

<sup>4</sup> *Davidson v. Isham*, 9 N. J. Eq. 186.

<sup>5</sup> *Dennis v. Eckhardt*, 3 Grant Cas. 390; *Dargan v. Waddill*, 9 Ired. 244; 49 Am. Dec. 421; *Bishop v. Banks*, 33 Conn. 121; 87 Am. Dec. 197.

<sup>6</sup> *Robinson v. Baugh*, 31 Mich. 290;

*McKeon v. See*, 51 N. Y. 300; 10 Am. Rep. 659; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; 90 Am. Dec. 181; *Whitney v. Bartholomew*, 21 Conn. 213; *Crump v. Lambert*, L. R. 3 Eq. Cas. 409; *Gilbert v. Showerman*, 23 Mich. 448; *Cooper v. Randall*, 53 Ill. 24.

<sup>7</sup> *Dittman v. Repp*, 50 Md. 516; 33 Am. Rep. 325.

<sup>8</sup> *Yocum v. Hotel St. George Co.*, 18 Abb. N. C. 340.

<sup>9</sup> *Tuebner v. B. R. Co.*, 66 Cal. 171.

from operating machinery in a lawful business, on the ground that it shakes and cracks the walls of the plaintiff's adjoining houses, and diminishes their rental value, it appearing that an adequate remedy existed in an action for damages, and that the plaintiff did not object to the erection of the machinery, but submitted to its use for seven years.<sup>1</sup>

**ILLUSTRATIONS.**—Complainant and defendant occupied adjoining buildings, the walls touching in places. The force of defendant's machinery caused the building of complainant to vibrate to such an extent as to seriously interfere with complainant's business. *Held*, that defendant was guilty of a nuisance, which it was the duty of the court to restrain: *Demarest v. Hardham*, 34 N. J. Eq. 469; *McKeon v. See*, 51 N. Y. 300; 10 Am. Rep. 659.

**§ 3004. Noisy Trades near Dwellings.**—The carrying on of noisy trades near dwellings constitutes a nuisance, where the noise interferes with the comfortable enjoyment of life and property by the inmates thereof.<sup>2</sup> Thus the following trades carried on near dwellings have been adjudged nuisances on account of noise, viz.: Blacksmith forges and shops;<sup>3</sup> boiler-makers;<sup>4</sup> gold-beaters;<sup>5</sup> iron-works;<sup>6</sup> printing-offices;<sup>7</sup> rolling-mills;<sup>8</sup> a steam planing-mill.<sup>9</sup> A stable is a nuisance when it is a wooden building with a plank floor so constructed that the stamping of the horses on it creates such a noise day and night that it can be heard not only throughout the square on which it and the plaintiff's house are situated, but on all the adjoining squares, and when in the opinion of the witnesses it impairs the value of the plaintiff's house as

<sup>1</sup> *Goodall v. Crofton*, 33 Ohio St. 271; 31 Am. Rep. 535.

<sup>2</sup> *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254.

<sup>3</sup> *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254; *Bradley v. Gill*, *Lutw.* 69; *Gullick v. Tremblitt*, 20 *Week. Rep.* 318; *Kinloch v. Robertson*, *Kames S. D.* 175.

<sup>4</sup> *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254.

<sup>5</sup> *Wallace v. Auer*, 10 Phila. 356.

<sup>6</sup> *Elliotson v. Feetham*, 2 Bing. N. C. 134.

<sup>7</sup> *Johnstone v. Constable*, 8 *Durie* (Scotch), 1263; *Robertson v. Campbell*, 13 *Fac. Col.* 61.

<sup>8</sup> *Scott v. Firth*, 10 L. T., N. S., 240; *Cooper v. R. R. Co.*, 35 *Jur.* 295; *Eaden v. Firth*, 1 *Hem. & M.* 573.

<sup>9</sup> *Hurlbut v. McKone*, 55 *Conn.* 31.

a dwelling.<sup>1</sup> The erection of a mill or factory will not be enjoined, at the suit of one dwelling in the vicinity, on account of the anticipated noise,<sup>2</sup> nor if the grievances can be remedied by scientific and skillful appliances; but the court will require such appliances to be used.<sup>3</sup>

**ILLUSTRATIONS.**—The defendant erected a rolling-mill with heavy hammers, used also for hammering iron, near the plaintiff's dwelling-house, and the noise arising from the business in the process of rolling and hammering iron was annoying and productive of great discomfort to the plaintiff and his family. It also appeared the business was productive of vibratory and jarring motions, which shook the plaintiff's building and cracked the walls. *Held*, a nuisance, and that the fact that the trade was a lawful and useful one did not justify its prosecution in a locality where it was productive of injury and damage to others: *Scott v. Firth*, 10 L. T., N. S., 240. The defendant was a printer, and had his printing-office, in which was a heavy printing-press, in the vicinity of the plaintiff's dwelling. In the prosecution of his business, the noise of his press was annoying to the plaintiff's family, and the press, when in use, produced vibratory and jarring sounds and motions, which shook and injured the building. *Held*, a nuisance: *Robertson v. Campbell*, 13 Fac. Col. 61. The defendants were the proprietors of an iron manufactory in a populous part of a city, and had a heavy steam-hammer therein. Adjoining their works was a church, over which the plaintiff presided, and a dwelling-house, in which he lived, and a school connected with the church, having about four hundred pupils. The noise of the steam-hammer disturbed the worship at the church, interfered seriously with the comfortable enjoyment of the dwelling by its noise and vibratory sounds, and also interfered seriously with the operations of the school. *Held*, a nuisance: *Roskell v. Whitworth*, 19 Week. Rep. 804.

§ 3005. **Animals.**—Noises by animals have been held nuisances; e. g., horses stamping at night in a livery-stable;<sup>4</sup> hogs and calves grunting and bleating by night in their pens;<sup>5</sup> dogs barking at night.<sup>6</sup>

<sup>1</sup> *Dargan v. Waddill*, 9 Ired. 244; 49 Am. Dec. 422.

<sup>2</sup> *Dorsey v. Allen*, 85 N. C. 358; 39 Am. Rep. 704.

<sup>3</sup> *Green v. Lake*, 54 Miss. 540; 28 Am. Rep. 378.

<sup>4</sup> *Dargan v. Waddill*, 9 Ired. 244; 49 Am. Dec. 421. See last section.

<sup>5</sup> *Bishop v. Banks*, 33 Conn. 121; 87 Am. Dec. 197; *Ohio etc. R. R. Co. v. Simon*, 40 Ind. 278.

<sup>6</sup> *Brill v. Flagler*, 23 Wend. 354.

§ 3006. **Bells.**— Ringing bells may amount to a nuisance.<sup>1</sup> In a recent Massachusetts case,<sup>2</sup> the ringing of a factory bell weighing about two thousand pounds, before half-past six o'clock in the morning, within from three hundred to one thousand feet of the residences of the plaintiffs, which awakened and disturbed them, was declared a nuisance, and enjoined, although a large majority of persons living nearer to the bell were not annoyed by it, and although some persons may have had such associations with the sound that it may have been to them a pleasure rather than an annoyance, or the sensibilities of others to the sound may have become so deadened that it ceased to disturb them.

§ 3007. **Musical Instruments.**— The noise of musical instruments kept up for such periods of time, and at such hours of the day or night, as to be really annoying to persons of ordinary sensibilities, or to produce other actual ill results, is a nuisance.<sup>3</sup>

§ 3008. **Other Noises.**— The noise of fire-works may constitute a nuisance.<sup>4</sup> The noises of billiard-rooms, of

<sup>1</sup> *Soltan v. De Held*, 9 Eng. L. & Eq. 104; *Hanson v. St. Mark's Church*, 3 Week. Not. Cas. 384.

<sup>2</sup> *Davis v. Sawyer*, 133 Mass. 289; 43 Am. Rep. 519.

<sup>3</sup> *Inchbald v. Barrington*, L. R. 4 Ch. 388. In *Walker v. Brewster*, L. R. 5 Eq. Cas. 31, the court said: "Having regard to the fact of this court having restrained the ringing of bells, I confess I have a strong opinion that the setting up a powerful brass band which plays twice a week for several hours in the immediate vicinity of a gentleman's house is a nuisance which this court would restrain."

<sup>4</sup> In an English case (*Walker v. Brewster*, L. R. 5 Eq. Cas. 31), the plaintiff was the owner of premises adjoining those occupied by the defendant, and only separated by a narrow foot-way, which he occupied for a residence. The defendant was the proprietor of a music-hall in Wolver-

hampton, and on the 10th of June, previous to the bringing of the plaintiff's bill, he had held a monster *fête* on the grounds, and this was followed by *fêtes* every Monday and Friday evening, with music, dancing, and fire-works (except that on Fridays no fire-works were discharged). The *fêtes* brought together great crowds of idle and dissolute persons, to the great annoyance of the plaintiff and his family, and the bands of music played from nine to ten hours on each occasion without cessation, and the noise from the fire-works were frequent and very annoying, and often frightened the plaintiff's horses, so that they broke loose from their fastenings, and the noise of the crowd was loud and continuous. The plaintiff alleged that if the *fêtes* were allowed to continue, the value of his residence would be depreciated, as a gentleman's residence, from one thousand to two thousand

places which are frequented by persons for drinking and carousing, and disorderly houses of all sorts, while they constitute public nuisances, may also, from their noises and other reasons, be nuisances to the neighborhood.<sup>1</sup> A skating-rink so managed as to disturb the neighbors with the noise may be enjoined as a nuisance.<sup>2</sup> The blowing of a steam-whistle as a signal of the approach or departure of trains may be prohibited in cities and places densely populated; and may under extraordinary circumstances become a private nuisance also.<sup>3</sup>

§ 3009. **Malicious Noises.**—Noises arising from malicious or mischievous motives are actionable, even though not amounting to sufficient to constitute a nuisance in the case of noises arising in the prosecution of a lawful trade or calling. Thus in an English case,<sup>4</sup> the plaintiff brought an action on the case against the defendant for willfully making loud noises, by discharging guns, whereby he was disturbed in the exercise of his right in taking wild ducks, by his decoys being frightened away. The court held that although the plaintiff was engaged in taking wild fowl upon a public stream, yet, that as he had a right to hunt there, the defendant had no right willfully to disturb him in the exercise of his right, and was liable in damages. In a somewhat similar case, where a similar result followed, the plaintiff was disturbed in the taking of wild fowl in a decoy-pond upon his own prem-

pounds. In granting the injunction, the vice-chancellor said: "I have a still clearer opinion that the noise of fire-works, as contrasted with the noise of the tolling of a bell, to say nothing of the damage that may be occasioned by the falling rocket-sticks, is a serious nuisance. But that the collection of crowds is a nuisance has been fully established; and in the neighborhood of a populous town, the letting off fire-works and performance of powerful bands will collect together crowds as a necessary and not merely a probable consequence."

<sup>1</sup> *Tanner v. Albion*, 5 Hill, 121; *Bloomhuff v. State*, 8 Blackf. 205; *People v. Sergeant*, 8 Cow. 139; *Gaunt v. Fynney*, L. R. 8 Ch. 8; 4 Moak, 718; *Inchbald v. Robinson*, L. R. 4 Ch. 388. Gathering in a noisy way in a pigeon-shooting match may be a nuisance: *King v. Moore*, 3 Barn. & Adol. 184. See *Walker v. Brewster*, L. R. 5 Eq. Cas. 25.

<sup>2</sup> *Snyder v. Cabell*, 29 W. Va. 48.

<sup>3</sup> *Knight v. Goodyear Co.*, 38 Conn. 438; 9 Am. Rep. 406; *First Baptist Church v. R. R. Co.*, 5 Barb. 79.

<sup>4</sup> *Carrington v. Taylor*, 11 East, 571.

ises, and the noises made by the defendant were also made upon his own premises, but with the view and purpose of frightening away the ducks from the plaintiff's pond.<sup>1</sup>

§ 3010. **Coming to Nuisance No Defense — Acquiescence.** — It is no defense that the plaintiff came to the nuisance.<sup>2</sup> The fact that a nuisance was originally built remote from human habitation, and plaintiffs have since put up their dwellings, is no defense in an action seeking to enjoin the further continuance of the nuisance.<sup>3</sup> So the fact that the plaintiff is a tenant from year to year, and that he has continued to lease the premises after the erection of the nuisance, at the same yearly rent, does not operate as a defense, or prevent the plaintiff from recovering such damages as he has sustained by reason of the nuisance.<sup>4</sup> One who hires land on which a railroad company maintains a nuisance may maintain an action if the nuisance is not abated. It is no defense that he need not have hired the land.<sup>5</sup> In the case of a private nuisance, the fact that the complainant has slept seven years upon his rights raises a strong, if not conclusive, presumption that the injury complained of is not of such a pressing and urgent nature as to entitle him to come into a court of equity and obtain the aid of a special injunction to restrain such nuisance.<sup>6</sup> Where one lies by and permits another to erect works at great expense, and to use them for several years without objection, he cannot come into equity for an injunction to restrain the

<sup>1</sup> *Keeble v. Hickeringill*, 11 East, 574.

<sup>2</sup> *Tipping v. St. Helens Smelting Co.*, L. R. 1 Ch. 66; *Howell v. McCoy*, 3 Rawle, 256; *Baukart v. Houghton*, 27 Beav. 425; *Smith v. Phillips*, 8 Phila. 10; *Alexander v. Kerr*, 2 Rawle, 83; 19 Am. Dec. 616; *Vedder v. Vedder*, 1 Denio, 257; *Roberts v. Clarke*, 18 L. T., N. S., 49; *Crosby v. Bessey*, 49 Me. 539; 77 Am. Dec. 271; *Mulli-*

*gan v. Elias*, 12 Abb. Pr., N. S., 259; *Angell v. R. R. Co.*, 38 N. J. Eq. 58; *Bushnell v. Robeson*, 52 Iowa, 540; *Hurlbut v. McKone*, 55 Conn. 31; 3 Am. St. Rep. 17.

<sup>3</sup> *Seifried v. Hays*, 81 Ky. 377; 50 Am. Rep. 167.

<sup>4</sup> *Smith v. Phillips*, 8 Phila. 10.

<sup>5</sup> *Central R. R. Co. v. English*, 73 Ga. 366.

<sup>6</sup> *Hieskell v. Cross*, 3 Brewst. 430.

use of such works in the same manner as they have been before used.<sup>1</sup> So if A constructs a work with the consent of B, either express or implied, equity will not afterwards restrain him by injunction, at the instance of B, although the work proves injurious to B.<sup>2</sup> But though plaintiff consented to the building of the thing of which he now complains as a nuisance, he is not estopped unless he gave such consent, knowing, or having reason to know, that the thing, when built, would be a nuisance. His act or consent must have been such as to make any subsequent attempt on his part to recover damages therefor a positive fraud.<sup>3</sup>

§ 3011. **Other Defenses.**—The presence of similar nuisances of the same kind is no defense.<sup>4</sup> It is no defense that the trade cannot be carried on without making much noise.<sup>5</sup> Defendant may show that the damage was contributed to by other causes than those for which the defendant is in fault.<sup>6</sup> But the fact that the act of a third person may have contributed to the final catastrophe will not exonerate a defendant sued for injuries resulting from an act which is unlawful, or is so hazardous as to be in the nature of a nuisance on account of the occasion for accident and injury which it continuously presents to innocent persons.<sup>7</sup>

<sup>1</sup> Southard v. Morris Canal, 1 N. J. Eq. 518.

<sup>2</sup> Elliotson v. Feetham, 2 Ring. N. C. 134.

<sup>3</sup> Hulme v. Shreve, 4 N. J. Eq. 116.

<sup>6</sup> Loughran v. Des Moines, 72 Iowa, 332.

<sup>5</sup> Corley v. Lancaster, 81 Ky. 171.

<sup>4</sup> Attorney-General v. Colney Hatch, L. R. 4 Ch. 146; McKeon v. See, 51 N. Y. 574; 10 Am. Rep. 659.

<sup>7</sup> Barry v. Terkildsen, 72 Cal. 254; 1 Am. St. Rep. 55.

**TITLE XXXII.**  
**MORTGAGES.**

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**PART I.—MORTGAGES OF REALTY, §§ 3012-3074.**  
**II.—CHATTEL MORTGAGES, §§ 3075-3092.**



# TITLE XXXII.

## MORTGAGES.

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### PART I. — MORTGAGES OF REALTY.

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#### CHAPTER CXL.

##### GENERAL PRINCIPLES.

- § 3012. Definition and nature of.
- § 3013. Who may make.
- § 3014. Who may take.
- § 3015. Requisites and form generally.
- § 3016. Designation of parties.
- § 3017. Description of the property.
- § 3018. Terminology of the proviso.
- § 3019. Specification of the thing secured.
- § 3020. Principles of construction.
- § 3021. Subject-matter of the mortgage.
- § 3022. Buildings, fixtures, crops, and franchises.
- § 3023. Equity of redemption.
- § 3024. Equitable mortgages.

§ 3012. Definition and Nature of a Mortgage. — A mortgage may be defined as a security for an obligation without possession.<sup>1</sup> At common law a mortgage of lands

<sup>1</sup> *Brown v. National Bank*, 44 Ohio St. 269; *Pearce v. Wilson*, 111 Pa. St. 14; 56 Am. Rep. 243; *Rapier v. Gulf City Paper Co.*, 77 Ala. 126; *Frank v. R. R. Co.*, 23 Fed. Rep. 123. In a doubtful case a transaction will be deemed to constitute a mortgage rather than a conditional sale. Nor, in order that it may be treated as a mortgage, is it essential that the mortgagor should have given his personal obligation for the debt: *Pioneer G. M. Co. v. Baker*,

23 Fed. Rep. 258; *Wilcox v. Morris*, 1 Murph. 116; 3 Am. Dec. 678; *Peckham v. Haddock*, 36 Ill. 38; *Dougherty v. McGolgan*, 6 Gill & J. 275; *Lyon v. Lyon*, 67 N. Y. 250; *Wilmerding v. Mitchell*, 42 N. J. L. 476; *Duty v. Graham*, 12 Tex. 427; 62 Am. Dec. 534; *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481; *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540; *Timms v. Shannon*, 19 Md. 296; 81 Am. Dec. 632; *Dutton v. Warschauer*, 21 Cal.

is defined as a conveyance upon condition, defeasible by performance of the condition.<sup>1</sup> In most of the older states of the Union a mortgage is held to pass the title in the property to the mortgagee, subject to the right of the mortgagor to reacquire the title by performing the condition of the mortgage.<sup>2</sup> In many of the newer states a mortgage is now considered as merely a lien upon the property, the debt being regarded as the principal thing, and the security as merely ancillary. In California, in conformity with the modern view, it is held that the settled doctrine of equity now is, that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal, and the land the incident; that the mortgage constitutes simply a lien, or encumbrance, and that the equity of redemption is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor in any of the ordinary modes of assurance, subject only to the lien of the mortgage; that the original character of mortgages has undergone a change; that they have ceased to be conveyances, except in form, and pass no estate in the land, but are mere securities.<sup>3</sup> Un-

609; 82 Am. Dec. 765; Horstman v. Gerker, 49 Pa. St. 282; 88 Am. Dec. 501; Austin v. Sprague Mfg. Co., 14 R. I. 464; New Orleans Banking Ass'n v. Adams, 109 U. S. 211. See also Doe v. Barton, 11 Ad. & E. 314; Walton v. Cody, 1 Wis. 420; Ladue v. R. R. Co., 13 Mich. 380; 87 Am. Dec. 759.

<sup>1</sup> Simon v. Schmidt, 41 Hun, 318; Erwin v. Curtis, 43 Hun, 292; Pancake v. Cauffman, 114 Pa. St. 113; Quick v. Turner, 26 Mo. App. 29; Durst v. Murphy, 119 Ill. 343; Cadman v. Peter, 118 U. S. 73; Bailey v. Bailey, 115 Ill. 551; Adams v. Adams, 51 Conn. 544.

<sup>2</sup> Toomer v. Randolph, 60 Ala. 356; Reynolds v. Canal and Banking Co. of N. O., 30 Ark. 520; Turner v. Watkins, 31 Ark. 429; Cross v. Robinson, 21 Conn. 379; Harper v. Ely, 70 Ill. 531; Erickson v. Rafferty, 79 Ill. 209; Stewart v. Barrow, 7 Bush, 368; Blaney v. Bearce, 2 Me. 132; Wilkins v. French, 20 Me. 111; Annapolis etc.

R. R. Co. v. Gantt, 39 Md. 115; Ewer v. Hobbs, 5 Met. 1-3; Reddick v. Gressman, 49 Mo. 389; Tripe v. Marcy, 39 N. H. 439; Kircher v. Schalk, 39 N. J. L. 335; Hemphill v. Ross, 66 N. C. 477; Allen v. Everly, 24 Ohio St. 97; Tryon v. Munson, 77 Pa. St. 250; Carpenter v. Carpenter, 6 R. I. 542; Henshaw v. Wells, 9 Humph. 568; Walker v. King, 44 Vt. 601; Faulkner v. Brockenborough, 4 Rand. 245.

<sup>3</sup> McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655; Rev. Codes Dak. 1877, sec. 1733; McMahon v. Russell, 17 Fla. 698; Carter v. Gunn, 64 Ga. 651; Fletcher v. Holmes, 32 Ind. 497; Rev. Codes Iowa 1880, sec. 1938; Seckler v. Delfs, 25 Kan. 159; Duclaud v. Rousseau, 2 La. Ann. 168; Livingston v. Hayes, 43 Mich. 129; Adams v. Corriston, 7 Minn. 456; Laws Mont. 1877, sec. 359; Kyger v. Ryley, 2 Neb. 20; Whitmore v. Shiverick, 3 Nev. 288; Laws N. M. 1876, c.

less expressly provided for, the mortgagee is not entitled to possession of the property until after foreclosure, where the mortgage is held to be only a lien upon the property.<sup>1</sup>

**§ 3013. Who may Make.**—Any person who is *sui juris* may give a mortgage, or empower an attorney to do so for him.<sup>2</sup> And by statute certain persons in a fiduciary or representative capacity may do so by order of court.<sup>3</sup> A mortgage by an infant is voidable only, and may be disaffirmed, but the disaffirmance must be prompt.<sup>4</sup> With regard to a married woman, the modern rule, principally statutory, is, that her mortgage is valid when made to secure her own debt.<sup>5</sup> A person of weak intellect can

36, sec. 8; *Waters v. Stewart*, 1 Caines Cas. 47; *Roberts v. Sutherland*, 4 Or. 219; *Thayer v. Cramer*, 1 McCord Ch. 395; *Wright v. Henderson*, 12 Tex. 43; *Comp. Laws Utah* 1876, 478; *Gen. Laws Wash.* 1877, sec. 550; *Word v. Trask*, 7 Wis. 566; 76 Am. Dec. 230; *Buck v. Swazey*, 35 Me. 41; 56 Am. Dec. 681; *Burke v. Cruger*, 8 Tex. 66; 58 Am. Dec. 102.

<sup>1</sup> *Mitchell v. Bartlett*, 52 Barb. 319; *Barrett v. Blackmar*, 47 Iowa, 565; *Seckler v. Delfs*, 25 Kan. 159; *Kidd v. Teepie*, 22 Cal. 255; *Wells v. Van Dyke*, 109 Pa. St. 330; *Berlack v. Halle*, 22 Fla. 236; 1 Am. St. Rep. 185. <sup>2</sup> *Zane v. Kennedy*, 73 Pa. St. 182; *Payne v. Patterson*, 77 Pa. St. 134; *Page v. Cooper*, 16 Beav. 396; *Con- taut v. Servosa*, 3 Barb. 128.

<sup>3</sup> *Edwards v. Taliaferro*, 34 Mich. 13; *Merritt v. Simpson*, 41 Ill. 391; *Agri- cultural Ins. Co. v. Barnard*, 26 Hun, 302; *Wetherill v. Harris*, 67 Ind. 452; *Black v. Dressell*, 20 Kan. 153; *Grif- fin v. Johnson*, 37 Mich. 87.

<sup>4</sup> *Willis v. Twombly*, 13 Mass. 204; *Loomer v. Wheelwright*, 3 Sand. Ch. 135; *Flynn v. Powers*, 35 How. Pr. 279; 36 How. Pr. 289; *Dana v. Coombs*, 6 Greenl. 89; 19 Am. Dec. 194; *Heath v. West*, 28 N. H. 101; *Callis v. Day*, 38 Wis. 643; *Kitchen v. Lee*, 11 Paige, 107; 42 Am. Dec. 101; *Story v. John- son*, 2 Young & C. 707; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Henry v. Root*, 33 N. Y. 526, 553;

*Young v. McKee*, 13 Mich. 552; *Hub- bard v. Cummings*, 1 Greenl. 11; *Big- elow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589; *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Robbins v. Eaton*, 10 N. H. 561; *Roberts v. Wig- gin*, 1 N. H. 73; 8 Am. Dec. 38; *Phil- lips v. Green*, 5 T. B. Mon. 355; *Allen v. Poole*, 54 Miss. 323; *Keegan v. Cox*, 116 Mass. 289; *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. Ch. 544; *Palmer v. Miller*, 25 Barb. 399; *Chandler v. McKinney*, 6 Mich. 217; 74 Am. Dec. 686; *Cronise v. Clark*, 4 Md. Ch. 403; *Dill v. Bowen*, 54 Ind. 204; *Walsh v. Young*, 110 Mass. 396; *Hamer v. Dip- ple*, 31 Ohio St. 72; 27 Am. Rep. 496; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; *Featherston v. McDonnell*, 15 U. C. C. P. 162; *Glenn v. Clark*, 53 Md. 580; *White v. Graves*, 107 Mass. 325; 9 Am. Rep. 38; *Kerr v. Russell*, 69 Ill. 666; 18 Am. Rep. 634; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442; 24 Am. Rep. 204; *Johnston v. Wallace*, 53 Miss. 331; 24 Am. Rep. 699; *Heburn v. Warner*, 112 Mass. 271; 17 Am. Rep. 86.

<sup>5</sup> *Yale v. Dederer*, 22 N. Y. 451; 78 Am. Dec. 216; *Young v. Graff*, 28 Ill. 20; *Owen v. Cawley*, 36 N. Y. 600; *Rogers v. Ward*, 8 Allen, 387; 85 Am. Dec. 710; *Knowles v. McCamly*, 10 Paige, 342; *Willard v. Eastham*, 15 Gray, 328; *Gardner v. Gardner*, 7 Paige, 112; *Heburn v. Warner*, 112 Mass. 271; 17 Am. Rep. 86; *Ledlie v.*

give a valid mortgage, provided no undue advantage was taken of his weakness.<sup>1</sup> One partner cannot give a mortgage of the partnership property to secure his own individual debt. A mortgage so given would attach only to the mortgagor's interest in the property after the partnership account had been taken.<sup>2</sup> Corporations have power to mortgage as incidental to the powers to acquire and hold real estate and to make contracts.<sup>3</sup>

§ 3014. **Who may Take.**—A mortgage may be taken by any one who is capable of holding real estate.<sup>4</sup> So an

Vrooman, 41 Barb. 109; White v. Story, 43 Barb. 124; White v. McNett, 33 N. Y. 371; Ballin v. Dillaye, 37 N. Y. 35; Cruger v. Cruger, 5 Barb. 227; Curtis v. Engel, 2 Sand. 287; Jaques v. Methodist Episcopal Church, 17 Johns. 548; 8 Am. Dec. 447; Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613; Nourse v. Henshaw, 123 Mass. 96; Burns v. Lynde, 6 Allen, 305; Athol Medicine Co. v. Fuller, 107 Mass. 437; Williams v. Hayward, 117 Mass. 532; Thacher v. Churchill, 118 Mass. 108; Krouskop v. Shontz, 51 Wis. 204; 37 Am. Rep. 817; Northw. Mut. Life. Ins. Co. v. Allis, 23 Minn. 337; Edwards v. Schoeneman, 104 Ill. 278; Rencher v. Wynne, 86 N. C. 268; Tiemeyer v. Turnquist, 85 N. Y. 516; 39 Am. Rep. 674; Ackley v. Westervelt, 86 N. Y. 448; Speck v. Gurney, 25 Hun, 644; Wilson v. Herbert, 41 N. J. L. 454; 32 Am. Rep. 343; Hall v. Tay, 181 Mass. 192; Plummer v. Jarman, 44 Md. 632; Campbell v. Tompkins, 32 N. J. Eq. 170; Newhart v. Peters, 80 N. C. 166; Marlow v. Barlew, 53 Cal. 456; Low v. Anderson, 41 Iowa, 476; Collins v. Wassell, 34 Ark. 17; Wasburn v. Roesch, 13 Ill. App. 268; Spurgin v. Traut, 65 Ill. 170; Saratoga County Bank v. Prunyn, 90 N. Y. 250; Huyler v. Atwood, 26 N. J. Eq. 504; Simms v. Kelly, 70 Ala. 429; Fitch v. Jeffries, 59 Miss. 506.

<sup>1</sup> Van Horn v. Keenan, 28 Ill. 445; Ripley v. Babcock, 13 Wis. 425; Marmon v. Marmon, 47 Iowa, 121; Day v. Seely, 17 Vt. 542; Copenrath v. Kienby, 83 Ind. 18; Bevin v. Powell, 11 Mo. App. 216.

<sup>2</sup> Hewitt v. Rankin, 41 Iowa, 35; Buchan v. Sumner, 2 Barb. Ch. 165; Fairchild v. Fairchild, 5 Hun, 407; Chicago Lumber Co. v. Ashworth, 26 Kan. 212; Moreau v. Saffarane, 3 Sneed, 595; 67 Am. Dec. 582; Hogle v. Lowe, 12 Nev. 286; Meily v. Wood, 71 Pa. St. 488; 10 Am. Rep. 719; Shanks v. Klein, 104 U. S. 18; Mechanics' Bank v. Godwin, 5 N. J. Eq. 334; Beecher v. Stevens, 43 Conn. 587; Collumb v. Read, 24 N. Y. 510; Hiscok v. Phelps, 49 N. Y. 97; French v. Lovejoy, 12 N. H. 458; Everett v. Schepmoes, 6 Hun, 479; Smith v. Kerr, 3 N. Y. 144; Wilson v. Hunter, 14 Wis. 683; 80 Am. Dec. 795; Holbrook v. Chamberlin, 116 Mass. 155; 17 Am. Rep. 146; Green v. Arnold, 11 R. I. 364; 23 Am. Rep. 466.

<sup>3</sup> Holbrook v. Chamberlin, 116 Mass. 155; 17 Am. Rep. 146; Daniels v. Hart, 118 Mass. 543; Thompson v. Lambert, 44 Iowa, 239; Aurora etc. Soc. v. Paddock, 80 Ill. 263; Mobile etc. R. R. Co. v. Talman, 15 Ala. 472; Philadelphia v. West. Union Tel. Co., 11 Phila. 327; Detroit v. Mut. Gas Co., 43 Mich. 594; Woodruff v. R. R. Co., 25 Hun, 246; Houston etc. R. R. Co. v. Shirley, 54 Tex. 125; Burt v. Rattle, 31 Ohio St. 116; Coe v. R. R. Co., 34 N. J. Eq. 266; McAllister v. Plant, 54 Miss. 106; Richards v. R. R. Co., 44 N. H. 127; Chapin v. R. R. Co., 8 Gray, 575; Bond v. Coke, 71 N. C. 97; Elwell v. R. R. Co., 67 Barb. 83; Richmond v. McGirr, 78 Ind. 192; In re St. Helen Mill Co., 3 Saw. 88.

<sup>4</sup> Fay v. Cheney, 14 Pick. 399; Appleton v. Boyd, 7 Mass. 131.

infant, alien, or married woman may be a mortgagee;<sup>1</sup> also corporations, if the debt was contracted in promoting the objects of their existence. In like manner, trustees and national banks may take mortgages on real estate as security for past indebtedness;<sup>2</sup> and it has latterly been held that a mortgage taken by a national bank to secure present or future advances is valid.<sup>3</sup> When a mortgage is taken to two or more persons as security for a joint debt, the mortgagees are joint tenants.<sup>4</sup>

**ILLUSTRATIONS.**—Suit brought by A against B and others on a promissory note made by B, C, and D, in favor of A, and for the foreclosure of a mortgage made by D and his wife to A. At the time he executed the note and mortgage D was of unsound mind. The money was obtained by D, and used for his benefit, and the transaction was *bona fide*. Held, that the mortgage was a valid one, and could be enforced against D and his representatives: *Copenrath v. Kienby*, 83 Ind. 18. A gave to a bank of Nebraska a mortgage of real estate; subsequently said bank was organized as a national bank, under the act of Congress approved June 3, 1864, and the amendments thereto. Those statutes prohibited said national bank from purchasing mortgage securities; state bank assigned to national bank the said mortgage. Held, that the assignment was valid, and that the mortgage might be foreclosed by the national bank: *Scofield v. State National Bank of Lincoln*, 9 Neb. 316; 31 Am. Rep. 412.

§ 3015. **Requisites and Form Generally.**—A verbal mortgage is invalid, but no particular words or form of conveyance are necessary to give the contract the qualities of a mortgage. It may be laid down as a general rule, that wherever a conveyance or assignment of an

<sup>1</sup> *Parker v. Lincoln*, 12 Mass. 16; *Hughes v. Edwards*, 9 Wheat. 489; *Tucker v. Fenno*, 110 Mass. 311; *Wochocka v. Wochocka*, 45 Wis. 423.

<sup>2</sup> *State v. Rice*, 65 Ala. 83; *Woods v. People's Nat. Bank*, 83 Pa. St. 57; *Turner v. Madison*, 78 Ind. 19; *Wiston v. Little*, 94 Pa. St. 64.

<sup>3</sup> *Union Nat. Bank v. Matthews*, 98 U. S. 621; *Thornton v. Nat. Exchange Bank*, 71 Mo. 221; *Scofield v. State Nat. Bank*, 9 Neb. 316; 31 Am. Rep.

412; *Nat. Bank v. Whitney*, 103 U. S. 99; *Oldham v. Wilmington Bank*, 85 N. C. 240.

<sup>4</sup> *Burnett v. Pratt*, 22 Pick. 556; *Mut. Life Ins. Co. v. Sturges*, 32 N. J. Eq. 678, 683; *Wright v. Ware*, 58 Ga. 150; *Brown v. Bates*, 55 Me. 520; 92 Am. Dec. 613; *Norcross v. Norcross*, 105 Mass. 265; *Stewart v. Allegheny Nat. Bank*, 101 Pa. St. 342; *Goodwin v. Richardson*, 11 Mass. 469.

estate is originally intended as a security for money, whether this intention appear from the deed itself or any other instrument, it is always considered in equity as a mortgage. The property upon which the security is to operate must be described with accuracy sufficient to identify it. The intention to create a lien must clearly appear, and the debt for which the security is given must be specified. It is not essential that the mortgage should be included in one instrument. It is frequently effected by means of an absolute deed, coupled with a defeasance in writing, or by parol.<sup>1</sup> A power of sale is not an essential ingredient of a mortgage.<sup>2</sup> Statutory forms of mortgage have been introduced into some of the states.<sup>3</sup> An absolute deed of trust is not a mortgage, and the distinction between such a deed and a deed of trust in the nature of a mortgage is well defined. Where the conveyance to a trustee is as collateral security merely, for the payment of a debt, with the condition that it shall become void upon its payment, and with a power to sell the land in case of default, it is a deed of trust in the nature of a mortgage. The grantor parts with his title conditionally only. If there is no such condition, but the conveyance is an absolute deed of trust, for the purpose of raising money to pay a debt, if not paid as agreed, the grantor parts with all his legal estate, and whatever rights he has are in their nature equitable merely. The fact that the deed is made to a trustee with power of sale does not change its character in this respect.

<sup>1</sup> Wilcox v. Morris, 1 Murph. 116; 3 Am. Dec. 678; Porter v. Muller, 53 Cal. 677; Burnside v. Terry, 45 Ga. 621; De Leon v. Higuera, 15 Cal. 483; Baldwin v. Jenkins, 23 Miss. 206; Mason v. Moody, 26 Miss. 184; Horbach v. Hill, 112 U. S. 144; Titcomb v. McAllister, 77 Me. 353; Logue's Appeal, 104 Pa. St. 136; Knight v. McCord, 63 Iowa, 429; Ross v. Brusie, 64 Cal. 245; Wilhelm v. Woodcock, 11 Or. 518; Klinck v. Price, 4 W. Va. 4; 6 Am. Rep. 268; New Orleans Banking Ass'n

v. Adams, 109 U. S. 211; Irwin v. Hubbard, 49 Ind. 350; 19 Am. Rep. 679.

<sup>2</sup> Lawrence v. Farmers' Loan and Trust Co., 13 N. Y. 200; Taylor v. Chowning, 3 Leigh, 654; Turner v. Bonchell, 3 Har. & J. 99; Jackson v. Henry, 10 Johns. 185, 196; 6 Am. Dec. 328; Hyman v. Devereux, 63 N. C. 624, 628; Lydston v. Powell, 101 Mass. 77.

<sup>3</sup> Notably California, Dakota Territory, Illinois, Indiana, Iowa, Maryland, Mississippi, Missouri, Tennessee.

Deeds of trust are either without a condition that they are to be void when the debt is paid, or they may have such a condition. The former are conveyances of an absolute estate in trust to secure a debt, with a power of sale in the trustee to execute the trust, and they divest the grantor of his legal estate, leaving in him nothing but an equity, while the latter constitute merely a security for the debt, defeasible upon its payment, the legal estate remaining in the mortgagor after default, as against all the world except the mortgagee. Both forms of instruments are mortgages in equity.<sup>1</sup>

ILLUSTRATIONS.—B, who furnished the money for A's entry on certain timber-land, took the title in his own name, agreeing to convey two thirds to A on repayment within a year, and the other one third on payment by A of a certain larger sum. *Held*, a mortgage: *Scriber v. Le Clair*, 66 Wis. 579. A deed of trust was given to secure a debt, and the property advertised for sale. The debtor obtained an injunction against the sale, and was induced to dismiss his suit and allow the sale to go on, on an agreement that the creditor should purchase and give time to the debtor to repurchase for the amount of the debt, which was a fair price for the land. *Held*, not a mortgage, but a sale with an option to repurchase: *Kerr v. Hill*, 27 W. Va. 576. A conveyed land to B. B agreed in writing to pay certain debts of A, A to repay the amount within three years, with interest, and upon repayment, B to reconvey the land to A. *Held*, that the transaction constituted a conditional sale, and not a mortgage: *Hays v. Carr*, 83 Ind. 275.

§ 3016. **Designation of Parties.**—Though highly desirable, absolute accuracy in the names of the parties is not indispensable to the validity of a mortgage; and where the mistake gives rise to a patent ambiguity, parol evidence is admissible to explain it. But where the wrong name is given, it is not competent to introduce verbal testimony to show what name was intended. Where two names are distinguishable, such as George and James, or

<sup>1</sup> *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637; *Lake v. Brown*, 116 Ill. 83; *Martin v. Alter*, 42 Ohio St. 94; *Chowning v. Cox*, 1 Rand. 306; 10 Am. Dec. 530; *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 651; *Fox v. Fraser*, 92 Ind. 265.

even where the names are much alike, as Edward and Edwin, it is not competent to go into direct parol evidence that where one name was written the other was intended. It is essential to the validity of a grant that the parties be named in the deed, or plainly designated, so as to distinguish them from all others. A grant to Henry, Earl of Pembroke, where his name is Robert, is good; or to A and his wife; or to a father and his son, if he have only one son, it is good; but if he have several sons, or if the grant be to a man's cousin, it is void for uncertainty.<sup>1</sup> A mortgage may be made to the heirs at law of a deceased person; but not to the heirs of a living person; for *nemo est hæres viventis*.<sup>2</sup> The name of the husband of a married woman should be given; or if unmarried, it should be stated that she is "single" or "a widow." A mortgage is well executed by a married woman signing her given name alone, her full name appearing in the body of the instrument and the acknowledgment.<sup>3</sup>

ILLUSTRATIONS.—A mortgage was signed by three persons, none of whose names appeared in the granting clause save by the pronoun "I." *Held*, not void for uncertainty: *Madden v. Floyd*, 69 Ala. 221. Bond and mortgage executed in blank as to name of obligee and mortgagee. *Held*, entirely incomplete, and of no more legal force than a simple piece of blank paper: *Chauncey v. Arnold*, 24 N. Y. 330.

§ 3017. **Description of Property.**—This should be accurate; but a general description which extrinsic evidence can make certain what property was intended to be included is sufficient.<sup>4</sup> Reference to other deeds for a descrip-

<sup>1</sup> *Peabody v. Brown*, 10 Gray, 45; *Scanlan v. Wright*, 13 Pick. 523, 530; 25 Am. Dec. 344; *Thorp v. Merrill*, 21 Minn. 366; 91 Am. Dec. 109; *Cobb v. Lucas*, 15 Pick. 7; *Kincaid v. Howe*, 10 Mass. 203; *Chauncey v. Arnold*, 24 N. Y. 330; *Stowell v. Haslett*, 5 Lans. 385; *Middleton v. Findla*, 25 Cal. 76; *Colton v. Seavey*, 22 Cal. 496; *Tustin v. Faught*, 23 Cal. 237.

<sup>2</sup> *Shaw v. Loud*, 12 Mass. 447; *Thomas v. Marshfield*, 10 Pick. 364,

367; *Hall v. Leonard*, 1 Pick. 27, 30; *Laurence v. Fletcher*, 8 Met. 153, 163; *City Bank of Kenoska v. McClellan*, 21 Wis. 112.

<sup>3</sup> *Zann v. Hatter*, 71 Ind. 136; 36 Am. Rep. 193.

<sup>4</sup> *Sharp v. Thompson*, 100 Ill. 447; 39 Am. Rep. 61; *Slater v. Breeze*, 36 Mich. 77; *Wilson v. Boyce*, 92 U. S. 320; *Keiffer v. Starn*, 27 La. Ann. 282; *Tucker v. Field*, 51 Miss. 191.

tion is sufficient.<sup>1</sup> An accurate and complete description of more lands than are embraced in the other deeds referred to, although the premises are described as "the same estate" as is mentioned in the deeds, will include the additional lands described.<sup>2</sup> So a mortgage of "all the town lots the mortgagor then owned in law or in equity," without further description, is not void for uncertainty.<sup>3</sup> And where the property is described as "all my estate," or "all my lands, wherever situated," or "all my property," it is sufficient.<sup>4</sup> The mortgagor is estopped from setting up that the description is so vague and indefinite as not to include any property.<sup>5</sup> And it requires proof of the strongest kind to enable a mortgagor to show that he did not intend to include property which is described in the mortgage.<sup>6</sup> Where there is a difference in the description contained in the operative part of the deed and a subsequent clause, the former must prevail.<sup>7</sup> A mortgage will not be declared void for uncertainty in the description, if the land can be located with reasonable certainty; and if two phrases cannot be reconciled, that which would defeat the mortgage should be rejected.<sup>8</sup> A mortgage may operate on land between the exterior line of a street and its center, although not so stating, when it clearly is intended to convey all the mortgagor's interest and estate, and afterwards the street is abandoned, and it appears that the mortgagor's estate extended to the center.<sup>9</sup> Failure to give the county and state in the description will not avoid the mortgage when it appears on its face, and in

<sup>1</sup> *Wallace v. Furber*, 62 Ind. 103; *Coogan v. Burling Mills*, 124 Mass. 390; *Holmes v. Abrahams*, 31 N. J. Eq. 415; *Newman v. Tymeson*, 13 Wis. 172; 80 Am. Dec. 735.

<sup>2</sup> *Auburn Congregational Church v. Walker*, 124 Mass. 69. But see *Fitzgerald v. Libby*, 142 Mass. 235.

<sup>3</sup> *Starling v. Blair*, 4 Bibb, 288; *Tranum v. Wilkinson*, 81 Ala. 406; *Rochat v. Emmett*, 35 Minn. 420.

<sup>4</sup> *Wilson v. Boyce*, 92 U. S. 320; *Usina v. Wilder*, 58 Ga. 178.

<sup>5</sup> *Whitney v. Buckman*, 13 Cal. 536; *Tryon v. Sutton*, 13 Cal. 490.

<sup>6</sup> *Shepard v. Shepard*, 36 Mich. 173.

<sup>7</sup> *Donnan v. Intelligencer etc. Co.*, 70 Mo. 168.

<sup>8</sup> *People v. Storms*, 97 N. Y. 364.

<sup>9</sup> *Smyth v. Rowe*, 33 Hun, 422.

the certificate of acknowledgment, that it was executed between residents of the state.<sup>1</sup>

**ILLUSTRATIONS.** — A mortgage described several lots by numbers, adding "being all of block 25," etc. It appeared that this block contained no such numbers, but they were in another block, and also that the mortgagor's intention was to mortgage the block in which he lived, and that he lived in block 25. *Held*, effectual to convey block 25: *Sharp v. Thompson*, 100 Ill. 447; 39 Am. Rep. 61. Under a statute of Missouri, certain bonds were issued to and accepted by a railroad company. The statute declared that the bonds should constitute a first lien and mortgage upon the road and property of that company. Subsequently the company executed a deed of trust of its lands, which had been granted by Congress to aid in the construction of the road. *Held*, that the granted lands passed under the bonds, and that the lien of the bond-holders took priority of the claims under the trust deed: *Wilson v. Boyce*, 92 U. S. 320. A executed a deed of trust to B, as trustee, to secure C, in the sum of three thousand dollars. The language of the granting clause in the deed was as follows: "Do by these presents sell, bargain, and convey unto said party of the second part the following described property, to wit, the undivided two-thirds interest of, in, and to," etc. In the *habendum* clause it was provided that upon default in payment of the note secured by the deed the trustee might proceed to sell said property, and also that "after condition broken the said B might take possession of the whole of said property, and sell the same," etc. *Held*, that the trustee could sell and convey only an undivided two-thirds interest of the property: *Donnan v. Intelligencer P. & P. Co.*, 70 Mo. 168.

**§ 3018. Terminology of the Proviso.** — No particular form of words is necessary. Any expressions from which it in fact appears that the instrument was intended to be a security are sufficient.<sup>2</sup> The intention of the parties is what is regarded; and the substance rather than the form.<sup>3</sup> Extraneous evidence is admissible to show what the condition really is.<sup>4</sup> But it must appear that the

<sup>1</sup> *Stockwell v. State*, 101 Ind. 1.

<sup>2</sup> *Adams v. Stevens*, 49 Me. 362; *Cowles v. Marble*, 37 Mich. 158; *Snyder v. Bunnell*, 64 Ind. 403.

<sup>3</sup> *Steel v. Steel*, 4 Allen, 417; *Lanfair v. Lanfair*, 18 Pick. 299; *Skinner*

*v. Cox*, 4 Dev. 59; *Palmer v. Howard*, 72 Cal. 293; 1 Am. St. Rep. 60.

<sup>4</sup> *Youngs v. Wilson*, 27 N. Y. 351; *Campbell v. Dearborn*, 109 Mass. 130; 12 Am. Rep. 671.

deed is to become void upon the happening of some event.<sup>1</sup>

ILLUSTRATIONS. — A deed recited that the grantor "was desirous of securing the said L., etc., against any loss by reason of their several obligations aforesaid." The deed contained no proviso for redemption, nor any declaration of trust. *Held*, upon its face a mortgage: *Skinner v. Cox*, 4 Dev. 59. A deed contained the following proviso: Provided, nevertheless, whereas an agreement has this day been entered into by and between myself and the said L. S., and A. S., wife of said L. S., whereby I, the said A., have undertaken, for a valuable consideration, to support the said L. and wife during their natural lives and that of the survivor of them, and now, if I, the said A., shall well and truly provide meat, clothing, etc., for them in sickness and health, so long as they live, etc. *Held*, to be a mortgage: *Steel v. Steel*, 4 Allen, 417.

§ 3019. **Specification of Thing Secured.** — The description is not required to be literally exact. If adequate to direct the attention of parties subsequently dealing with the property to sources of correct and full information, it is sufficient.<sup>2</sup> In the absence of all fraudulent intention, a mortgage to secure against future liabilities, described with reasonable certainty, is valid.<sup>3</sup> Parol evidence is admissible to identify the note intended to be secured.<sup>4</sup> And when the mortgage contains a recital of the indebtedness, it is sufficient evidence of the debt in a foreclosure suit, when there is no note or bond given with the mort-

<sup>1</sup> *Goddard v. Coe*, 55 Me. 385; *Adams v. Stevens*, 49 Me. 362; *Freeman's Bank v. Vose*, 23 Me. 98.

<sup>2</sup> *Ricketson v. Richardson*, 19 Cal. 330; *Booth v. Barnum*, 9 Conn. 286; 23 Am. Dec. 339; *Sheafe v. Gerry*, 18 N. H. 245; *Gilman v. Moody*, 43 N. H. 239; *Hurd v. Robinson*, 11 Ohio St. 232; *Gill v. Finney*, 12 Ohio St. 38; *Lewis v. De Forest*, 20 Conn. 427; *Michigan Insurance Co. v. Brown*, 11 Mich. 265; *Machette v. Wanless*, 1 Col. 225; *Brown v. Dewey*, 1 Sand. Ch. 56; *Paine v. Benton*, 32 Wis. 491; *Russell v. Southard*, 12 How. 139; *Pearce v. Hall*, 12 Brish, 209; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *McDaniels v. Colvin*, 16 Vt. 300; 42 Am.

Dec. 512; *Hart v. Chalker*, 14 Conn. 77.

<sup>3</sup> *Hubbard v. Savage*, 8 Conn. 215; *Pettibone v. Griawold*, 4 Conn. 158; 10 Am. Dec. 106; *Bramhall v. Flood*, 41 Conn. 68; *Stoughton v. Pasco*, 5 Conn. 442, 446; 13 Am. Dec. 72; *Crane v. Deming*, 7 Conn. 387, 396; *Esterly v. Purdy*, 50 How. Pr. 350; *Murray v. Barney*, 34 Barb. 336; *Ackerman v. Hunsicker*, 85 N. Y. 47; 39 Am. Rep. 621; *Burgess v. Eve*, L. R. 13 Eq. 450; *Summers v. Roos*, 42 Miss. 749; 2 Am. Rep. 653; *Menzies v. Lightfoot*, L. R. 11 Eq. 450; *Klein v. Glass*, 53 Tex. 37; *Brooks v. Lester*, 36 Md. 65.

<sup>4</sup> *Melvin v. Fellows*, 33 N. H. 401; *Prescott v. Hayes*, 43 N. H. 593; *Kim-*

gage.<sup>1</sup> Where the description is of all past indebtedness owing by the mortgagor to the mortgagee, it is sufficient, even though no amount is mentioned.<sup>2</sup>

ILLUSTRATIONS.—The description consisted of “book-accounts and several notes, the exact date and amount of which are not recollected, but amounting in the whole to the sum of fifteen hundred dollars or thereabouts.” *Held*, sufficient: *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315. L. gave a mortgage to A., the plaintiff, to secure any indorsements he had made or should thereafter make for L., or the firm of L. & M., to the amount of six thousand dollars. A. made indorsements, which he had to pay, to the amount of five thousand dollars. Judgments were docketed against L. before all the indorsements had been made. A. had no actual notice of such docketing before making the indorsements. *Held*, that the mortgage was valid, and that the subsequent indorsements had priority over the judgments: *Ackerman v. Hunsicker*, 85 N. Y. 47; 39 Am. Rep. 621. C. gave a mortgage to S., in which the debt secured was described as follows: “Whereas the said S., at my request and for my sole accommodation, has agreed to indorse my own negotiable paper, and business paper received by me from others, and afterwards by me negotiated, to be made within two years from the date hereof, and also to become my security on other paper, the whole not exceeding in amount the sum of sixteen thousand dollars, at any given time within the said two years, and all to be discounted by” certain banks, “and payable at said banks, or any one or more of them, or otherwise; and the said S. has also indorsed for me and become my security on sundry promissory notes, bills of exchange, and other negotiable paper which has not yet come to maturity, a part whereof is due to or payable at one or more of the said banks, and some part thereof in other places not remembered, the whole amounting to about sixteen thousand dollars.” *Held*, a sufficient description of the debt: *Uiley v. Smith*, 24 Conn. 290; 63 Am. Dec. 163.

§ 3020. Principles of Construction.—The same general principles of construction applicable to other written

*ball v. Myers*, 21 Mich. 276; 4 Am. Rep. 487; *Hurd v. Robinson*, 11 Ohio St. 232; *Uiley v. Smith*, 24 Conn. 290, 314; 63 Am. Dec. 163; *Boody v. Davis*, 20 N. H. 140; 51 Am. Dec. 210.

<sup>1</sup> *Whitney v. Buckman*, 13 Cal. 536; *Eyster v. Gaff*, 2 Col. 228.

<sup>2</sup> *Mitchell v. Burnham*, 44 Me. 286; *Evans v. Pence*, 78 Ind. 439; *Clough v. Seay*, 49 Iowa, 111; *Holgdon v. Shannon*, 44 N. H. 572; *Carnall v. Duval*, 22 Ark. 136; *Brookings v. White*, 49 Me. 479; *Eacho v. Cosby*, 26 Gratt. 112.

instruments are equally applicable to mortgages, and inasmuch as the mortgagor is presumed to draw the deed, it is construed against him in the event of its language being equivocal or ambiguous.<sup>1</sup> The primary object of construction being to ascertain the intention of the parties, their surrounding circumstances, and the nature and object of the transaction, may be inquired into. But it is beyond the province of construction to import into a document matter which its contents will not justify, and thus make an agreement for the parties which they themselves have neglected to do.<sup>2</sup> The laws of the state where the mortgage was executed are, as a general rule, applicable to its construction, subject to the rule of the applicability of the law of the place of performance. Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought.<sup>3</sup>

**§ 3021. Subject-matter of the Mortgage.**—Speaking generally, any estate or interest in land which may be sold can also be mortgaged.<sup>4</sup> Instances of this occur in the case of contingent interests, or a possibility coupled with an interest, estates in remainder or reversion, the

<sup>1</sup> *Stuart v. Worden*, 42 Mich. 154; *Jerome v. Hopkins*, 2 Mich. 96; *Farmers' Loan and Trust Co. v. Commercial Bank of Racine*, 15 Wis. 424, 438; 82 Am. Dec. 689; *Wiley v. Sirdorus*, 41 Iowa, 224; *Packard v. Hill*, 7 Cow. 434; *Gibson v. Minet*, 1 H. Black. 569; *Brickell v. Batchelder*, 62 Cal. 623; *Facey v. Otis*, 11 Mich. 213.

<sup>2</sup> *Farmers' Loan and Trust Co. v. Commercial Bank of Racine*, 15 Wis. 424; 82 Am. Dec. 689; *Phillips v. Raymond*, 17 Mich. 287; *Grant v. Merchants' etc. Bank*, 35 Mich. 515.

<sup>3</sup> *Morgan v. R. R. Co.*, 2 Woods, 244; *Junction R. R. Co. v. Bank of Ashland*, 12 Wall. 226; *Little v. Riley*, 43 N. H. 109; *Parham v. Pulliam*, 5 Cold. 497; *Lindsay v. Hill*, 66 Me. 212; 22 Am. Rep. 564; *Duncan v. Helm*, 22 La. Ann. 418; *Scudder v. Union Nat. Bank*, 91 U. S. 406.

<sup>4</sup> *Dorsey v. Hall*, 7 Neb. 460; *Neligh v. Michenor*, 11 N. J. Eq. 539; *Miller v. Tipton*, 6 Blackf. 238; *Wilson v. Russ*, 17 Fla. 691; Cal. Civ. Code, sec. 2947.

interest of one who holds a bond for title, or who is in possession under a part-performed parol contract to purchase. So, also, rents and franchises may be mortgaged; stock in an unincorporated company, formed to hold real estate; certificates of purchase of state school-lands.' The exceptions to the rule are: The right of pre-emption of the public lands; the interest which a legatee of the proceeds has in the land of a testator ordered to be sold and distributed; a mere possibility of acquiring land.<sup>2</sup> A lessee may mortgage to the extent of his leasehold interest a building which he has erected, but may not remove.<sup>3</sup>

ILLUSTRATIONS. — A entered into a written contract with B, whereby B bound himself to convey certain lands to A. *Held*, that A might mortgage his interest in the lands under the contract: *Neligh v. Michenor*, 11 N. J. Eq. 539. A leased premises to B, who erected a dwelling-house thereon by permission of A, and with the right to remove the house at the expiration of the lease if he complied with its terms. *Held*, that B had such an interest in the realty as he might convey by mortgage, and that the house and underpinning stones became attached to and a part of that interest: *Hagar v. Brainerd*, 44 Vt. 294.

<sup>1</sup> *Wilson v. Wilson*, 32 Barb. 328; *John v. Nut*, 19 Wend. 659; *Whitney v. Buckman*, 13 Cal. 536; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Hagar v. Brainerd*, 44 Vt. 294; *Bull v. Sykes*, 7 Wis. 449; *Sinclair v. Armitage*, 12 N. J. Eq. 174; *Jarvis v. Dutcher*, 16 Wis. 307; *Dodge v. Silverthorn*, 12 Wis. 644; *Mowry v. Wood*, 12 Wis. 413; *Durkee v. Stringham*, 8 Wis. 1; *McGuire v. Van Pelt*, 55 Ala. 344; *Curtis v. Root*, 20 Ill. 518; *Laughlin v. Braley*, 25 Kan. 147; *Smith v. Patton*, 12 W. Va. 541; *Purmont v. McCrea*, 5 Paige, 620; *Benedict v. Peppers*, 58 Cal. 618; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Gilbert v. Penn*, 12 La. Ann. 235; *Penn v. Ott*, 12 La. Ann. 233; *Crane v. Turner*, 67 N. Y. 437; *Ir. re John and Cherry Streets*, 19 Wend. 659; *Hosmer v. Carter*, 68 Ill. 98; *Massey v. Papin*, 24 How. 362; *Cutts v. York Mfg. Co.*, 18 Me. 190; *Hudson City Sav. Inst. v. McArthur*, 8 N. Y. Week. Dig. 63; *Murdock v. Chapman*, 9 Gray, 156; *Power v. Lester*, 23 N. Y. 527; *Kidd v. Teeple*, 22

Cal. 255; *Pierce v. R. R. Co.*, 24 Wis. 551; 1 Am. Rep. 203; *Hoyle v. R. R. Co.*, 54 N. Y. 314; 13 Am. Rep. 595; *Randall v. Elwell*, 52 N. Y. 521; 12 Am. Rep. 747; *Emerson v. R. R. Co.*, 67 Me. 387; 24 Am. Rep. 39.

<sup>2</sup> *Whitney v. Buckman*, 13 Cal. 536; *Quinn v. Kenyon*, 38 Cal. 499; *Bull v. Shaw*, 48 Cal. 455; *Douglas v. Gould*, 52 Cal. 656; *Wood v. Reeves*, 23 S. C. 382; *Penn v. Ott*, 12 La. Ann. 233; *Gilbert v. Penn*, 12 La. Ann. 235; *Bronard v. Dugas*, 5 La. Ann. 585; *Davis v. Hayden*, 9 Mass. 519; *Dart v. Dart*, 7 Conn. 255; *Bayler v. Commonwealth*, 40 Pa. St. 37; 80 Am. Dec. 551; *Gray v. Smith*, 3 Watts, 289; *Hoff v. Burd*, 17 N. J. Eq. 201; *Purcell v. Mather*, 35 Ala. 570; 76 Am. Dec. 307; *Skipper v. Stokes*, 42 Ala. 255; 94 Am. Dec. 646; *Low v. Pew*, 108 Mass. 347; 11 Am. Rep. 357; *Pierce v. Emery*, 32 N. H. 484; *Payne v. Patterson*, 77 Pa. St. 134; *Barnard v. Eaton*, 2 Cush. 295; *Looker v. Peckwell*, 38 N. J. L. 253; *Nigeler v. Maurin*, 34 Minn. 118.

<sup>3</sup> *French v. Prescott*, 61 N. H. 27.

§ 3022. **Buildings, Fixtures, Crops, and Franchises.**—*Prima facie*, a mortgage of real estate covers all the buildings and fixtures attached to the realty at the date of the mortgage or subsequently during its existence.<sup>1</sup> It also includes such articles as are necessary to the use of the realty, and without which it would cease to be a sufficient security.<sup>2</sup> But where improvements only are included in the mortgage, no interest in the land passes to the mortgagee.<sup>3</sup> A mortgage on crops, growing or yet unplanted, is valid. And a merely verbal mortgage of an unplanted crop is valid between the parties. A mortgage on crops need not contain a provision that the mortgagee may take possession on default.<sup>4</sup> The lien of a landlord upon grow-

<sup>1</sup> Doyle v. Lord, 64 N. Y. 433; 21 Am. Rep. 629; Esty v. Baker, 48 Me. 495; Greenwood v. Murdock, 9 Gray, 20; 69 Am. Dec. 272; Gibson v. Brockway, 8 N. H. 465; 31 Am. Dec. 200; Whitney v. Olney, 3 Mason, 280; Wilson v. Hunter, 14 Wis. 683; 80 Am. Dec. 795; Martin v. Beatty, 54 Ill. 100; Buckout v. Swift, 27 Cal. 433; 87 Am. Dec. 90; Milton v. Colby, 5 Met. 78; Hutchins v. King, 1 Wall. 53; Dorr v. Dudderar, 88 Ill. 107; Harris v. Bannou, 78 Ky. 568; Gardner v. Finley, 19 Barb. 317; Hill v. Gurin, 51 Cal. 47; Toulinson v. Thompson, 27 Kan. 70.

<sup>2</sup> Sullivan v. Toole, 26 Hun, 203; Noyes v. Terry, 1 Lana. 222; Johnston v. Morrow, 60 Mo. 339; Clore v. Lambert, 78 Ky. 224; Bank v. Stevens Tool Co., 130 Mass. 547; Bond v. Coke, 71 N. C. 97; Allen v. Woodard, 125 Mass. 400; 28 Am. Rep. 250; Buckley v. Buckley, 11 Barb. 43; Thomas v. Davis, 76 Mo. 72; 43 Am. Rep. 756; Eason v. Miller, 15 S. C. 194; Parsons v. Lent, 34 N. J. Eq. 67; Carliss v. McLagin, 29 Me. 115; Stillman v. Hamer, 7 How. (Miss.) 421; Martin v. Beatty, 54 Ill. 100; Wharton v. Moore, 84 N. C. 479; 37 Am. Rep. 627; Rice v. Dewey, 54 Barb. 455; Hollingsworth v. Chaffe, 33 La. Ann. 547; Pettingill v. Evans, 5 N. H. 54; Water Co. v. Fluming Co., 22 Cal. 631.

<sup>3</sup> Mitchell v. Black, 64 Me. 48.

<sup>4</sup> Cook v. Steel, 42 Tex. 53; Lehman v. Marshall, 47 Ala. 362; Stephens v. Tucker, 55 Ga. 543; Cotton v. Willoughby, 83 N. C. 75; 35 Am. Rep. 564; Wilkerson v. Tillman, 66 Ala. 532; Nichol v. Stewart, 36 Ark. 612; Argues v. Wasson, 51 Cal. 630; 21 Am. Rep. 718; Watkins v. Wyatt, 9 Bart. 250; 30 Am. Rep. 63; Sellers v. Lester, 48 Miss. 513; Robinson v. Ezzell, 72 N. C. 231; Moore v. Byrum, 10 S. C. 452; 30 Am. Rep. 58; Everman v. Robb, 52 Miss. 653; 24 Am. Rep. 682; Apperson v. Moore, 30 Ark. 56; 21 Am. Rep. 170; Booker v. Jones, 55 Ala. 266; 21 Am. Rep. 170; Cook v. Corthell, 11 R. I. 482; 23 Am. Rep. 518; Mayer v. Taylor, 69 Ala. 403; 44 Am. Rep. 522; Butt v. Ellett, 19 Wall. 544; Redd v. Burrus, 58 Ga. 574; Comstock v. Scales, 7 Wis. 159; Hutchinson v. Ford, 9 Bush, 318; 15 Am. Rep. 711; Rees v. Coats, 65 Ala. 256; Pennington v. Jones, 57 Iowa, 37; Coman v. Thompson, 47 Mich. 22; 41 Am. Rep. 706; Ford v. Sutherland, 2 Mon. 440; Bryant v. Pennell, 61 Me. 108; 14 Am. Rep. 550; Caldwell v. Hall, 49 Ark. 508; 4 Am. St. Rep. 64; Minnesota L. O. Co. v. Maginnis, 32 Minn. 193; Montgomery v. Merrill, 65 Cal. 432; Woodlief v. Harris, 95 N. C. 211; Wheeler v. Becker, 68 Iowa, 723; Miller v. McCormick etc. Co., 35 Minn. 399; Wilson v. Frouty, 70 Cal. 196.

ing crops for the payment of rent is not such an interest in land as can be mortgaged.<sup>1</sup> At common law a mortgage did not cover what was not in existence at its date, but courts of equity hold the contrary, and sustain such mortgages, not on the ground of a present conveyance of a thing not *in esse*, but that the purported conveyance is a contract which will attach to the thing as soon as it comes into existence.<sup>2</sup> In mortgaging its franchise, a railroad does not convey its corporate existence, but only so much of its franchise as will enhance the value of the security.<sup>3</sup> A railroad mortgage conveying all the income, tolls, profits, moneys, rights, benefits, and advantages had, received, or derived from the company's property does not pass moneys which were past income and earnings.<sup>4</sup> A mortgagee may assign the interest he has in the mortgaged property, by way of security.<sup>5</sup>

ILLUSTRATIONS.—A mortgaged lot 1 to B. A subsequently bought lot 2, and employed C to move the house from lot 1 to lot 2. Afterwards A sold lot 2 to D. D then sold the house to C, who detached it from the lot, and was moving it to a lot he owned, when B, whose mortgage was unpaid, replevied the

<sup>1</sup> *Orcutt v. Moore*, 134 Mass. 48; 45 Am. Rep. 278; *Broughton v. Powell*, 52 Ala. 123.

<sup>2</sup> *Griffith v. Douglass*, 73 Me. 532; 40 Am. Rep. 395; *Ross v. Wilson*, 7 Bush, 29; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Emerson v. R. R. Co.*, 67 Me. 387; 24 Am. Rep. 39; *Pierce v. Emery*, 32 N. H. 484; *Little Rock etc. R. R. Co. v. Page*, 35 Ark. 304; *Olinpint v. Eckerley*, 38 Ark. 69; *McCaffrey v. Woodlin*, 65 N. Y. 459; 22 Am. Rep. 644; *Stover v. Eycleshimer*, 3 Keyes, 620; *Seymour v. R. R. Co.*, 25 Barb. 284; *Wright v. Bircher*, 72 Mo. 179; 37 Am. Rep. 433; *Christy v. Dana*, 34 Cal. 548; *Williams v. Briggs*, 11 R. I. 476; 22 Am. Rep. 653, note; *Rice v. Kelo*, 57 Iowa, 115; *Collins v. Faulk*, 69 Ala. 58; *Hale v. Frost*, 99 U. S. 389; *Dunham v. Issett*, 15 Iowa, 284; *R. R. Co. v. Woelpper*, 64 Pa. St. 366; 3 Am. Rep. 596; *Branch v. Jesup*,

106 U. S. 468; *Shaw v. Bill*, 95 U. S. 10; *Benjamin v. R. R. Co.*, 49 Barb. 441; *City of Bath v. Miller*, 53 Me. 308; *Willink v. Banking Co.*, 18 N. J. Eq. 377; *R. R. Co. v. Condrey*, 11 Wall. 481; *Howe v. Freeman*, 14 Gray, 566; *Smith v. McCullough*, 104 U. S. 25; *Dinsmore v. R. R. Co.*, 12 Wis. 649; *United States v. R. R. Co.*, 12 Wall. 362; *Williamson v. R. R. Co.*, 29 N. J. Eq. 311; *Alabama v. Montague*, 117 U. S. 602; *Chapman v. R. R. Co.*, 26 W. Va. 299; *Rubey v. Mississippi C. & M. Co.*, 21 Mo. App. 159.

<sup>3</sup> *Butler v. Rahm*, 46 Md. 547; *El-dridge v. Smith*, 34 Vt. 484; *Meyer v. Johnston*, 53 Ala. 237; *Hays v. R. R. Co.*, 61 Ill. 422; *Miller v. R. R. Co.*, 36 Vt. 452.

<sup>4</sup> *Dow v. R. R. Co.*, 20 Fed. Rep. 768.

<sup>5</sup> *Jones v. Guaranty etc. Co.*, 101 U. S. 622; *Fay v. Noble*, 12 Cush. 18; *Tompson v. Lambert*, 44 Iowa, 239.

house. *Held*, that he was entitled to do so: *Dorr v. Dudderar*, 88 Ill. 107. A executed to B the following document: "Know all men by these presents, that I, A, do hereby give to B a mortgage on all my cotton, corn, and wheat that I may raise during the year 1876, to secure the payment of the above note this day given by me; and in default of payment by the 1st of November next, then I authorize the said B to take all the crops raised by me, or any other person he may select so to do." The crops referred to had not been planted at the time the document was given. *Held*, as between the parties, to be a good and enforceable lien upon the crops mentioned in the document: *Moore v. Byrum*, 10 S. C. 452; 30 Am. Rep. 58. A railroad company under authority of law mortgaged "all their road, property, rights, liberties, privileges, corporate franchises, income, tolls, and receipts then held or thereafter to be acquired, . . . in trust, for the use, benefit, and security of the holders" of certain bonds therein described. *Held*, that the mortgage was a lien upon engines, rolling stock, etc., in actual use by the company, and required for the transaction of its business, whether owned at the date of the mortgage or afterwards acquired: *Philadelphia etc. R. R. Co. v. Woelpper*, 64 Pa. St. 366; 3 Am. Rep. 596.

§ 3023. **Equity of Redemption.**—This is the right which courts of equity have from early times given to mortgagors to recover the mortgaged premises after condition broken, upon performance of the condition and payment of costs.<sup>1</sup> It is based upon the equitable principle of relief against forfeitures.<sup>2</sup> For long after the existence of the right was first admitted it was held to be a mere right only, and that the mortgagor had no estate in the property, either at law or in equity.<sup>3</sup> The right arises by operation of law, and is never stipulated for in the mortgage. No principle of equity jurisprudence is more firmly settled than that the mortgagor's right to redeem cannot be waived or extinguished by any

<sup>1</sup> *Emanuel College v. Evans*, 1 Rep. in Ch. 18; *Roscarrick v. Barton*, 1 Cas. in Ch. 217; *Goodall's Case*, 5 Rep. 96; *Wade's Case*, 5 Rep. 115.

<sup>2</sup> 4 Kent's Com. 138; *Coote on Mortgages*, 17, 19; *Willett v. Winnell*, 1 Vern. 488; *Pritchard v. Elton*, 38 Conn. 434; *White v. Rittenmyer*, 30

Iowa, 268; *Hyndman v. Hyndman*, 19 Vt. 9; 46 Am. Dec. 171; *Penrh v. Davis*, 96 U. S. 332; *Wyman v. Babcock*, 2 Curt. 386; *Linnell v. Lyford*, 72 Me. 280.

<sup>3</sup> *Roscarrick v. Barton*, 1 Cas. in Ch. 217.

collateral agreement entered into contemporaneously with the execution of the mortgage. Courts uniformly regard with great jealousy all attempts to fetter or embarrass the exercise of this right, which is an outgrowth of the just triumph of equitable principles over the harsh operation of a mere technical rule of law. Where, therefore, a mortgagor is induced to enter into a contract with the mortgagee, at the time of the loan of the money, waiving or agreeing not to exercise his right of redemption in the event of default, the contract will be set aside as being oppressive to the debtor and offensive to the established maxim of equity, "Once a mortgage, always a mortgage."<sup>1</sup> In Washington it has been held that under the modern conception of a mortgage, there is no such thing as an equity of redemption in the mortgagor, because the legal title has not passed from him; that the equity is in the mortgagee, and consists of his right to have the property sold for payment of the mortgage debt.<sup>2</sup>

**§ 3024. Equitable Mortgages.**—These arise where the parties intend by their transaction to secure the payment of money or the performance or furtherance of some act, and where they have omitted, either from accident or design, to clothe such transaction with the formalities necessary to constitute a legal mortgage.<sup>3</sup> The species of

<sup>1</sup> *Clark v. Henry*, 2 Cow. 324; *Willard's Eq. Jur.* 423, 447; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; 2 *Jones on Mortgages*, sec. 1039; *McKinstry v. Conly*, 12 Ala. 682; *Story's Eq. Jur.*, sec. 1019; *Baxter v. Willey*, 9 Vt. 276; 31 Am. Dec. 623; 3 *Addison on Contracts*, sec. 1026; 15 Vin. Abr. 468; *Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722; *Turner v. Marsh*, 54 N. Y. 599; 13 Am. Rep. 623; *Parmer v. Parmer*, 74 Ala. 285; but see *Chicago etc. R. R. Co. v. Watson*, 113 Ill. 195.

<sup>2</sup> *Parker v. Dacres*, 2 Wash. Ter. 439.

<sup>3</sup> *Yates v. Yates*, 21 Wis. 473;

*Mitchell v. Wade*, 39 Ark. 377; *Moore v. Lackey*, 53 Miss. 85; *Dingley v. Ventura Bank*, 57 Cal. 471; *Richardson v. Barrick*, 16 Iowa, 407; *Wayt v. Carwithen*, 21 W. Va. 516; *Hall v. R. R. Co.*, 58 Ala. 22; *Gale v. Morris*, 29 N. J. Eq. 222; *Curtis v. Buckley*, 14 Kan. 499; *Webb v. Hoselton*, 4 Neb. 308; 19 Am. Rep. 638; *Wright v. Troutman*, 81 Ill. 374; *Dodd v. Neilson*, 90 N. Y. 243; *Fisk v. Stewart*, 24 Minn. 97; *Donald v. Hewitt*, 33 Ala. 534; 73 Am. Dec. 431; *Price v. Cutts*, 29 Ga. 142; 74 Am. Dec. 52; *Grahams v. Stevens*, 34 Vt. 166; 80 Am. Dec. 675.

transactions which may constitute an equitable mortgage are necessarily as numerous as the modes in which contracts may be made for the giving of security on real estate. Among the more frequently occurring cases the following may be mentioned, viz.: An agreement to give a mortgage;<sup>1</sup> an informal mortgage;<sup>2</sup> a defective mortgage, where the defect arises through accident or mistake;<sup>3</sup> an assignment by way of security of rents and profits;<sup>4</sup> an assignment by way of security of a contract for the purchase of land;<sup>5</sup> a statutory lien;<sup>6</sup> the lien of an unpaid vendor;<sup>7</sup> the lien of a vendee who has paid, but not re-

<sup>1</sup> *Burdick v. Jackson*, 7 Hun, 488; *Carter v. Holman*, 60 Mo. 498; *Richardson v. Hamlett*, 33 Ark. 237; *De-la-ire v. Keenan*, 3 Desaus. 74; 4 Am. Dec. 604; *Starks v. Redfield*, 52 Wis. 349; *Biebinger v. Continental Bank*, 99 U. S. 143; *Boehl v. Wadgymar*, 54 Tex. 589; *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; *McClintock v. Laing*, 22 Mich. 212; *Dodge v. Wellman*, 42 Barb. 390; *Carr v. Carr*, 4 Lans. 314; *Arnold v. Patrick*, 6 Paige, 310; *Simon v. Schurch*, 29 N. Y. 598; *Langley v. Vaughn*, 10 Heisk. 553; *Payne v. Wilson*, 74 N. Y. 352; *Price v. Cutts*, 29 Ga. 142; 74 Am. Dec. 52; *Peckham v. Haddrell*, 36 Ill. 38; *Newlin v. McAfee*, 64 Ala. 357; *Lyon v. Lyon*, 67 N. Y. 250; *Gilson v. Gilson*, 2 Allen, 115; *Chadwick v. Clapp*, 69 Ill. 119; *Remington v. Higgins*, 54 Cal. 620; *Matter of Howe*, 1 Paige, 124; 19 Am. Dec. 395.

<sup>2</sup> *Flagg v. Mann*, 2 Sum. 533; *Harrington v. Fortner*, 58 Mo. 468; *Black v. Gregg*, 58 Mo. 565; *Lake v. Doud*, 10 Ohio, 415; *Abbott v. Godfrey*, 1 Mann. (Mich.) 198; *Goodman v. Randall*, 44 Conn. 321.

<sup>3</sup> *Love v. Sierra Nev. M. Co.*, 32 Cal. 639; 91 Am. Dec. 602; *Miller v. R. R. Co.*, 36 Vt. 452; *Blackburn v. Tweedie*, 60 Mo. 505; *Burnett v. Boyd*, 60 Miss. 627; *Daggett v. Rankin*, 31 Cal. 322; *Muskingum Bank v. Carpenter*, 7 Ohio, pt. 1, 21; 28 Am. Dec. 616; *Shaw v. Carpenter*, 54 Vt. 155; 41 Am. Rep. 837.

<sup>4</sup> *Alexander v. Berry*, 51 Miss. 422;

*Hulett v. Soullard*, 26 Vt. 295; *Jackson v. Green*, 4 Johns. 186; *Smith v. Patten*, 12 W. Va. 541; *Nugent v. Riley*, 1 Met. 117; 35 Am. Dec. 355.

<sup>5</sup> *Fessler's Appeal*, 75 Pa. St. 483; *Brockway v. Wells*, 1 Paige, 617; *Purdy v. Bullard*, 41 Cal. 444; *Smith v. Lackor*, 23 Minn. 454; *Fitzhugh v. Smith*, 82 Ill. 486; *Steinkemeyer v. Gillespie*, 82 Ill. 253; *Lewis v. Boskins*, 27 Ark. 61; *Gunderman v. Gunnison*, 39 Mich. 313; *Hill v. Eldred*, 49 Cal. 398; *Jones v. Yorkam*, 5 Neb. 265.

<sup>6</sup> *Wilson v. Boyce*, 92 U. S. 320; *Whitehead v. Vineyard*, 50 Mo. 30; *Brunswick etc. R. R. Co. v. Hughes*, 52 Ga. 557; *Ketchum v. R. R. Co.*, 4 Dill. 78; *Coe v. Johnson*, 18 Ind. 218.

<sup>7</sup> *Sharp v. Collins*, 74 Mo. 266; *Gallagher v. Mars*, 50 Cal. 23; *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115; *Jackson v. McChesney*, 7 Cow. 360; 17 Am. Dec. 520; *Smith v. Smith*, 9 Abb. Pr., N. S., 420; Cal. Civ. Code, sec. 3046; *Hutchinson v. Patrick*, 22 Tex. 318; *Lewis v. Pusey*, 8 Bush, 615; *Carpenter v. Mitchell*, 54 Ill. 126; *King v. Young Men's Ass'n*, 1 Woods, 386; *Davis v. Hamilton*, 50 Miss. 213; *Moore v. Anders*, 14 Ark. 628; 60 Am. Dec. 551; *Conner v. Banks*, 18 Ala. 42; 52 Am. Dec. 209; *Fisk v. Potter*, 2 Keyes, 64; *Stuart v. Harrison*, 52 Iowa, 511; *Wilson v. Lyon*, 51 Ill. 166; *Gilman v. Brown*, 1 Mass. 213; *Rice v. Wilburn*, 31 Ark. 108; 25 Am. Rep. 549; *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449; *Moahier v. Meek*, 80 Ill. 79.

ceived, a conveyance;<sup>1</sup> a deposit of title deeds;<sup>2</sup> a conditional sale.<sup>3</sup>

ILLUSTRATIONS.—An instrument entitled “memoranda of contract,” signed by A and wife and B, recited that A had borrowed three thousand dollars from B, with which he had purchased land, “the use and control of which we do hereby turn over to the said B until sold, and when sold the three thousand dollars above named and one half of the advance over, together with the three thousand dollars that may be obtained on the sale of said land, we will pay to B”; that A was to make two hundred dollars’ worth of improvements, B to pay taxes and keep the farm in good repair; and that if B should die “before the sale of the farm and the canceling of this paper,” then the three thousand dollars should be a gift to A. *Held*, an equitable mortgage: *Brown v. Brown*, 103 Ind. 23. Certain realty purchased by H. was, at his request, conveyed to his wife for her sole use; and he signed an agreement, to which she was not a party, to make with her a mortgage back to secure the price, after their execution of a note and mortgage to a savings bank to raise money for repairs. She accepted the deed, joined in the mortgage to the bank, but refused to mortgage back. *Held*, that the transaction created an equitable mortgage, and though ignorant of the agreement, the wife must either perform or surrender the deed: *Hall v. Hall*, 50 Conn. 104. B loaned A five

<sup>1</sup> *Stewart v. Wood*, 63 Mo. 252; *Wickman v. Robinson*, 14 Wis. 494; 80 Am. Dec. 789; *Cooper v. Merritt*, 30 Ark. 686; *Chase v. Peck*, 21 N. Y. 585; *Rose v. Watson*, 10 H. L. Cas. 672; Cal. Civ. Code, sec. 3050; *Willis v. Searcy*, 49 Ala. 222.

<sup>2</sup> *Griffin v. Griffin*, 18 N. J. Eq. 104; *Shitz v. Dreffenschach*, 3 Pa. St. 233; *Probasco v. Johnson*, 2 Disn. 96; *Gothard v. Flynn*, 25 Miss. 58; *Meador v. Meador*, 3 Heisk. 562; *Gardner v. McClure*, 6 Minn. 250; *Gale v. Morris*, 29 N. J. Eq. 222; *Carpenter v. Black Hawk G. N. Co.*, 64 N. W. 51; *Luch’s Appeal*, 44 Pa. St. 579; *Jarvis v. Dutcher*, 16 Wis. 307; *Hutzler v. Phillips*, 26 S. C. 136; 4 Am. St. Rep. 687.

<sup>3</sup> *Palmer v. Howard*, 72 Cal. 293; 1 Am. St. Rep. 60; *Flagg v. Mann*, 2 Sum. 486; *Davis v. Stonestreet*, 4 Ind. 101; *Saxton v. Hitchcock*, 47 Barb. 220; *Shitz v. Dusenberg*, 28 Ohio St. 371; *Cornell v. Hall*, 22 Mich. 377;

*Brown v. Dewey*, 2 Barb. 28; *Campbell v. Dearborn*, 109 Mass. 130; 12 Am. Rep. 487; *Reed v. Reed*, 75 Me. 264; *Hale v. Jewell*, 7 Me. 435; 22 Am. Dec. 212; *Carr v. Rising*, 62 Ill. 14; *Hanford v. Blessing*, 80 Ill. 188; *Haines v. Thompson*, 70 Pa. St. 434; *Hickman v. Cantrell*, 9 Yerg. 172; 30 Am. Dec. 396; *Turnipseed v. Cunningham*, 16 Ala. 501; 50 Am. Dec. 190; *Eiland v. Radford*, 7 Ala. 724; 42 Am. Dec. 610; *Williamson v. Culpepper*, 16 Ala. 211; 50 Am. Dec. 175; *McLaughlin v. Sheppard*, 32 Me. 143; 52 Am. Dec. 646; *Perkins’s Lessee v. Dibble*, 10 Ohio, 433; 36 Am. Dec. 97; *Man. Bank v. Bank of Pennsylvania*, 7 Watts & S. 335; 42 Am. Dec. 240; *Stephens v. Sherrod*, 6 Tex. 294; 55 Am. Dec. 776; *Weatherley v. Weatherley*, 40 Miss. 462; 90 Am. Dec. 344; *Bethlehem v. Annis*, 40 N. H. 340; 77 Am. Dec. 700; *Ferris v. Wilcox*, 51 Mich. 105; 47 Am. Rep. 551.

hundred dollars, and A handed him certain title deeds to keep as security for that debt. The deeds were not recorded. A died, leaving the debt unpaid and the deeds in the possession of B. A's widow brought suit to compel the delivery of the deeds to her. *Held*, that the transaction constituted an equitable mortgage, and that a court of equity would not interfere in favor of complainant until she did equity and paid the debt for which the deeds were pledged: *Griffin v. Griffin*, 18 N. J. Eq. 104.

## CHAPTER CXLI.

## ASSIGNMENT OF MORTGAGE.

§ 3025. By whom may be made.

§ 3026. Mode of assignment.

§ 3027. Of portion of debt.

§ 3028. Assignment subject to equities.

§ 3029. Effect and construction.

§ 3025. **By Whom may be Made.**—When made to secure a joint debt, the assignment may be made by one of the joint mortgagees in the name of both.<sup>1</sup> Otherwise in case of a separate debt.<sup>2</sup> All of several trustees must join;<sup>3</sup> otherwise in the case of executors or administrators.<sup>4</sup> A foreign administrator cannot make a valid assignment.<sup>5</sup> All the members of a partnership must join in an assignment of a mortgage made to the partnership.<sup>6</sup> A mortgage made to a *feme covert* to secure community money cannot be assigned by her alone without the concurrence of her husband; but with his consent she can, in equity, make a valid assignment.<sup>7</sup> Where one holds a mortgage to secure a debt, and to indemnify himself as surety for the mortgagor, he can assign his interest in the property to secure his debt.<sup>8</sup> An assignee of a mortgage which empowers the mortgagee to sell on default, but makes no mention of assigns of the mortgagee, has no power to sell.<sup>9</sup>

<sup>1</sup> Bruce v. Bonney, 12 Gray, 107, 110; 71 Am. Dec. 739; King v. Harrington, 2 Aiken, 33; 16 Am. Dec. 675; Appleton v. Boyd, 7 Mass. 131.

<sup>2</sup> Savary v. Clements, 8 Gray, 155; Gilson v. Gilson, 2 Allen, 115; Burnett v. Pratt, 22 Pick. 556; Herring v. Woodhull, 29 Ill. 92; 81 Am. Dec. 296.

<sup>3</sup> Webster v. Vandevanter, 6 Gray, 428; Austin v. Shaw, 10 Allen, 552; Manahan v. Varnum, 11 Gray, 405.

<sup>4</sup> Baldwin v. Hatchett, 56 Ala. 461; George v. Baker, 3 Allen, 326; Mut. Life Ins. Co. v. Sturges, 33 N. J. Eq. 328; Crooker v. Jewell, 31 Me. 306;

Bogert v. Hertell, 9 Paige, 52; Hitchcock v. Merritt, 15 Wis. 522; Ladd v. Wiggin, 35 N. H. 421; 69 Am. Dec. 551.

<sup>5</sup> Hutchins v. State Bank, 12 Met. 421; Cutter v. Davenport, 1 Pick. 81; 11 Am. Dec. 149; Gardner v. Commercial Bank, 95 Ill. 298; Smith v. Tiffany, 16 Hun, 552.

<sup>6</sup> Dillon v. Brown, 11 Gray, 179; 71 Am. Dec. 700.

<sup>7</sup> Tryon v. Sutton, 13 Cal. 490; Moreau v. Branson, 37 Ind. 195; Baker v. Armstrong, 57 Ind. 189.

<sup>8</sup> Waller v. Oglesby, 85 Tenn. 321.

<sup>9</sup> Dolbear v. Norduft, 84 Mo. 619.

**ILLUSTRATIONS.**—The assignee of a surviving mortgagee brought suit to foreclose. A demurrer for want of parties was interposed. It appeared that the deceased mortgagee had received his proportion of the mortgage debt. *Held*, that the plaintiff could maintain the suit: *King v. Harrington*, 2 Aiken, 33; 16 Am. Dec. 675. A mortgage was given to several persons to secure their several debts. All the mortgagees died. Foreclosure suit was brought by the administrator of the survivor, whose debt alone remained unpaid. *Held*, that as the plaintiff claimed by right of survivorship the action could not be maintained in his name as administrator to the survivor: *Burnett v. Pratt*, 22 Pick. 556. Mortgage made by D to A, and by him assigned to B and C. Foreclosure suit brought by B alone. *Held*, that B and C were joint tenants, and that C was a necessary party to the action: *Webster v. Vandevanter*, 6 Gray, 428. A, B, and C were duly appointed executors. A and B assigned a mortgage belonging to the residuary estate to C, who was also residuary legatee. *Held*, that C acquired a good title to the mortgage: *Hitchcock v. Merrick*, 15 Wis. 578. A claimed as assignee of a mortgage assigned to him by the administratrix of the mortgagee. Plea that the administratrix had never been appointed in this commonwealth. *Held*, on general demurrer, that the plea was good: *Cutter v. Davenport*, 1 Pick. 81; 11 Am. Dec. 149. Nancy D. sold land to B, who afterwards made a note and mortgage back to her. Nancy and her husband assigned the note and mortgage to A, who brought suit to foreclose. The grantees of the mortgagor defended on the ground that the assignment by Nancy with consent of her husband was ineffectual. *Held*, that a married woman, with the consent of her husband, may make an equitable assignment of a note and mortgage executed to her, by the sale and mere delivery of the same to another: *Baker v. Armstrong*, 57 Ind. 189.

**§ 3026. Method of Assignment.**—Where it is considered that a mortgage passes an estate in the land to the mortgagee, the assignment must be in writing, but an assignment may be good without actual delivery, where it is connected with evidence to show that the mortgagee intended to transfer his interest.<sup>1</sup> A release or quitclaim

<sup>1</sup> *Mitchell v. Burnham*, 44 Me. 286; *Y. 276*; *Adams v. Parker*, 12 Gray, 53; *Warden v. Adams*, 15 Mass. 233; *Torrey v. Deavitt*, 53 Vt. 331; *Morrison v. Mendenhall*, 18 Minn. 232; *Mulford v. Peterson*, 35 N. J. L. 127; *Runyan v. Mercereau*, 11 Johns. 534; 6 Am. Dec. 393; *Freyer v. Rockefeller*, 63 N. Y. 276; *Adams v. Parker*, 12 Gray, 53; *Douglass v. Durin*, 51 Me. 121; *Aldridge v. Weems*, 2 Gill & J. 36; 19 Am. Dec. 250; *Hills v. Eliot*, 12 Mass. 26; 7 Am. Dec. 26; *Smith v. Kelley*, 27 Me. 237; 46 Am. Dec. 595; *Nichols v. Reynolds*, 1 R. I. 30; 36 Am. Dec. 238.

deed would be sufficient.<sup>1</sup> And a conveyance with warranty would, in addition, be effective as an equitable assignment of the debt.<sup>2</sup> In those states where a mortgage is held to be a mere security for a debt, the debt must be assigned in order to pass any interest in the premises.<sup>3</sup> The assignment of the debt carries with it the right to the security, but the converse of the proposition does not hold good.<sup>4</sup> Payment of the mortgage debt by one having an interest to protect will operate as an assignment of the mortgage.<sup>5</sup> That which is in form a discharge of a mortgage may be treated in equity as an assignment, where so to construe it best accords with justice and the intention of the parties.<sup>6</sup>

ILLUSTRATIONS. — A claimed under a mortgage from B to C, since deceased. D, F, and A were heirs of C. D, by quitclaim, conveyed her interest to F, and he, by quitclaim, to A. F was administrator of A, but did not quitclaim in that capacity. There had been no proceedings for the purpose of foreclosing the mortgage. This was an action by writ of entry to recover the land. *Held*, that the quitclaim deeds did not operate as an assignment of the mortgage: *Douglass v. Durin*, 51 Me. 121. The

<sup>1</sup> *Thompson v. Kenyon*, 100 Mass. 106; *Weeks v. Eaton*, 15 N. H. 145; *Welch v. Priest*, 8 Allen, 165; *Dixfield v. Newton*, 41 Me. 221; *Furbush v. Goodwin*, 25 N. H. 425; *Hunt v. Hunt*, 14 Pick. 374; 25 Am. Dec. 400.

<sup>2</sup> *Smith v. Hitchcock*, 130 Mass. 570; *Welsh v. Phillips*, 54 Ala. 309; 25 Am. Rep. 679; *Ruggles v. Barton*, 13 Gray, 506; *Hinds v. Ballow*, 44 N. H. 621; *Wilson v. Troup*, 2 Cow. 195; 14 Am. Dec. 458; *Johnson v. Sandhoff*, 30 Minn. 197; *Taylor v. Agricultural Ass'n*, 68 Ala. 229; *King v. Harrington*, 2 Aiken, 33; 16 Am. Dec. 675.

<sup>3</sup> *Power v. Lester*, 23 N. Y. 527; *Mack v. Wetlar*, 39 Cal. 247; *Seckler v. Del's*, 25 Kan. 159; *Carpenter v. Longan*, 16 Wall. 274; *Bowers v. Johnson*, 49 N. Y. 432; *Trimn v. Marsh*, 54 N. Y. 599; 13 Am. Rep. 623; *Merritt v. Bartholick*, 47 Barb. 253; *Hitchcock v. Merrick*, 18 Wis. 357; *Paige v. Chapman*, 58 N. H. 333; *Delano v. Bennett*, 90 Ill. 533; *Lunt v. Lunt*, 71 Me. 377; *Wright v. Eves*, 10 Rich. Eq. 582; *Johnson v. Cornett*, 29 Ind. 59;

*Swan v. Staple*, 35 Iowa, 248; *Stewart v. Preston*, 1 Fla. 10; 44 Am. Dec. 621; *Peters v. Jamestown Bridge Co.*, 5 Cal. 334; 63 Am. Dec. 134; *Connecticut M. L. I. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655.

<sup>4</sup> *Wilson v. Kimball*, 27 N. H. 300; *Scott v. Turner*, 15 La. Ann. 346; *Blake v. Williams*, 36 N. H. 39; *Potter v. Stevens*, 46 Mo. 229; *Croft v. Bunster*, 9 Wis. 503; *Mapps v. Sharpe*, 32 Ill. 13; *Bacon v. Goodnow*, 59 N. H. 115; *Lawrence v. Knap*, 1 Root, 248; 1 Am. Dec. 42; *Austin v. Burbank*, 2 Day, 474; 2 Am. Dec. 119; *Vose v. Handy*, 2 Greenl. 322; 11 Am. Dec. 101; *Stewart v. Preston*, 1 Fla. 10; 44 Am. Dec. 621; *Terry v. Woods*, 6 Smedes & M. 139; 45 Am. Dec. 274; *Roberts v. Halstead*, 9 Pa. St. 32; 49 Am. Dec. 541; *Perkins v. Sterne*, 23 Tex. 561; 76 Am. Dec. 72; *Bank of Ind. v. Anderson*, 14 Iowa, 544; 83 Am. Dec. 390.

<sup>5</sup> *Bacon v. Goodnow*, 59 N. H. 415.

<sup>6</sup> *Guckian v. Riley*, 135 Mass. 71.

mortgagor of land subject to two mortgages filed a bill in equity to redeem it from the first mortgage, after the first mortgagee had made entry on the land for breach of the condition of his mortgage, and for the purpose of foreclosure under the General Statutes, chapter-140, sections 1 and 2, and before the possession so gained had been continued for three years. While the suit was pending, the three years expired; after which the first mortgagee, the suit still pending, executed a quitclaim deed of the land to the second mortgagee, and at the same time indorsed to him the first mortgage note. *Held*, that upon the subsequent abandonment of the suit the second mortgagee succeeded to all the rights of the first mortgagee, and held the land by an indefeasible title under a completed foreclosure: *Thompson v. Kenyon*, 100 Mass. 108. A and wife gave a mortgage to the I. Co., and subsequently a second one to B. B assigned it to C by a written indorsement on the note. There was no further or other assignment. *Held*, an equitable assignment of the mortgage: *Conn. Mut. Life Ins. Co. v. Talbot*, 118 Ind. 373; 3 Am. St. Rep. 655. A made to B a mortgage to secure certain negotiable notes. These notes were sold before maturity by B to C. Subsequently A conveyed the mortgaged premises to B in payment of the notes, and B thereupon satisfied the mortgage without the knowledge of C. B afterwards mortgaged the same property to a bank, which had no notice that the first mortgage had not been paid. The bank then foreclosed, and bought the property in. C then brought suit to foreclose, obtained a decree, and the bank appealed. *Held*, that the transfer of the notes carried the mortgage with it as an equitable incident as between the parties, but not as to third parties without notice: *Bank of Ind. v. Anderson*, 14 Iowa, 544; 83 Am. Dec. 390.

§ 3027. **Of Portion of Debt.**—An assignment of less than the whole of the debt carries with it a *pro rata* interest in the mortgage;<sup>1</sup> though, if he please, the mortgagee may assign the whole of the premises as security for part only of the debt.<sup>2</sup> Several notes may be secured by one

<sup>1</sup> *Johnson v. Brown*, 31 N. H. 405; *Phelan v. Olney*, 6 Cal. 478; *Bryant v. Damon*, 6 Gray, 564; *English v. Carney*, 25 Mich. 178; *Woodruff v. King*, 47 Wis. 261; *Keyes v. Wood*, 21 Vt. 331; *Collard v. Hudson*, 34 N. J. Eq. 38; *Duncan v. Louisville*, 13 Bush, 378; 26 Am. Rep. 201; *Miller v. R. R. Co.*, 40 Vt. 399; 94 Am. Dec. 414; *Donley v. Hays*, 17 Serg. & R. 400; *Adger v. Pringle*, 11 S. C. 527; *Beld-*

*ing v. Manly*, 21 Vt. 550; *Moore v. Ware*, 38 Me. 496; *Terry v. Woods*, 6 Smedes & M. 139; 45 Am. Dec. 274; *Burhaus v. Hutcheson*, 25 Kan. 625; 37 Am. Rep. 274.

<sup>2</sup> *Walker v. Dement*, 42 Ill. 272; *Langdon v. Keith*, 9 Vt. 299; *Wright v. Parker*, 2 Aiken, 212; *Henderson v. Herrod*, 10 Smedes & M. 631; *Foley v. Rose*, 123 Mass. 557; *Grattan v. Wiggins*, 23 Cal. 16; *Banks v. Tarle-*

mortgage, and may be afterwards assigned to different persons. Questions then arise as to the priority of payment of the various notes or portions of the debt so assigned, and the decisions are not at all harmonious on the points. They may be divided into three classes: 1. Those which hold that the proceeds should be applied *pro rata* to the several notes, irrespective of their dates of maturity or of assignment;<sup>1</sup> 2. Those which hold that the assignee takes precedence over the assignor with respect to the notes retained by him, and that, as between several assignees, they are entitled to precedence in the order of their several assignments;<sup>2</sup> 3. Those which hold that several notes secured by one mortgage have precedence, as between different assignees, in the order in which such notes mature.<sup>3</sup> Where one of several notes secured by a single mortgage is transferred, an equitable interest in the mortgage passes to the transferee, although there is only an oral understanding that such shall be the case, or although nothing is said.<sup>4</sup>

ILLUSTRATIONS. — P. made three promissory notes in favor of M., one payable in two years and the other two in three years. The first note was indorsed by G., an accommodation indorser.

ton, 23 Miss. 173; Pattison v. Hull, 9 Cow. 752; McLean's Appeal, 103 Pa. St. 255; Patrick's Appeal, 105 Pa. St. 356; Redman v. Purrington, 65 Cal. 271.

<sup>1</sup> Keyes v. Wood, 21 Vt. 331; Pattison v. Hull, 9 Cow. 747; Phelan v. Olney, 6 Cal. 478; Donley v. Hays, 17 Serg. & R. 400; Betz v. Heebner, 1 Penr. & W. 280; Hancock's Appeal, 34 Pa. St. 155; Cooper v. Ulmann, Walk. Oh. 251; English v. Cary, 25 Mich. 178; McCurdy v. Clark, 27 Mich. 445; Wilcox v. Allen, 36 Mich. 160; Dixon v. Clayville, 44 Md. 573; Cage v. Her, 5 Smedes & M. 410; 43 Am. Dec. 521; Henderson v. Herrod, 10 Smedes & M. 631; Jefferson College v. Prentiss, 29 Miss. 46; Page v. Pierce, 26 N. H. 317; Andrews v. Hobgood, 1 Lea, 693; Tinsley v. Boykin, 46 Tex. 592; Paris Exchange Bank v. Beard, 49 Tex. 358; Parker v. Mercer, 6 How. (Miss.) 320; 38 Am. Dec. 438.

<sup>2</sup> McClintic v. Wise's Adm'r, 25 Gratt. 448; 18 Am. Rep. 694; Griggsby v. Hair, 25 Ala. 327; Salzman v. His Creditors, 2 Rob. (La.) 241; Barkdull v. Herwig, 30 La. Ann. 618; Waterman v. Hunt, 2 R. I. 298; Parkhurst v. Watertown S. E. Co., 107 Ind. 594.

<sup>3</sup> Richardson v. McKim, 20 Kan. 346; Wilson v. Haywood, 6 Fla. 171; Vansant v. Allmon, 23 Ill. 30; Frink Reynolds, 33 Ill. 481; State Bank v. Tweedy, 8 Blackf. 447; 46 Am. Dec. 486; Murdock v. Ford, 17 Ind. 52; Issett v. Lucas, 17 Iowa, 503; Grapen-gether v. Fejervary, 9 Iowa, 163; 74 Am. Dec. 336; Mitchell v. Laden, 36 Mo. 526; 88 Am. Dec. 156; Thompson v. Field, 38 Mo. 320; Ellis v. Lamme, 42 Mo. 153; Wood v. Trask, 7 Wis. 566; 76 Am. Dec. 230; Lyman v. Smith, 21 Wis. 674.

<sup>4</sup> Norton v. Palmer, 142 Mass. 433.

All the notes were secured by one mortgage. P. contended that for the protection of G. the proceeds of the foreclosure should first be applied to the payment of the note first due. *Held*, that the proceeds of the premises should be applied proportionally on the three notes: *Parker v. Mercer*, 6 How. (Miss.) 320; 38 Am. Dec. 438. A assigned part of a mortgage to B. The property was sold under foreclosure. The proceeds were insufficient to pay the mortgage in full. *Held*, that B was entitled to be paid in full before A received anything: *Barkdull v. Herwig*, 30 La. Ann. 618. A, one of joint mortgagees, sold to B his interest in the second note, secured by the mortgage. B assigned the same to C. Only one note had become due at the time of the decree. *Held*, that C took the note subject to the risk of the adequacy of the security, and subject to the payment of the note first falling due: *Wood v. Trask*, 7 Wis. 566; 76 Am. Dec. 230. A mortgaged his land to B to secure three notes. B indorsed the notes, and assigned the mortgage to C, who recovered judgment against both A and B on the note first coming due. The land was not worth enough to pay the three notes. *Held*, that from the proceeds on foreclosure, the two notes, which in C's hands were then overdue, must be paid before B was entitled to anything, and that B's assignee *pendente lite* took B's rights, and no more: *Anderson v. Sharp*, 44 Ohio St. 260.

§ 3028. **Assignment Subject to Equities.**—The assignee of a note secured by mortgage takes it subject to the same equities to which he would be liable if it were an ordinary note or bill of exchange not secured by any mortgage.<sup>1</sup> So in an action on a mortgage by an assignee, who received it and the note secured by it for value before maturity in good faith, and without notice of any defect, the mortgagor cannot raise the defense of want of consideration, or that the note and mortgage were obtained from him by fraudulent representations.<sup>2</sup> But if the note secured was non-negotiable,<sup>3</sup> or had been as-

<sup>1</sup> *Kelley v. Whitney*, 45 Wis. 110; 30 Am. Rep. 697; *Boyd v. Parker*, 43 Md. 782; *McKenna v. Kirkwood*, 50 Mich. 544; *Webb v. Hoselton*, 4 Neb. 308; 19 Am. Rep. 638; *Sawyer v. Prickett*, 19 Wall. 146; *Updegraff v. Edwards*, 45 Iowa, 513; *Duncan v. Louisville* etc., 13 Bush, 385; 26 Am. Rep. 201; *New Orleans v. Montgomery*, 95 U. S. 16; *James v. Morey*, 2 Cow. 246; 14 Am. Dec. 475, and note 513; *Mott v.*

*Clark*, 9 Pa. St. 399; 49 Am. Dec. 566; *Lewis v. Kirk*, 28 Kan. 497; 42 Am. Rep. 173.

<sup>2</sup> *Taylor v. Page*, 6 Allen, 86; *Paige v. Chapman*, 58 N. H. 333; *Smart v. Bement*, 4 Abb. App. 253; *Woodruff v. Morristown*, 34 N. J. Eq. 179.

<sup>3</sup> *Reddish v. Ritchie*, 17 Fla. 867; *Horstman v. Gerker*, 49 Pa. St. 147; 88 Am. Dec. 501; *Richardson v. Woodruff*, 20 Neb. 132.

signed after maturity,<sup>1</sup> an assignee of the mortgage takes it subject to all the equities existing between the original parties.<sup>2</sup> It has been held in a recent case that the innocent assignee for value of the bond and mortgage, without notice of certain credits to which the mortgagor was entitled, took the securities subject to the defenses of the mortgagor against his mortgagee.<sup>3</sup> The assignee of a mortgage who fails to inquire of the mortgagor whether he has any defense takes subject to the mortgagor's equities against the mortgagee; and the rule is the same although the mortgagor before the assignment may have confessed judgment in favor of the mortgagee in open court, the judgment being afterwards opened. The assignee may give the confession of judgment in evidence, but it does not work an estoppel.<sup>4</sup> An assignee who takes no declaration of set off, or makes no inquiries of the mortgagor as to conditions in the way of payment, takes the mortgage subject to any equities between the parties.<sup>5</sup>

ILLUSTRATIONS. — A mortgaged land to B to secure negotiable notes to the amount of twenty-five thousand dollars. B negotiated five thousand dollars of these to C for a valuable consideration, and afterwards negotiated the remaining twenty thousand dollars, and assigned four fifths of the mortgage to D, who accepted only on condition that B released to the mortgagors the portion covered by the five thousand dollars, which B did without the consent of C. *Held*, that upon delivery of the five-thousand-dollar notes to C, one fifth interest in the mortgage passed to him by operation of law, and that his title thereto could not be affected by any transaction between B and D to which he did not consent: *Smith v. Stevens*, 49 Conn. 181. A gave a note to B not negotiable, secured by a mortgage, as security for the performance of an agreement. C took an assignment of the note and mortgage, and attempted to foreclose.

<sup>1</sup> *Fish v. French*, 15 Gray, 520; *Howard v. Gresham*, 27 Ga. 347.

<sup>2</sup> *Silverman v. Bullock*, 98 Ill. 11; *Carpenter v. Lorgan*, 16 Wall. 273; *Glidden v. Hunt*, 24 Pick. 221; *Reddish v. Ritchie*, 17 Fla. 867; *Eversole v. Maull*, 50 Md. 95; *Ashton's Appeal*, 73 Pa. St. 153; *Central Bank v. Cope-*

*land*, 18 Md. 305; 81 Am. Dec. 597; *Nichols v. Lee*, 10 Mich. 526; 82 Am. Dec. 57.

<sup>3</sup> *Moffatt v. Hardin*, 22 S. C. 9.

<sup>4</sup> *Earnest v. Hoskins*, 100 Pa. St. 551.

<sup>5</sup> *Theyken v. Howe Machine Co.*, 109 Pa. St. 95.

*Held*, that C was chargeable with notice of the equities between A and B, and that A, on performing the agreement, could maintain against C a cross-action for the cancellation of the note and mortgage: *Humphrey v. Beckwith*, 48 Mich. 151.

§ 3029. **Effect and Construction.**—The general effect of the assignment is to transfer not only the claim against the mortgagor, but also all securities held by the assignor for the same debt,<sup>1</sup> though if there be a contract of guaranty of a strictly personal nature made to the mortgagee, it will not pass.<sup>2</sup> The assignor impliedly covenants not to receive payment of the debt assigned, or that if he does, he will pay it over to the assignee.<sup>3</sup> But to protect himself in this regard, the assignee usually gives notice to the mortgagor of the assignment, and unless he does so, and loss ensues, his only remedy is against the assignor on the implied covenant.<sup>4</sup> The assignor is, in general, held to warrant the validity of the mortgage, including the bonds and notes.<sup>5</sup> But the assignor is not answerable for a defective title, unless he has made some representation respecting it, which the assignee was entitled to and did rely on, and has thereby suffered loss.<sup>6</sup> Where the mortgage confers on the mortgagee or his assigns a power of sale after default, in those states where a mortgage is regarded as security merely, an assignment of the note secured by the mortgage carries with it the power of sale.<sup>7</sup> A defective execution of a power of sale operates as an assignment of the mortgage, and the assignee may maintain a

<sup>1</sup> *Machine Co. v. Emerson*, 115 Mass. 154; *Phillips v. Bank of Lewistown*, 18 Pa. St. 394; *Gibbons v. Hoag*, 95 Ill. 45; *Selfridge v. Northampton Bank*, 8 Watts & S. 311; *Taft v. Munson*, 63 Barb. 31; *Gardiner v. Gerriah*, 23 Me. 46; *Greve v. Coffin*, 14 Minn. 345; 100 Am. Dec. 229.

<sup>2</sup> *Smith v. Starr*, 4 Hun. 123; *Newcomb v. Hale*, 90 N. Y. 326; 43 Am. Rep. 173.

<sup>3</sup> *McCabe v. Farnsworth*, 27 Mich. 52; *Hortsmann v. Gerker*, 49 Pa. St.

282; 88 Am. Dec. 501; *Van Kuren v. Corkins*, 4 Hun. 120; *Johnson v. Carpenter*, 7 Minn. 176.

<sup>4</sup> *Hortsmann v. Gerker*, 49 Pa. St. 282; 88 Am. Dec. 501; *Burhans v. Hutcheson*, 25 Kan. 625; 37 Am. Rep. 274.

<sup>5</sup> *Ross v. Terry*, 63 N. Y. 613.

<sup>6</sup> *Vincent v. Berry*, 46 Iowa. 571.

<sup>7</sup> *Hamilton v. Lubukee*, 51 Ill. 415; 99 Am. Dec. 562; *Gilgour v. Gockley*, 83 Ill. 109.

writ of entry against a person in possession who shows no title to the land.<sup>1</sup> A mortgagee does not lose his interest in the mortgage by assigning it to his creditor as collateral security for his own debt, though the assignment stipulates that he is to forfeit all interest if he fails to pay at a fixed time, and he does so fail.<sup>2</sup> After having assigned the debt secured by the mortgage, the power of the mortgagee ceases, and a release made by him is a nullity, and will be canceled, and the mortgage lien enforced.<sup>3</sup>

ILLUSTRATIONS.—A held a mortgage to secure a debt and to indemnify himself as surety for the mortgagor. *Held*, that he could assign his interest in the property to secure his debt, and that his assignee's rights were paramount to the right of subrogation possessed by creditors of the mortgagor: *Waller v. Oglesby*, 85 Tenn. 321. Where a mortgage was foreclosed by an assignee for non-payment of interest before the principal was due, *held*, that his assignor could not prove the payment of all the interest to him by the mortgagor before the assignment: *Newton B. & L. Ass'n v. Boyer*, 42 N. J. Eq. 273. A. executed to R. a bond and mortgage, without consideration, for the purpose of effecting a loan for himself. R. failed to procure the loan, but sold the bond and mortgage for value to B. *Held*, that R., having no authority to sell, conveyed no title to B., and A. was entitled to surrender and cancellation of them: *Davis v. Bechstein*, 69 N. Y. 440; 25 Am. Rep. 218.

<sup>1</sup> *Holmes v. Turners Falls Co.*, 142 Mass. 590; *Taylor v. A. & M. Ass'n*, 68 Ala. 229.

<sup>2</sup> *Hughes v. Johnson*, 38 Ark. 235.

<sup>3</sup> *Fassett v. Mulock*, 5 Col. 466.

## CHAPTER CXLII.

## RIGHTS, INTERESTS, AND LIABILITIES OF PARTIES.

- § 3030. The mortgagor.
- § 3031. The mortgagee.
- § 3032. The purchaser of the equity of redemption.
- § 3033. The lessee of the mortgagor.
- § 3034. Right of mortgagor to bring ejectment.
- § 3035. Right of mortgagee to bring ejectment.
- § 3036. Right of mortgagee to writ of entry.
- § 3037. Subsequent encumbrancers.
- § 3038. Mortgagee under mortgage of indemnity.
- § 3039. Right of parties to maintain partition.
- § 3040. When mortgagee estopped from setting up mortgage.

§ 3030. **The Mortgagor.**—Under the modern interpretation of a mortgage as adopted in most of the states, no estate in the land passes to the mortgagee. He has merely a lien for the security of the debt, the estate remaining in the mortgagor as it was before the mortgage.<sup>1</sup> And the latter may exercise all rights of ownership over the property as fully and effectually as he could have done if the mortgage had not been in existence, with the qualification, however, that he must do nothing which will impair the value of the security, or render it less available to the mortgagee.<sup>2</sup> The possession of the mortgagor is presumed to be in subordination to the title of the

<sup>1</sup> *Wade v. Miller*, 32 N. J. L. 303; *Childs v. Childs*, 10 Ohio St. 342; 75 Am. Dec. 512; *Bryan v. Butts*, 27 Barb. 505; *Chamberlain v. Thompson*, 10 Conn. 343; 26 Am. Dec. 390; *Orr v. Hadley*, 36 N. H. 578; *Bartlett v. Borden*, 13 Bush, 45; *Wilkins v. French*, 20 Me. 111; *Gabbert v. Schwartz*, 69 Ind. 450; *Hall v. Savill*, 3 G. Greene, 37; 54 Am. Dec. 485; *Farnsworth v. Boston*, 126 Mass. 3; *Hitchcock v. Harrington*, 6 Johns. 290; 5 Am. Dec. 229; *Mann v. Talcon*, 25 Tex. 271.

<sup>2</sup> *Kennett v. Plummer*, 28 Mo. 142; *Orr v. Hadley*, 36 N. H. 579; *Buchan-*

*an v. Munroe*, 22 Tex. 537; *Waring v. Smyth*, 2 Barb. Ch. 119; 47 Am. Dec. 299; *Barrett v. Blackmar*, 47 Iowa, 565; *Mitchell v. Bartlett*, 52 Barb. 319; *Norwich v. Hubbard*, 22 Conn. 587; *Bird v. Decker*, 64 Me. 550; *Annapolis etc. R. R. Co. v. Garrett*, 39 Md. 115; *Kimball v. Lewiston Steam Mill Co.*, 55 Me. 499; *Woods v. Hildebrand*, 46 Mo. 284; 2 Am. Rep. 513; *Coker v. Whitlock*, 54 Ala. 180; *Murphy v. Welch*, 128 Mass. 489; *Oldham v. Pfleger*, 84 Ill. 102; *Angier v. Agnew*, 95 Pa. St. 587; 42 Am. Rep. 624.

mortgagee, until the contrary is shown.<sup>1</sup> The possession of the mortgagor is the possession of the mortgagee, who is not liable to be disseised by any act of the mortgagor remaining in possession; and the latter can make no lease or contract respecting the mortgaged premises effectual to bind the mortgagee or prejudicial to his title.<sup>2</sup> The mortgagor and his assigns are not entitled as against the mortgagee to be allowed for improvements made upon the premises,<sup>3</sup> nor are they bound to rebuild erections destroyed by fire.<sup>4</sup> The estate of the mortgagor is liable to be attached, levied upon, and sold under execution, without prejudice, of course, to the lien of the mortgage.<sup>5</sup> The mortgagor's lessee is not entitled to crops growing on the premises, as against the mortgagee, under a lease subsequent to the mortgage.<sup>6</sup> If the mortgagee does not interfere with the mortgagor's collecting rents and profits, the mortgagee cannot recover them from the mortgagor, even though after sale there is a deficiency.<sup>7</sup> The mortgagor cannot defeat the mortgage by buying the land in collusion with a third person at a tax sale.<sup>8</sup> Where at the date of the mortgage the mortgagor has not title to the land, but subsequently acquires the same, it is a well-established rule that such after-acquired title inures to the benefit of the mortgagee, and, as is said, feeds the mortgage.<sup>9</sup> But this rule does not apply where it would

<sup>1</sup> *Conner v. Whitmore*, 52 Me. 185.

<sup>2</sup> *Colton v. Smith*, 11 Pick. 311; 22 Am. Dec. 375; *Beach v. Royce*, 1 Root, 244; *Judd v. Woodruff*, 2 Root, 298; *Sweetser v. Lowell*, 33 Me. 446; *McDermott v. Burke*, 16 Cal. 580.

<sup>3</sup> *Childs v. Dolan*, 5 Allen, 319; *Baird v. Jackson*, 98 Ill. 78; *Marshall v. Stewart*, 80 Ind. 189; *Wharton v. Moore*, 84 N. C. 479; 37 Am. Rep. 627; *Rice v. Dewey*, 54 Barb. 455.

<sup>4</sup> *Reid v. Bank of Tennessee*, 1 Sneed, 262.

<sup>5</sup> *Franklin v. Gorham*, 2 Day, 142; 2 Am. Dec. 86; *Fox v. Clark*, Walk. Ch. 535; *Hackett v. Buck*, 128 Mass. 369; *Moors v. Albrow*, 129 Mass. 9; *Phinizy*

*v. Clark*, 62 Ga. 623; *Walters v. Defenbaugh*, 90 Ill. 241; *Lovelace v. Webb*, 62 Ala. 271; *Perrin v. Reid*, 35 Vt. 2.

<sup>6</sup> *Lane v. King*, 8 Wend. 584; 24 Am. Dec. 105.

<sup>7</sup> *Keyser v. Hitz*, 4 Mackey, 179.

<sup>8</sup> *McAlpine v. Zitzer*, 119 Ill. 273; *Kezer v. Clifford*, 59 N. H. 208; *Allison v. Armstrong*, 28 Minn. 276; 41 Am. Rep. 624.

<sup>9</sup> *Tefft v. Munson*, 63 Barb. 38; *Gibbons v. Hoag*, 95 Ill. 45; *Pike v. Galvin*, 29 Me. 183; *Judd v. Seekins*, 62 N. Y. 266; *Philby v. Sanders*, 11 Ohio St. 490; 78 Am. Dec. 316; *Rauch v. Dech*, 116 Pa. St. 157; 2 Am. St. Rep. 598.

work manifest injustice.<sup>1</sup> Where the mortgagor warrants the title, he is, under the general principle, estopped from asserting a want of title in the mortgagee.<sup>2</sup> A grantee who has assumed payment of a mortgage is estopped from setting up a title acquired under a prior mortgage.<sup>3</sup> Where mortgagors of a homestead declare the mortgage to be for purchase-money, they are estopped, when sued on the negotiable note, from asserting the contrary.<sup>4</sup>

ILLUSTRATIONS. — A conveyed land to B. The land was subject to a mortgage, which was recited to be part of the consideration, and which the grantee orally agreed to pay. It was afterwards attached by one who had no notice of the oral agreement. *Held*, that the grantor could enforce the mortgage against the land without first resorting to other land also covered by the mortgage: *Iowa Loan and Trust Co. v. Mowery*, 67 Iowa, 113. A occupied real estate which he had conveyed to B by a deed, absolute in form, there being, however, a parol agreement to reconvey upon the payment by A to B of certain sums due. B conveyed the real estate to C, who, during A's temporary absence, took possession and by force repelled A's re-entry. *Held*, that A was lawfully in possession, and could maintain trespass for an assault: *Perkins v. West*, 55 Vt. 265.

§ 3031. **The Mortgagee.** — By virtue of the rule as now obtaining in most of the states, the mortgagee takes no estate in the land, but has only a lien thereon as security for the debt until foreclosure.<sup>5</sup> His interest in the land is regarded as personalty, and is subject to the rules of

<sup>1</sup> *Hawkins v. Harlan*, 68 Cal. 236.

<sup>2</sup> *Comstock v. Smith*, 13 Pick. 116; 23 Am. Dec. 670; *Pike v. Galvin*, 29 Me. 184; *Cross v. Robinson*, 21 Conn. 379; *Den v. Gardner*, 20 N. J. L. 556; 45 Am. Dec. 388; *Sutlive v. Jones*, 61 Ga. 676; *Jones v. Reese*, 65 Ala. 134; *Boone v. Armstrong*, 87 Ind. 168; *Goodenough v. Fellows*, 53 Vt. 102; *Preston v. Evans*, 56 Md. 476; *Weyh v. Boylan*, 85 N. Y. 394; 39 Am. Rep. 669; *Hutchinson v. Gill*, 91 Pa. St. 253; *Chapman v. Miller*, 130 Mass. 289; *Kerngood v. Davis*, 21 S. C. 183.

<sup>3</sup> *Conner v. Howe*, 35 Minn. 518.

<sup>4</sup> *Heidenheimer v. Stewart*, 66 Tex. 321.

<sup>5</sup> *Woods v. Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513; *Fletcher v. Holmes*, 32 Ind. 513; *Hubbell v. Moulson*, 53 N. Y. 225; 43 Am. Rep. 519; *Norwich v. Hubbard*, 22 Conn. 587; *Great Falls Co. v. Worster*, 45 N. H. 512; *Mills v. Sheppard*, 30 Conn. 98; *Gilman v. Wills*, 66 Me. 273; *Home Ins. Co. v. Smith*, 28 Hun, 296; *Brown v. Bates*, 55 Me. 520; 92 Am. Dec. 613; *Scott v. Mewhiter*, 49 Iowa, 487; *McLaughlin v. Sheppard*, 32 Me. 143; 52 Am. Dec. 646; *Beckett v. Dean*, 57 Miss. 232; *Morris v. Mowatt*, 2 Paige, 586; 22 Am. Dec. 661. And see § 3012, *ante*.

law governing that species of property.<sup>1</sup> He has no right to actual possession and receipt of rents and profits, except where the mortgage carries the estate, and then only after condition broken; but he has constructive possession before discharge or foreclosure through the possession of the mortgagor, who is *quasi* tenant at will.<sup>2</sup> He is deemed a purchaser within the meaning of the registry acts,<sup>3</sup> and is entitled to rely on the record, and to be protected from encumbrances and defects not disclosed by it.<sup>4</sup> As the relationship of mortgagor and mortgagee is not considered to be of a fiduciary character, the mortgagee, whether in possession, or not, is entitled to purchase from the mortgagor his estate and interest in the land.<sup>5</sup> In the event of the mortgagor's title being sold under execution, the mortgagee may buy and hold it adversely to the mortgagor.<sup>6</sup> He may also, in some states, acquire title to the property by purchase at a tax sale, when he is not in possession; but if he is receiving the rents, and buys the property in at a tax sale, he will be deemed to hold the title on behalf of the mortgagor.<sup>7</sup> When the

<sup>1</sup> Webster v. Calden, 56 Me. 204; Woodruff v. Mutschler, 34 N. J. Eq. 33; Baldwin v. Hatchett, 56 Ala. 461; Martin v. Smith, 124 Mass. 111; Stewart v. Allegheny Nat. Bank, 101 Pa. St. 342; Long's Appeal, 77 Pa. St. 151.

<sup>2</sup> Willis v. Moore, 59 Tex. 628; 46 Am. Rep. 284; Skinner v. Buck, 29 Cal. 253; Besser v. Hawthorne, 3 Or. 129; Carpenter v. Brenham, 40 Cal. 221; Schreiber v. Carey, 48 Wis. 208; Harley v. Estes, 6 Neb. 386; Walker v. Johnson, 37 Tex. 127; Green v. Butler, 26 Cal. 595; Pugh v. Davis, 96 U. S. 332; McLeod v. Bullard, 84 N. C. 515; Ten Eyck v. Craig, 62 N. Y. 406; Hunt v. Hunt, 14 Pick. 374; 25 Am. Dec. 400; Babcock v. Kennedy, 1 Vt. 457; 18 Am. Dec. 695; Stoney v. Shultz, 1 Hill Eq. (S. O.) 465; 27 Am. Dec. 429.

<sup>3</sup> Salter v. Baker, 54 Cal. 140; Patton v. Eberhart, 52 Iowa, 67; Whelan v. McCreary, 64 Ala. 319; Pierce v.

Fannce, 47 Me. 507; Kesner v. Trigg, 98 U. S. 50; Weinberg v. Rempe, 18 W. Va. 829.

<sup>4</sup> McFarlane v. Griffith, 4 Wash. C. C. 585; Brophy Min. Co. v. Brophy etc. Min. Co., 15 Nev. 101; Rogers v. Blackwell, 49 Mich. 192; James v. Morey, 2 Cow. 246; 14 Am. Dec. 475. <sup>5</sup> Pugh v. Davis, 96 U. S. 332; Green v. Butler, 26 Cal. 595; McLeod v. Bullard, 86 N. C. 210; Ten Eyck v. Craig, 62 N. Y. 406; Duval v. P. & M. Bank, 10 Ala. 636.

<sup>6</sup> Blythe v. Richards, 10 Serg. & R. 261; 13 Am. Dec. 672.

<sup>7</sup> Coombs v. Warren, 34 Me. 89; Martin v. Swoffard, 59 Miss. 328; Waterson v. Devoe, 18 Kan. 223; Ten Eyck v. Craig, 62 N. Y. 406; Sidenberg v. Ely, 90 N. Y. 257; 43 Am. Rep. 163; Brown v. Simons, 44 N. H. 475; Mooshier v. Norton, 100 Ill. 63; Schenck v. Kelley, 88 Ind. 444; Smith v. Lewis, 20 Wis. 350. But see Burdchard v. Roberts, 70 Wis. 111, 5 Am.

mortgagee takes possession of the property, he is bound to use it as a provident owner would, and to use like diligence to make it productive.<sup>1</sup> Before he enters in possession, a mortgagee is not bound by covenants running with the land.<sup>2</sup> When a mortgagee rightfully enters into possession, he is accountable only for what he actually receives, or could have received by the exercise of due diligence; but he is not permitted to manage the property in a negligent or wasteful manner; and even though he has assigned the mortgage, he is equally responsible for the acts and omissions of his assignee, as it is held to be his duty not to permit other than a proper person to take possession of the land.<sup>3</sup> Under what is known as the doctrine of tacking, but which has found little favor in the United States, a third mortgagee may by buying the first mortgage tack onto it the third, and so obtain priority for his third mortgage over the second. But this can be done only where the first mortgagee is held to be the legal owner of the estate, and where the third mortgagee had no notice of the second mortgage at the time he lent his money; and it was early held in this country that where the laws provide for the recording of mortgages this doctrine has no application.<sup>4</sup> Another right of a mortgagee is that of the consolidating of two or more mortgages. It arises where the same mortgagee has taken separate mortgages at different times and on different

St. Rep. 148, and *Eck v. Swennumson*, 73 Iowa, 423, 5 Am. St. Rep. 690, where it is held that the mortgagee and one who holds under him cannot acquire a tax title, and thereby defeat the mortgagor's title and his equity of redemption.

<sup>1</sup> *Benham v. Rowe*, 2 Cal. 387; 56 Am. Dec. 342; *Shaeffer v. Chambers*, 6 N. J. Eq. 548; 47 Am. Dec. 211.

<sup>2</sup> *Morris v. Mowatt*, 2 Paige, 586; 22 Am. Dec. 661.

<sup>3</sup> *Harper v. Ely*, 70 Ill. 581; *Gillman v. Wills*, 66 Me. 273; *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519; *Hubbard v. Shaw*, 12 Allen, 120;

*Bell v. Mayor of New York*, 10 Paige, 73; *Cookes v. Culbertson*, 9 Nev. 199; *Breckenridge v. Brooks*, 2 A. K. Marsh. 335; 12 Am. Dec. 401; *Youle v. Richards*, 1 N. J. Eq. 534; 23 Am. Dec. 722; *Caldwell v. Hall*, 49 Ark. 508; 4 Am. St. Rep. 64; *Gresham v. Ware*, 79 Ala. 192.

<sup>4</sup> *Parkist v. Alexander*, 1 Johns. Ch. 399; *Grant v. U. S. Bank*, 1 Caines Cas. 112; *Chandler v. Dyer*, 37 Vt. 345; *Wing v. McDowell*, Walk. Ch. 175; *Nelson v. Boyce*, 7 J. J. Marsh. 401; 23 Am. Dec. 411. The doctrine of tacking was abolished in England by the vendor and purchaser act of 1874.

properties from the same mortgagee, and consists of the right of such mortgagee to refuse to receive payment of less than all of the mortgages. It was founded on the notion that where in one case the property might afford an inadequate security, and in another case the security might be more than ample, it would be inequitable to permit the mortgagor to redeem the ample security and leave the mortgagee to take his chances of payment out of the inadequate one. The doctrine obtains in a few of the states;<sup>1</sup> but the prevailing rule is, that a mortgagor may redeem each mortgage separately.<sup>2</sup> The mortgagee may release a part of the mortgaged premises with or without receiving any portion of the mortgage debt, but the remainder of the property continues liable for the amount of the debt remaining unpaid; it being considered that every portion of the premises is equally subject to the whole of the debt.<sup>3</sup> But if a mortgaged estate is sold in lots, and the mortgagee, with knowledge of such sale, releases one lot from the operation of the mortgage, he can enforce payment of only a proportionate share as against the others.<sup>4</sup> A mortgage is discharged only by payment or release, and not by a change in or renewal of the note or debt which the mortgage was given to secure.<sup>5</sup>

ILLUSTRATIONS.—M., having a claim to land in Missouri under a Spanish grant, mortgaged a part of the land to D. Afterwards Congress confirmed the claim to M. or his legal representatives. *Held*, that this confirmation inured to the benefit of the mortgagee, rather than to the heirs of M.: *Massey v. Papin*, 24 How. 362. A mortgaged property, and afterwards sold it to B, who assumed the mortgage, and gave his own notes, with a surety, as collateral to the original debt. The

<sup>1</sup> *Walling v. Aikin*, 1 McMull. Eq. 1; *Bank of S. C. v. Rose*, 1 Strob. Eq. 257; *Rowan v. The Sharp's Rifle Mfg. Co.*, 29 Conn. 282; *Lamson v. Sutherland*, 13 Vt. 309.

<sup>2</sup> *Kipp v. Delamater*, 58 How. Pr. 183; *Beck v. Ruggles*, 6 Abb. N. C. 69.

<sup>3</sup> *Smith v. Roberts*, 91 N. Y. 470; *Contant v. Senors*, 3 Barb. 123.

<sup>4</sup> *Fassett v. Traber*, 20 Ohio, 540; *Lock v. Fulford*, 52 Ill. 166; *George v. Wood*, 9 Allen, 83; 85 Am. Dec. 741; *Stirling v. Forrester*, 3 Bligh, 575; 590; *Guion v. Knapp*, 6 Paige, 35, 29 Am. Dec. 741; *Jones v. Myrick*, 8 Gratt. 180; *Taylor v. Short*, 27 Iowa, 361; 1 Am. Rep. 280.

<sup>5</sup> *Bunker v. Barron*, 79 Me. 62; 1 Am. St. Rep. 282.

surety was sued, and his estate being small, the judgment was compromised for a less sum, the grantee of the equity of redemption making no objection. *Held*, that the mortgagee was not accountable for more than he actually received, but that the costs of suit should not be deducted from that sum: *Johnson v. Rice*, 8 Me. 157. A mortgaged land to B to secure a specific debt, and afterwards conveyed his equity of redemption in the same land and other property in trust to pay all his debts, among them other debts due to B, not secured by the mortgage. *Held*, that B was entitled to receive the whole amount of his mortgaged debt out of the land, and come in *pro rata* with other creditors as to his other debts: *Bell v. Hammond*, 2 Leigh, 416. A mortgage was given to A, to secure two negotiable notes of the same date and maturity,—the one payable to A, and the other to B,—and the transaction showed that an equality between A and B was intended. *Held*, that A could not claim a superior equity as against C, who had become a *bona fide* purchaser of the note from B, without such equity: *Beresford v. Ward*, 1 Disn. 169. A mortgaged real estate to B, to whom he was also indebted under a building contract relating to the same land, which had been duly recorded, but not enforced by suit within six months, as required by the Massachusetts statute. B entered upon the property for condition broken. It was then agreed between the parties that B should let the estate, and apply the rents to the debt under the building contract, after which, and before any rent had been received or become payable, A took advantage of the insolvent law. *Held*, that the rents subsequently received by B must be deemed to have been received by him as mortgagee: *Hilliard v. Allen*, 4 Cush. 532. A conveyed his ranch and stock to B and C, to manage and sell in order to reimburse themselves for a loan. *Held*, that B and C were, in effect, mortgagees in possession, and liable for the loss of stock unnecessarily abandoned: *Wann v. Coe*, 31 Fed. Rep. 369. Plaintiff in foreclosure agreed with A, the purchaser of the equity of redemption, that if A would buy at the sale, plaintiff would take a new mortgage. This was done, and A never gave up possession. *Held*, that judgment creditors of the mortgagor, whose liens were subsequent to the original mortgage, could not charge plaintiff as mortgagee in possession with rents and profits: *Van Druyne v. Shann*, 41 N. J. Eq. 311. An administrator rightfully pledged to A a mortgage belonging to the estate as security for A's advances for the use of the estate. A put the mortgage into the administrator's hands for collection; and the latter, instead of suing it in A's name, sued it in his own, and the mortgagor, not knowing of A's rights, settled the judgment by

surrendering the land. *Held*, that the land in the hands of the heirs of the administrator's intestate remained liable to A: *Reynolds v. Rees*, 23 S. C. 438. A and B owned land, lots 1, 2, and 3, subject to a mortgage. Upon a division, A took lot 1, and B lots 2 and 3, B agreeing to assume the mortgage debt. B borrowed money of C, mortgaging lot 2 to secure it, and agreeing to apply it for the purpose of obtaining a release of lot 2 from the old mortgage. Instead, he obtained a release of lot 3. C released a part of lot 2 from the lien of the mortgage, and thus enabled B to obtain money from sales. With this and other money B paid the original mortgage debt, and B consenting, C sought to foreclose against lot 2. *Held*, that this could not be done, and that A was entitled to a release of lot 2: *Richardson v. Traver*, 112 U. S. 423. A mortgaged all his land for the purchase-money to B, and subsequently mortgaged successive portions to C, D, and E. A having become bankrupt, his assignees sold under order of the court all the land in C's portion, and applied the money on B's mortgage. *Held*, that C was entitled to have E's portion and D's portion sold in that order for the relief of his mortgage: *Milligan's Appeal*, 104 Pa. St. 503. A held a senior mortgage on a tract of land, B a second mortgage, and C a junior mortgage. A foreclosed, bid in the land, and assigned the certificate of sale to B. The mortgagor conveyed the equity of redemption to C, who redeemed and took a sheriff's deed. *Held*, that B could foreclose as against C: *Crane v. Aultman Taylor Co.*, 61 Wis. 110.

### § 3032. The Purchaser of the Equity of Redemption.

The position of the purchaser of an equity of redemption depends to a very great extent upon the language employed in his conveyance, and referring to the mortgage subject to which he takes the property. It may impose upon him the liability to pay the mortgage debt direct to the mortgagee, or merely to indemnify the mortgagor therefrom, or to repay him when he pays the mortgagee.<sup>1</sup> Or it may, as regards the purchaser, confine the liability to the land only, without creating any personal claim against the grantee.<sup>2</sup> It may estop him from

<sup>1</sup> *Garnsey v. Rogers*, 47 N. Y. 233; 47 Am. Rep. 467; *Moore's Appeal*, 88 7 Am. Rep. 440; *Binns v. Paige*, 1 Pa. St. 450; 32 Am. Rep. 469.

<sup>2</sup> *Collins v. Rowe*, 1 Abb. N. C. 97; *Meech v. Ensign*, 49 Conn. 191; 44 Am. Rep. 223; *Vrooman v. Turner*, 69 N. Y. 230; 25 Am. Rep. 195.

disputing the validity of the mortgage.<sup>1</sup> It may affect the liability of the mortgagor in case the mortgagee subsequently extends the time for payment of the debt without the consent of the former.<sup>2</sup> It also may materially affect questions of notice to others who claim under the deed.<sup>3</sup> In the absence of any contract or circumstances to the contrary, it is presumed that one who purchases mortgaged property takes it charged with the payment of the mortgage debt.<sup>4</sup> Where the deed expressly states that the land is subject to a mortgage, it is as effectually charged therewith in the hands of the purchaser as though he had expressly assumed the payment, or had made the mortgage himself.<sup>5</sup> Where the purchaser assumes payment of the mortgage he makes himself personally liable for its payment, and judgment of deficiency can be had against him; but where he simply buys the land subject to the mortgage, he incurs no personal liability in the event of the security being deficient.<sup>6</sup> He is, however, not entitled to the benefit of any collateral security obtained by the mortgagee after the execution of the mortgage. He buys the equity of redemption only, and is not concerned with any other security not a part of the original transaction;<sup>7</sup> nor does he acquire any right to have the securities marshaled in his favor.<sup>8</sup> And where he

<sup>1</sup> *Ritter v. Phillips*, 53 N. Y. 586; *Johnston v. Crawley*, 25 Ga. 316; 71 Am. Dec. 173. But as to California, see *Boggs v. Fowler*, 16 Cal. 559; 76 Am. Dec. 561; *Parkinson v. Sherman*, 74 N. Y. 88; 30 Am. Rep. 268.

<sup>2</sup> *Calvo v. Davies*, 73 N. Y. 211; *Hoy v. Bramhall*, 19 N. J. Eq. 563; 97 Am. Dec. 687; *George v. Andrews*, 60 Md. 26; 45 Am. Rep. 706.

<sup>3</sup> *Campbell v. Vedder*, 1 Abb. App. 295.

<sup>4</sup> *Dickason v. Williams*, 129 Mass. 182; 37 Am. Rep. 316; *Gayle v. Wilson*, 30 Gratt. 166; *Shuler v. Hardin*, 25 Ind. 386; *Savings Bank v. Grant*, 41 Mich. 101; *Wolbert v. Lucas*, 10 Pa. St. 73; 49 Am. Dec. 578; *Ather-ton v. Toney*, 43 Ind. 211.

<sup>5</sup> *Cobb v. Dyer*, 69 Me. 494; *Manwaring v. Powell*, 40 Mich. 371; *Sweetzer v. Jones*, 35 Vt. 317; 82 Am. Dec. 639; *Johnson v. Thompson*, 129 Mass. 398.

<sup>6</sup> *Strohauer v. Voltz*, 42 Mich. 444; *Woodbury v. Swan*, 58 N. H. 380; *Pinnell v. Boyd*, 33 N. J. Eq. 190; *Fuller v. Hunt*, 48 Iowa, 163; *Merryman v. Moore*, 90 Pa. St. 78; *Fiske v. Tolman*, 124 Mass. 254; 26 Am. Rep. 659; *Smith v. Trusslow*, 84 N. Y. 660; *Klapworth v. Dressler*, 13 N. J. Eq. 62; 78 Am. Dec. 69; *Daub v. Englebach*, 109 Ill. 267.

<sup>7</sup> *Brewer v. Staples*, 3 Sand. Ch. 579.

<sup>8</sup> *Stevens v. Church*, 41 Conn. 369.

buys in an outstanding title paramount to that of the mortgagor, it does not inure to the benefit of the mortgagee, or in any way confirm the mortgage title.<sup>1</sup> If all the mortgaged premises are sold to different persons in separate parcels, they must contribute to the payment of the mortgage according to the value of their several parcels when it was executed.<sup>2</sup> If any parcel remains in the hands of the mortgagor, that parcel is first liable to pay the mortgage debt, and the purchasers of the several parcels will be liable in the inverse order of their purchases.<sup>3</sup> The purchaser of land upon which the record shows a mortgage, executed by one in whom the record showed no title to the person in whom the title stood of record, is affected with notice that at the time of the execution of the mortgage the mortgagor was the equitable owner of the property, and will take the land subject to the lien of the mortgage, where he knew of the record before he purchased.<sup>4</sup>

**ILLUSTRATIONS.** — By the terms of a mortgage, the mortgagee agreed to release any part of the land on receipt of a certain sum per foot. The mortgagor afterwards sold to different persons, one of whom, A, redeemed his lot on payment of the specified sum per foot, another lot-owner, B, protesting against the act of the mortgagee in so releasing. Then the mortgagee sought to foreclose on the land remaining. *Held*, that he should not be restrained at B's instance, but that B might also redeem his lot by paying the specified sum per foot: *Clark v. Fountain*, 135 Mass. 464. A had a mortgage on two pieces of land, to one of which B acquired a later title, and afterwards the equity of redemption in the other piece. *Held*, that B could not redeem

<sup>1</sup> *Knox v. Easton*, 38 Ala. 345. But he cannot cut off the mortgage by acquiring a tax title: *Travelers Ins. Co. v. Patten*, 98 Ind. 209.

<sup>2</sup> *Gage v. McGregor*, 61 N. H. 47; *Morrison v. Beckwith*, 4 T. B. Mon. 73; 16 Am. Dec. 136; *Chittenden v. Barney*, 1 Vt. 28; 18 Am. Dec. 672.

<sup>3</sup> *Mahagan v. Mead*, 63 N. H. 570; *Sternberger v. Hanna*, 42 Ohio St. 305; *Clowes v. Dickenson*, 5 Johns. Ch. 235; *Milligan's Appeal*, 104 Pa. St. 503; *Shepherd v. Adams*, 32 Me. 63;

*Prickett v. Sibert*, 75 Ala. 315; *Bates v. Ruddick*, 2 Iowa, 423; 65 Am. Dec. 774. In Kentucky, Massachusetts, Georgia, and Iowa, the rule is not followed: See *Dickey v. Thompson*, 8 B. Mon. 312; *George v. Wood*, 11 Allen, 41; *Knowles v. Lawton*, 18 Ga. 476; 63 Am. Dec. 290; *Huff v. Farwell*, 67 Iowa, 298. And see *Lyman v. Lyman*, 32 Vt. 79; 76 Am. Dec. 151.

<sup>4</sup> *Clark v. Holland*, 72 Iowa, 34; 2 Am. St. Rep. 230.

by paying a proportionate share of the mortgage debt: *Andreas v. Hubbard*, 50 Conn. 351. Mortgaged premises were conveyed in parcels as follows: 1. To A, by deed without date, but acknowledged May 30th, delivered June 2d, and recorded June 2d; 2. To B, by deed dated May 27th, delivered May 30th, and recorded September 22d; 3. To C, by deed dated May 30th, delivered May 30th, and recorded July 31st. A had no notice of the conveyances to B and C. Upon the question of the liability of the parcels for the payment of the mortgage, *held*, that the first parcel was entitled to be postponed to the second and third, on account of A's want of notice, and because the latter were not recorded within the statutory limit of fifteen days; and that the third might be postponed to the second: *Hill v. Howell*, 36 N. J. Eq. 25.

§ 3033. **Lessee of Mortgagor.** — Where the lease is made before the mortgage, the mortgagee is bound by it, and cannot evict the tenant so long as he fulfills the obligations of the lease. And where it is held that the legal estate in the land passes to the mortgagee, he is entitled to the rents as incident to the reversion.<sup>1</sup> Until he elects to take them, and gives notice to that effect to the tenant, the latter must pay them to the mortgagor, who may deal with them as he sees fit.<sup>2</sup> But on his election to take the rents, and giving notice thereof to the tenants, they must pay all rents accrued and unpaid since the execution of the mortgage, to the mortgagee as well as those to accrue after the notice.<sup>3</sup> Where the lease is made subsequently to the mortgage, it is not binding on the mortgagee, if the lessee had actual or constructive notice of the mortgage, and the mortgagee may at any time eject the lessee as a mere trespasser.<sup>4</sup> The foregoing are the rules of the

<sup>1</sup> *King v. R. R. Co.*, 45 Conn. 226; *Hemphill v. Giles*, 66 N. C. 512; *Globe Mar. Mills Co. v. Quinn*, 76 N. Y. 23; 32 Am. Rep. 259.

<sup>2</sup> *King v. R. R. Co.*, 45 Conn. 226; *Noyes v. Rich*, 52 Me. 115; *Long v. Wade*, 70 Me. 358.

<sup>3</sup> *Baldwin v. Walker*, 21 Conn. 168; *Burden v. Thayer*, 3 Met. 76; 37 Am. Dec. 117; *Kimball v. Lockwood*, 6 R. I. 138; *Russell v. Allen*, 2 Allen, 42;

*Mirick v. Hoppin*, 118 Mass. 582; *Stone v. Patterson*, 19 Pick. 476; 31 Am. Dec. 156; *Watford v. Oates*, 57 Ala. 290; *Crosby v. Harlow*, 21 Me. 499; 38 Am. Dec. 276.

<sup>4</sup> *Willington v. Gale*, 7 Mass. 138; *Blaney v. Bearce*, 2 Me. 132; *McDermott v. Burke*, 16 Cal. 580; *Henshaw v. Wells*, 9 Humph. 568; *Lane v. King*, 3 Wend. 584; 24 Am. Dec. 105.

common law on the subject, but they have been materially modified in those states where the mortgagee is not regarded as having any legal estate in the land until condition broken or foreclosure.<sup>1</sup> Thus in California, the mortgagor may make a binding assignment of the rents and profits until foreclosure and sale, and there is nothing inequitable in this towards the mortgagee, as until that time he has no right to the rents in any event;<sup>2</sup> and in New York the mortgagor, though insolvent, may, until the appointment of a receiver, or until the foreclosure sale, receive the rents to his own use or assign them to another.<sup>3</sup> The lessee is not entitled to compensation for improvements, even though he may have made advances of money to the mortgagor under an agreement for its being spent in improvements, and it was so spent.<sup>4</sup>

ILLUSTRATIONS.—A railroad company leased its road to another company for five years, and afterwards mortgaged the same property to trustees for the holders of certain bonds, the mortgage providing that the mortgagees, on default of the payment of interest on the bonds for six months, might enter and take possession of the property and receive the rents and income. The mortgagees entered for such default, and gave notice to the lessees to pay to them all rents then due, or thereafter accruing. At this time a large sum was due from the lessees for rent, and a few days after the entry a creditor of the lessor's factorized the lessees as debtors of the lessors for the rents overdue. *Held*, that these rents were not taken by the attachment, but belonged to the mortgagees: *King v. R. R. Co.*, 45 Conn. 226. A was a yearly tenant of B. During the tenancy B mortgaged to C. The equity of redemption afterwards became vested in D, to whom A attorned as tenant. C brought suit against A for possession without having given him any notice to quit. *Held*, that A was entitled to reasonable notice to quit, and that the action was not maintainable: *Hemphill v. Giles*, 66 N. C. 512. A

<sup>1</sup> *Cheever v. R. R. Co.*, 39 Vt. 653; *Polhemus v. Trainer*, 30 Cal. 685; *Mayo v. Fletcher*, 14 Pick. 525; *Mills v. Heaton*, 52 Iowa, 215; *Astor v. Turner*, 11 Paige, 436; 43 Am. Dec. 766; *Hogsett v. Ellis*, 17 Mich. 351; *Trabue v. Ramage*, 80 Ky. 323.

<sup>2</sup> *Dewey v. Latson*, 6 Cal. 609.

<sup>3</sup> *Syracuse City Bank v. Tallman*, 31 Barb. 201; *Veckler v. Delfs*, 25 Kan. 159; *Mitchell v. Bartlett*, 52 Barb. 319; *Argall v. Pitts*, 78 N. Y. 239; *Barrett v. Blackmar*, 47 Iowa, 566; *Clason v. Corley*, 5 Sand. 447.

<sup>4</sup> *Haven v. R. R. Co.*, 8 Allen, 369.

leased land to B for a term of ten years. B assigned the lease to C, who, during the term erected a mill on the premises, and placed machinery therein. A conveyed the property to D, subject to the lease, and to a mortgage he had made subsequent to the lease. D subsequently conveyed the premises subject to all encumbrances to E, the plaintiff. The mortgage was foreclosed, and the premises bought by B. At the sale, he gave notice that he claimed the machinery. B subsequently sold the property to F, the defendant. *Held*, that the machinery belonged to E: *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23; 32 Am. Rep. 259.

### § 3034. Right of Mortgagor to Bring Ejectment.—

This action will lie against a trespasser, even though the mortgagor may be liable to be similarly sued by the mortgagee.<sup>1</sup> And in Michigan, Iowa, and Texas, it is provided by statute that a mortgagor may recover possession from his mortgagee at any time before his rights have been foreclosed, it being considered that the entry of the mortgagee without permission of the mortgagor is as wrongful as that of any other person.<sup>2</sup> The general rule, though, is, that this action cannot be maintained by a mortgagor against a mortgagee in possession after condition broken; at all events, so long as the debt remains unpaid.<sup>3</sup> Nor can a purchaser at an execution sale against the mortgagor maintain ejectment against the mortgagee. The only right such purchaser acquires is to redeem the premises by paying the mortgage.<sup>4</sup> In Pennsylvania, a mortgagor may bring ejectment against a mortgagee in possession, and the action is governed by the same equitable principles which apply to the case of

<sup>1</sup> *Olmsted v. Elder*, 5 N. Y. 144; *Pell v. Ulmar*, 18 N. Y. 139; *Gibson v. Seymour*, 3 Vt. 565.

<sup>2</sup> *Humphrey v. Hurd*, 29 Mich. 44; *Mills v. Heaton*, 52 Iowa, 215; *Morrow v. Morgan*, 48 Tex. 304; *Reading v. Waterman*, 46 Mich. 107; *Brown v. Snell*, 6 Fla. 741.

<sup>3</sup> *Connor v. Whitmore*, 52 Me. 185; *Hennessey v. Farrell*, 20 Wis. 42; *Parsons v. Willis*, 17 Mass. 420; *Wells v. Rice*, 34 Ark. 346; *Kilgour v. Gook-*

*ley*, 83 Ill. 109; *Johnson v. Elliot*, 26 N. H. 67; *Brinkman v. Jones*, 44 Wis. 498; *Holt v. Rees*, 44 Ill. 30; *Martin v. Fridley*, 23 Minn. 13; *Dickason v. Dawson*, 85 Ill. 53; *Beall v. Harwood*, 2 Har. & J. 167; 3 Am. Dec. 532; *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519.

<sup>4</sup> *Harper v. Ely*, 70 Ill. 581; *Doe v. Tunnell*, 1 Houst. 320; *Den v. Wright*, 7 N. J. L. 175; 11 Am. Dec. 546.

a bill in equity to redeem. If the fact of payment is found, the verdict is for the plaintiff unconditionally; if a balance is due, the verdict will be for plaintiff, conditioned that he pay such balance within a time specified.<sup>1</sup>

**§ 3035. Right of Mortgagee to Bring Ejectment.**—At common law the mortgagee might, after maturity of the mortgage, without foreclosure or sale, bring ejectment against the mortgagor, and that, without the necessity of first giving notice to quit or demanding possession.<sup>2</sup> And a similar action may be maintained by a second mortgagee, or a purchaser of the equity of redemption at an execution sale.<sup>3</sup> Ejectment will equally lie against the assignee of a mortgagor, or any person claiming under him.<sup>4</sup> And the assignee of a mortgagee, his heirs, and, in case of their non-residence, his personal representatives, have the same right.<sup>5</sup> The general rule is, that the holder of a merely equitable title cannot maintain ejectment, and this applies to one having only an equitable mortgage.<sup>6</sup> In some of the states, statutes have been enacted prohibiting the bringing of actions of ejectment by mortgagee against mortgagor, and any agreement to the contrary is held to be inequitable, and will not be enforced.<sup>7</sup>

**§ 3036. Writ of Entry.**—Unless there is any agreement between the parties that the mortgagor may remain

<sup>1</sup> Wells v. Van Dyke, 109 Pa. St. 330.

<sup>2</sup> Johnson v. Watson, 87 Ill. 535; Ford v. Steele, 54 Vt. 562; Allen v. Ranson, 44 Mo. 263; 100 Am. Dec. 282; Ahern v. White, 39 Md. 409; Newall v. Wright, 3 Mass. 138; 3 Am. Dec. 98; Coit v. Fitch, Kirby, 254; 1 Am. Dec. 20; Hobart v. Sanborn, 13 N. H. 226; 38 Am. Dec. 483; Chapman v. Glassell, 13 Ala. 50; 48 Am. Dec. 41; Carroll v. Ballance, 26 Ill. 9; 79 Am. Dec. 354.

<sup>3</sup> Savage v. Dooley, 28 Conn. 411; 73 Am. Dec. 680; Black v. Justice, 86 N. C. 504; Newman v. Tymeson, 13 Wis. 172; 80 Am. Dec. 735.

<sup>4</sup> Pierce v. Brown, 24 Vt. 165; Johnson v. Phillips, 13 Gray, 198; Middletown Bank v. Bates, 11 Conn. 519.

<sup>5</sup> Brown v. Mace, 7 Blackf. 2.

<sup>6</sup> Carr v. Carr, 52 N. Y. 251; Dodge v. Wellman, 43 How. Pr. 427.

<sup>7</sup> Newton v. McKay, 30 Mich. 380; Gross v. Wellwood, 90 N. Y. 638; Sahler v. Signer, 37 Barb. 329; Hazeltine v. Granger, 44 Mich. 503; Morris v. Mowatt, 2 Paige, 586; 22 Am. Dec. 661; Swart v. Service, 21 Wend. 36; 34 Am. Dec. 211; Duty v. Graham, 12 Tex. 427; 62 Am. Dec. 534; Pueblo etc. R. R. Co. v. Beahoe, 8 Col. 32.

in possession of the premises, the mortgagee may, in those states where he has the right to possession, either before or after condition broken, maintain a writ of entry against the mortgagor.<sup>1</sup> And he may also maintain this writ against persons claiming under the mortgagor, who may have entered and ousted him.<sup>2</sup>

§ 3037. **Subsequent Encumbrancers.**—Only such liens of which he had either actual or constructive notice at the time of taking his security are binding upon a junior mortgagee.<sup>3</sup> No modification of the terms or increase of the indebtedness in a prior encumbrance can be made to his prejudice, and he has the right to redeem any encumbrance prior to his own;<sup>4</sup> and the form of the transaction constituting the first mortgage is immaterial.<sup>5</sup> Junior mortgagees are entitled to the exercise of good faith and reasonable diligence in the assertion and enforcement of his rights by a prior encumbrancer.<sup>6</sup> They are also entitled to have separate securities held by a prior mortgagee marshaled in their favor.<sup>7</sup> But if there are two junior mortgagees, each of whom has a claim upon one of the separate securities, then the rule is, that the prior mortgagee shall satisfy his claim out of the proceeds of both securities in proportion to the amount which each

<sup>1</sup> Howard v. Houghton, 64 Me. 445.

<sup>2</sup> Stewart v. Davis, 63 Me. 539.

<sup>3</sup> Gardner v. Emerson, 40 Ill. 296; Whitacre v. Fuller, 5 Minn. 508. In Ohio, priority dates from recording, irrespective of actual knowledge: Stansell v. Roberts, 13 Ohio, 148; 42 Am. Dec. 193; Clabaugh v. Byerly, 7 Gill, 354; 48 Am. Dec. 575; Perry's Appeal, 22 Pa. St. 43; 60 Am. Dec. 63.

<sup>4</sup> Davis v. Rogers, 28 Iowa, 413; Gardner v. Emerson, 40 Ill. 296; Carpentier v. Brenham, 40 Cal. 221; Saunders v. Frost, 5 Pick. 259; 16 Am. Dec. 394; Coe v. R. R. Co., 10 Ohio St. 372; 75 Am. Dec. 518.

<sup>5</sup> Davis v. Rogers, 28 Iowa, 413.

<sup>6</sup> Bradley v. Gelkinson, 57 Iowa, 543.

300; Alexander v. Welch, 10 Ill. App. 181; Shields v. Kimbrough, 64 Ala. 504.

<sup>7</sup> Turner v. Flinn, 67 Ala. 529; Bergen Savings Bank v. Barrows, 30 N. J. Eq. 89; Henshaw v. Wells, 9 Humph. 568; Andreas v. Hubbard, 50 Conn. 351; Abbott v. Powell, 6 Saw. 91; Jones v. Dow, 18 Wis. 241; Searle v. Chapman, 121 Mass. 19; McLaughlin v. Hart, 48 Cal. 639; Grogan v. Thrift, 58 Cal. 378; Barker v. Rollins, 30 Iowa, 412; Lanahan v. Sears, 102 U. S. 318; State Savings Bank v. Harbin, 18 S. C. 425; Herbert v. Mechanics' etc. Ass'n, 17 N. J. Eq. 497; 90 Am. Dec. 601; Millsaps v. Bond, 64 Miss. 543.

may produce.<sup>1</sup> An exception to this rule of marshaling the securities occurs, however, when it is probable that its application will occasion great delay to the prior mortgagee in obtaining payment of his claim, in which case, after decreeing satisfaction of the first mortgage out of the whole property, the court will provide for the subrogation of the second mortgagee to the other security.<sup>2</sup> Where the first mortgage comprises only one security, and the second only a portion of that one, then the second mortgagee takes his title subject to the whole amount of the prior mortgage.<sup>3</sup> The rule as to the purchase of tax titles by a mortgagor applies equally to junior encumbrancers, who are prevented from setting up such a title in opposition to the first mortgage.<sup>4</sup> If after sale of the mortgaged premises there is any balance remaining in the hands of the first mortgagee, he holds it as trustee for the subsequent encumbrancer.<sup>5</sup>

ILLUSTRATIONS. — L. and R. gave to plaintiff two mortgages on four separate parcels of land, two of which parcels belonged to R., the others belonging to both. Subsequently, L. and R. mortgaged one of the last-named parcels to defendant, and afterwards they mortgaged the other to plaintiff. The two mortgages first given were foreclosed. *Held*, that from the fund realized from the sale of R.'s land, and from the sale of the lot covered by plaintiff's last mortgage, should be satisfied plaintiff's two first mortgages, and that the balance of the fund should be applied to the payment of the mortgage given to defendant rather than to the payment of plaintiff's third mortgage: *Thomas v. Moravia Foundry and M. Co.*, 43 Hun, 487. H. conveyed the west half of his land in trust to secure a debt to B. Afterwards, he conveyed the east half in trust to secure, first, a debt, to D., second, "other debts secured on any portion of said land." The west half was consumed by claims paramount to B.'s. *Held*, that B.'s debt was embraced in the

<sup>1</sup> *Green v. Ramage*, 18 Ohio, 428; 51 Am. Dec. 458; *Woollen v. Hillen*, 9 Gill, 185; 52 Am. Dec. 690; *Thomas v. Moravia Foundry and M. Co.*, 43 Hun, 487.

<sup>2</sup> *King v. McVickar*, 3 Sand. Ch. 192.

<sup>3</sup> *Kellogg v. Rand*, 11 Paige, 59.

<sup>4</sup> *Connecticut Mutual Life Ins. Co. v. Bulte*, 45 Mich. 113; *Horton v. Ingersoll*, 13 Mich. 409; *Boyd v. Allen*, 15 Lea, 81.

<sup>5</sup> *White v. Dougherty*, 1 Mart. & Y. 309; 17 Am. Dec. 802.

trust of the east half: *Hunter v. Beach*, 80 Va. 361. A was assignee of a first and a second mortgage on land, on which B held a third mortgage. A foreclosed the first mortgage, and bid the property in. B had already foreclosed his mortgage, bid the property in, and taken a sheriff's deed. *Held*, that B, in redeeming from A, redeemed as owner, and the second mortgage was not cut off: *Dickerman v. Lust*, 66 Iowa, 444.

§ 3038. **Mortgagee under Mortgage of Indemnity.**—Until the mortgagee has sustained some loss or injury by reason of his having incurred the obligation, to indemnify him against which the mortgage was given, his rights under the mortgage are inchoate, and it is not until he has been damnified, actually or constructively, that he can enforce the mortgage.<sup>1</sup> Though, whether the mortgagee has been damnified or not, the rights of the creditor may have accrued against the mortgage.<sup>2</sup> And until the debt has been paid, the mortgagee, by entering satisfaction on the record of the mortgage deed, or otherwise, cannot prejudicially affect the rights of the principal creditor.<sup>3</sup> The mortgagee is held to occupy the position of trustee towards sureties who are not parties to the mortgage, where there are several debts secured by the same mortgage, and it is his duty to see that the proceeds of the mortgaged property are applied *pro rata* to the payment of the debts for which the several sureties are respectively bound.<sup>4</sup> Where a mortgage is given to secure a debt due the mortgagee, and also to indemnify as surety on certain debts, his right to hold the mortgage will not be affected by a failure to prove the debt alleged to be due to himself, on a bill filed by a creditor of the mortgagee.<sup>5</sup>

<sup>1</sup> *Bush v. Stamps*, 26 Miss. 463; *Jones v. Quinnipiack Bank*, 29 Conn. 25; *Osborn v. Noble*, 46 Miss. 449; *Pool v. Doster*, 59 Miss. 258; *Rankin v. Wilsey*, 17 Iowa, 463; *Hall v. Cushman*, 16 N. H. 462; 43 Am. Dec. 562; *Hellams v. Abercrombie*, 15 S. C. 110; 40 Am. Rep. 684.

<sup>2</sup> *Morrill v. Morrill*, 54 Vt. 74; 38 Am. Rep. 659; *Kramer's Appeal*, 37

Pa. St. 71; *McLean v. Lafayette Bank*, 3 McLean, 587; *Matthews v. Joyce*, 85 N. C. 258; *Moore v. Moberly*, 7 B. Mon. 299; *Rice v. Dewey*, 13 Gray, 47.

<sup>3</sup> *McMullen v. Neal*, 60 Ala. 552.

<sup>4</sup> *Fielder v. Varnier*, 45 Ala. 429; *Willis v. Caldwell*, 10 B. Mon. 199.

<sup>5</sup> *Reinhard v. Bank of Ky.*, 6 B. Mon. 252.

Where a mortgage is taken to indemnify one who is surety on several notes, and he has ceased to be liable on some, and continues liable on others, and the property is not sufficient to pay all the notes, the surety has a right to indemnify himself, first, by paying in full those notes for which he is liable.<sup>1</sup> A mortgage given by a guardian to his sureties in his guardianship bond, reciting such bond, and conditioned for the faithful performance of its condition, does not create a trust in favor of the ward; the mortgagees have the legal and beneficial interest in it, and may use it as their own.<sup>2</sup>

ILLUSTRATIONS. — Several persons united in a mortgage reciting that A, one of the parties, had lately commenced and intended to pursue the business of a merchant; that the mortgagee had agreed to give him credit and become his surety and indorser in the prosecution of the business to the amount of ten thousand dollars; and containing a proviso that the mortgagee should be indemnified for all such credits, indorsements, and suretyships not exceeding at any time ten thousand dollars. *Held*, that the sureties were not discharged from their liabilities under the mortgage, because the mortgagee did not limit his credits, advances, etc., to the sum of ten thousand dollars: *Clagett v. Salmon*, 5 Gill & J. 314. A mortgage given to indemnify a surety provided that the property should not be liable for more than five thousand dollars. *Held*, that it might be liable for five thousand dollars and interest: *Stafford v. Jones*, 91 N. C. 189. Assignees of a second mortgage, who also held an indemnity mortgage from their assignor against loss from the first mortgage, assigned to A, who foreclosed and bid in the premises for the full amount of the mortgage, the first mortgage still remaining a subsisting lien. *Held*, that the condition of the indemnity mortgage had been fully met: *Sergeant v. Ruble*, 33 Minn. 354. A was liable as principal, B as surety, on a note held by a bank. On its becoming due, B made a note for the amount to A, which A indorsed, and the bank took this note, secured by a mortgage on B's land, in payment of the other note. *Held*, that the bank could enforce note and mortgage against B: *Galesburg Bank v. Davis*, 108 Ill. 633.

§ 3039. **Rights of the Parties to Maintain Partition.** — After foreclosure the mortgagee of an undivided

<sup>1</sup> *Eastman v. Foster*, 8 Met. 19.

<sup>2</sup> *Miller v. Wack*, 1 N. J. Eq. 204.

moiety in land may have partition against the owner of the other half; but until his title has been completed by foreclosure, he is not a tenant in common with the owner of the other half, but has merely a lien or charge which may be redeemed at any time. He cannot maintain a complaint or petition for partition, but such proceedings may be had against him.<sup>1</sup> The mortgagee of the interest of one tenant in common is a necessary party to a partition suit between the mortgagors in order to bind him by the decree therein.<sup>2</sup> Where the mortgagee is properly joined in the suit, the effect of the decree as to him is to substitute for an undivided interest in the whole land the portion allotted to the mortgagor in severalty. The whole of the mortgagor's estate still remains subject to the mortgage.<sup>3</sup> Partition may be had by one tenant in common in possession, who has mortgaged his undivided interest, against his co-tenants, unless such co-tenants be also mortgagees, in which event their consent is necessary, though the mortgagee himself, in such a case, could have partition.<sup>4</sup> Where a tenant in common executes a mortgage of his undivided interest in the land to one of his co-tenants, and all the tenants are made parties to a partition in which the mortgage is not mentioned, the lot set apart to the mortgagor will be subject to the mortgage, which may be enforced against it.<sup>5</sup> But the mortgage cannot, by means of the decree in partition, be made to include property not described in it; so that

<sup>1</sup> *Phelps v. Townsley*, 10 Allen, 554; *Ewer v. Hobbs*, 5 Met. 1; *Goodwin v. Richardson*, 11 Mass. 469; *Norcross v. Norcross*, 105 Mass. 265. See *ante*, Title Real Property — Partition.

<sup>2</sup> *Loomis v. Riley*, 24 Ill. 307; *Colton v. Smith*, 11 Pick. 311; 22 Am. Dec. 375; *Harbison v. Sanford*, 90 Mo. 477. But see *Stewart v. Allegheny Bank*, 101 Pa. St. 342.

<sup>3</sup> *Thurston v. Minke*, 32 Md. 571; *Torrey v. Cook*, 116 Mass. 163; *Bradley v. Fuller*, 23 Pick. 1; *Jackson v.*

*Pierce*, 10 Johns. 414; *Hull v. Lyon*, 27 Mo. 570; *Williams College v. Mallett*, 12 Me. 398.

<sup>4</sup> *Colton v. Smith*, 11 Pick. 311; 22 Am. Dec. 375; *Upham v. Bradley*, 17 Me. 423; *Blodgett v. Hildreth*, 8 Allen, 186; *Bradley v. Fuller*, 23 Pick. 1; *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466; *Wright v. Strother*, 74 Va. 857.

<sup>5</sup> *Watson v. Priest*, 9 Mo. App. 263. And see *Bienvenu v. Traders' etc. Ins. Co.*, 33 La. Ann. 213.

if the mortgage covers the undivided interest of one tenant in common in several parcels of land, and the tenancy in common extends to other parcels in the partition, the several parcels contained in the mortgage will be treated as one separate estate.<sup>1</sup> The purchaser of a mortgagor's interest in land at an execution sale is a necessary party to a partition suit.<sup>2</sup>

ILLUSTRATIONS. — A, B, and C owned in common lots 1, 2, and 3. D held a mortgage with the pact *de non alienando* on C's undivided one-third interest in the three lots. A, B, and C partitioned the three lots among themselves, lot 3 falling to C. C mortgaged lot 3 to E, who foreclosed and bought in at sheriff's sale. D took judgment against C, and seized and sold his one undivided third interest in the three lots, and bought it in, ignoring the partition and E's claim. D then brought a partition suit against A and B, setting out the one undivided third interest of each in the three lots, and citing E in, and praying that E be declared to have no title to lot 3. *Held*, that D was entitled to the relief claimed: *Bienvenu v. Factors' and Traders' Ins. Co.*, 33 La. Ann. 213. A and B being seized of a lot of ground in undivided moieties, A died, devising his interest in the lot to B and four others in equal shares. B purchased the interest of one of the other parties, and then executed a mortgage for all his interest in the lot. Subsequently, in partition proceedings instituted by B to divide A's real estate, a certain purpart was awarded to one of the devisees thereof other than B, including A's undivided interest in the lot in question, the said purpart being made subject to the payment of owelty. Subsequently the holder of the mortgage foreclosed, and bought in the premises at the sheriff's sale. *Held*, that he acquired title to only an undivided half-interest in said lot, and not to a seven-tenths interest therein: *Stewart v. Allegheny Nat. Bank*, 101 Pa. St. 342. A brought suit in partition against his co-tenant, B. A's interest in the property was unencumbered; B's was subject to various mortgages, covering his undivided interest in various parcels. *Held*, that a decree of partition could not extend any mortgage to property not described and included in such mortgage: *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466.

§ 3040. **When Mortgagee Estopped from Setting up Mortgage.** — Under the general rule that acquiescence or

<sup>1</sup> *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466.

<sup>2</sup> *De la Vega v. League*, 64 Tex. 205.

silence, when the circumstances require an answer or denial, or other conduct, may amount to an admission, a mortgagee who is present at an auction sale of the property by the mortgagor when it is announced that the title is unencumbered, and who fails to correct such announcement, is estopped from setting up his mortgage against a purchaser at the sale, although the mortgage was then duly recorded;<sup>1</sup> and *a fortiori* if the mortgagee actually states that the mortgage is discharged, and thereby induces a third person to take a mortgage on the property, he is estopped from afterwards setting up his mortgage in competition with the second mortgagee.<sup>2</sup> But where an assignee in bankruptcy sells the interest of the bankrupt mortgagor in certain real estate, the mortgagee, though present at the sale, is under no duty to make known his mortgage when that information could have been obtained from the records, and no estoppel arises.<sup>3</sup> However, in order to work an estoppel against the mortgagee, the facts relied upon as constituting it must be of a conclusive character, and must be supported by clear and satisfactory evidence.<sup>4</sup> Where the mortgagee's statements amount only to an expression of opinion, and he makes no active efforts to bring the purchase about, and the purchaser relied upon the representations of the mortgagor, when he might readily have ascertained the truth for himself, the mortgagee is not estopped from enforcing his mortgage against the purchaser.<sup>5</sup> To effect an estoppel against the mortgagee, there must be either actual fraud, or fault or negligence equivalent to fraud, on his part, and the party claiming the estoppel must also

<sup>1</sup> Markham v. O'Connor, 52 Ga. 183; 12 Am. Dec. 217; Quattlebaum v. 21 Am. Rep. 249; Rice v. Bunce, 49 Mo. 231; 8 Am. Rep. 129; Storrs v. Black, 24 S. C. 48.  
<sup>2</sup> Mason v. Philbrook, 69 Me. 57.  
<sup>3</sup> Preble v. Conger, 66 Ill. 370; Kelley v. Fisk, 110 Ind. 552.  
<sup>4</sup> Preble v. Conger, 66 Ill. 370.  
<sup>5</sup> Lasselle v. Barnett, 1 Blackf. 150;

be free from the imputation of laches in acting upon the belief of ownership.<sup>1</sup>

ILLUSTRATIONS. — S. bought ten acres of land, part of a larger lot, upon which there was a mortgage, held by M., who agreed to release the ten acres from the mortgage, and did so after he had foreclosed the mortgage on the whole, without, however, making S. a party to the suit, and had sold the premises to B. with notice of the facts. S. had in the mean time held the possession, made valuable improvements, and again mortgaged his interest to V., who brought suit for foreclosure, making S. and B. parties. *Held*, that the ten acres subject to the lien of M.'s mortgage for a proportional part of the mortgage debt belonged to S., and passed by his subsequent mortgage to V., and that V. was entitled to redeem and have a release of the premises from B. upon payment of this sum, and to foreclose as against S.: *Veach v. Schaup*, 3 Iowa, 194. A wife stood by and said nothing while her husband assured one of whom he proposed to borrow money on a first mortgage that a mortgage held by her on the land had been fully paid. The money was lent accordingly. *Held*, that she was estopped from asserting the contrary: *Kelley v. Fisk*, 110 Ind. 552. A signed on the original mortgage an indorsement in these words: "I acknowledge the receipt of fifty-one hundred dollars on the within mortgage," and he acknowledged receipt of the same amount on the copy of the mortgage on the record, and a draft for the balance of the mortgage was given to A, who received the money. The next day a new mortgage was given to the payors of the draft on the same property. Afterwards A brought suit to foreclose the old mortgage. *Held*, that he was estopped from questioning the correctness of the entry: *Quattlebaum v. Black*, 24 S. C. 49.

<sup>1</sup> *Trenton Banking Co. v. Duncan*, 86 N. Y. 221.

## CHAPTER CXLIII.

## ASSUMPTION OF MORTGAGE.

- § 3041. Form and nature of.
- § 3042. By junior mortgagee.
- § 3043. By married woman.
- § 3044. Release of mortgagor by mortgagee.
- § 3045. Release of purchaser by mortgagor or mortgagee.

§ 3041. **Form and Nature of.**—It is not necessary that the agreement should be in writing, where it is fully performed by the grantor having delivered a deed and given up possession to the grantee.<sup>1</sup> It is usual to recite that the grantee assumes and agrees to pay the mortgage as part of the consideration expressed in the deed.<sup>2</sup> Any expression clearly importing that the obligation is imposed upon the grantee, and that he knowingly assumes it, is sufficient, but the liability is not to be implied.<sup>3</sup> And if the contract between the parties is that the mortgage is to be considered as part of the purchase-money, it is sufficient to constitute an assumption;<sup>4</sup> the legal operation of the agreement being that the requisite portion of the purchase-money is left in the hands of the grantee wherewith to pay the mortgage.<sup>5</sup> But an agreement to pay the interest

<sup>1</sup> Thomas v. Dickinson, 12 N. Y. Rep. 124; Sparkman v. Gove, 44 N. J. L. 252; Furnas v. Durgin, 119 Mass. 510; Bowen v. Kurtz, 37 Iowa, 239; 500; 20 Am. Rep. 341; Cumberland v. Codrington, 3 Johns. Ch. 229; 3 Am. Dec. 492; Equitable L. A. Soc. v. Bostwick, 100 N. Y. 628; Gage v. Jenkinson, 58 Mich. 169.

<sup>2</sup> Lennig's Estate, 52 Pa. St. 138; Weed Sew. Mach. Co. v. Emerson, 115 Mass. 554; Huyler v. Atwood, 26 N. J. Eq. 504; Dunn v. Rogers, 43 Ill. 260; Crawford v. Edwards, 33 Mich. 354; Ross v. Worthington, 11 Minn. 438; 88 Am. Dec. 95.

<sup>3</sup> Patton v. Adkins, 42 Ark. 197; Locke v. Homer, 131 Mass. 93; 41 Am. Rep. 199; Stebbins v. Hall, 29 Barb. 524; Merriman v. Moore, 90 Pa. St. 80; Muhlig v. Fiske, 131 Mass. 110; Bowen v. Beck, 94 N. Y. 86; 46 Am.

Rep. 124; Sparkman v. Gove, 44 N. J. L. 252; Furnas v. Durgin, 119 Mass. 500; 20 Am. Rep. 341; Cumberland v. Codrington, 3 Johns. Ch. 229; 3 Am. Dec. 492; Equitable L. A. Soc. v. Bostwick, 100 N. Y. 628; Gage v. Jenkinson, 58 Mich. 169.

<sup>4</sup> Thayer v. Torrey, 37 N. J. L. 339; Comstock v. Hitt, 37 Ill. 542; Jewett v. Draper, 6 Allen, 434; Kearney v. Tanner, 17 Serg. & R. 94; 17 Am. Dec. 648; Trotter v. Hughes, 12 N. Y. 74; 62 Am. Dec. 137; Cubberly v. Yager, 42 N. J. Eq. 289; Ayres v. Randall, 108 Ind. 595; Ludington v. Low, 53 N. Y. Sup. Ct. 374.

<sup>5</sup> Garnsey v. Rogers, 47 N. Y. 233; Twitchell v. Mears, 8 Biss. 211; Brauman v. Dowse, 12 Cush. 227; Thomp-

does not create any obligation to pay the principal;<sup>1</sup> though a covenant to assume a mortgage is equivalent to a covenant to pay it.<sup>2</sup> Even though the vendee execute a bond direct to the mortgagee conditioned to pay the mortgage within a given time, the mortgagor is not discharged, but the vendee becomes his surety merely.<sup>3</sup> And where the agreement is that the grantee is to pay the mortgage as part of the purchase-money, it operates, as between those parties, as a discharge of the mortgage debt.<sup>4</sup> The transaction is an original promise to pay, and not an agreement to pay, the debt of another.<sup>5</sup> The grantee becomes the principal debtor, and the mortgagor is regarded as the surety.<sup>6</sup> And on himself parting with the property he should obtain a similar covenant from his grantee, otherwise his own personal liability will continue.<sup>7</sup> And if the purchaser buys only a portion of the premises, but assumes payment of the mortgage as part of the price, the portion so bought will in his hands be primarily liable for the payment of the whole of the mortgage.<sup>8</sup> Each successive grantee who covenants to pay the mortgage becomes an original promisor, with the original mortgagor as his surety, and the mortgagee is entitled to sue any of

son v. Thompson, 4 Ohio St. 333; Belmont v. Coman, 22 N. Y. 438; 78 Am. Dec. 213.

<sup>1</sup> Manhattan Life Ins. Co. v. Crawford, 9 Abb. N. C. 365.

<sup>2</sup> Schley v. Fryer, 100 N. Y. 71.

<sup>3</sup> Fireman's Ins. Co. v. Wilkinson, 35 N. J. Eq. 160.

<sup>4</sup> Libby v. Palmer, 51 Ill. 331; Ely v. McKnight, 30 How. Pr. 97; Gilbert v. Averill, 15 Barb. 20; Russell v. Pistor, 7 N. Y. 171; 57 Am. Dec. 509. See Palmeto v. Carey, 63 Wis. 426, where it is held that judgment of deficiency may be had against the grantee who has assumed. Otherwise in New Jersey: See Chancellor v. Traphagen, 41 N. J. Eq. 369.

<sup>5</sup> Murray v. Smith, 1 Duer, 412; Fish v. Dodge, 4 Denio, 311; 47 Am. Dec. 254; Ely v. McKnight, 30 How. Pr. 97; Townsend v. Ward, 27 Conn. 610.

<sup>6</sup> Calvo v. Davies, 73 N. Y. 215; Osborne v. Cabell, 77 Va. 462; George v. Andrews, 60 Md. 26; 45 Am. Rep. 706; Russell v. Pistor, 7 N. Y. 171; 57 Am. Dec. 509; Corbett v. Waterman, 11 Iowa, 86; Unger v. Smith, 44 Mich. 22; Deyermant v. Chamberlin, 22 Hun, 110; Klapworth v. Dressler, 13 N. J. Eq. 62; 78 Am. Dec. 69. But see Shepherd v. May, 115 U. S. 505, where it is held that the mortgagee's assent is necessary.

<sup>7</sup> Vreeland v. Van Blarcom, 35 N. J. Eq. 530; Fleishhauer v. Doellner, 9 Abb. N. C. 372.

<sup>8</sup> Salem v. Edgerly, 33 N. H. 46; Browne v. Lynde, 91 N. Y. 92; Russell v. Pistor, 7 N. Y. 171; 57 Am. Dec. 509; George v. Andrews, 60 Md. 26; 45 Am. Rep. 706; Engle v. Haines, 5 N. J. Eq. 186; 43 Am. Dec. 624; Higham v. Harria, 108 Ind. 246.

them, and is not confined to the last one only.<sup>1</sup> But the relationship of principal and surety created as between the mortgagor and his grantee is not to be extended to their position towards the mortgagee, who is entitled to regard them both as his principal debtors, and may have a personal decree against them accordingly.<sup>2</sup> The purchase and assumption of payment by a senior mortgagee of a junior mortgage causes the postponement of the senior in favor of the junior mortgage.<sup>3</sup> Where the mortgagor conveys land to one who assumes the mortgage, he may, after the debt becomes due, and without first paying it, file a bill of foreclosure, or sue for the amount of the mortgage.<sup>4</sup> Where property is purchased subject to a deed of trust, it is chargeable in the purchaser's hands with the debt over and above his bid.<sup>5</sup> The doctrine of novation has no application where the purchaser of land agrees, as part of the price, to pay an outstanding mortgage, even if the mortgagee afterwards agrees to accept the purchaser and release the mortgagor.<sup>6</sup>

ILLUSTRATIONS. — It was agreed between vendor and purchaser that a mortgage of record claimed by the vendor to have been paid should be satisfied of record within a year, and that if it was not the purchaser might pay it out of purchase-money due. *Held*, not such an assumption of the mortgage as entitled the mortgagee to maintain an action on it against the purchaser: *Ayres v. Randall*, 108 Ind. 595. A conveyed a portion of land subject to a one-thousand-dollar mortgage to B, who agreed, as part of the consideration, to pay five hundred dollars of the mortgage debt when due, or whenever A should be ready to pay the residue. *Held*, that B was bound to pay only five hundred dollars, without interest, and not one half of the mortgage debt: *Edwards v. Thostenson*, 64 Iowa, 680. A mortgaged certain realty, and subsequently conveyed the land to B by a deed

<sup>1</sup> *Mechanics' Bank v. Goff*, 13 R. I. 516; *Flagg v. Gettmacher*, 98 Ill. 293; *Torrey v. Bank of Orleans*, 8 Paige, 649; *Weber v. Zeimet*, 30 Wis. 283.

<sup>2</sup> *Rubens v. Prindle*, 44 Barb. 336; *Calvo v. Davies*, 73 N. Y. 211; *Waters v. Hubbard*, 44 Conn. 340; *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327; *Corbett v. Waterman*, 11 Iowa, 86.

<sup>3</sup> *Fowler v. Fay*, 62 Ill. 375.

<sup>4</sup> *Abell v. Coons*, 7 Cal. 105; 68 Am. Dec. 229; *Furnas v. Durgin*, 119 Mass. 500; 20 Am. Rep. 341, and note 346.

<sup>5</sup> *Scheppelmann v. Fuerth*, 87 Mo. 351.

<sup>6</sup> *Kelso v. Fleming*, 104 Ind. 180.

which described the mortgage, and provided that the payment thereof "is assumed by the grantee as a further consideration for the conveyance." B conveyed the land to C, and C to D, the deeds of B and C containing the same provision as that of A. The mortgagee sued C for the amount of the mortgage debt. *Held*, that the action could be maintained: *Mechanics' Savings Bank v. Goff*, 13 R. I. 516. A made three successive mortgages of his realty to B, C, and D. He then sold this realty to E., describing the mortgages in his deed of conveyance, and adding the words: "Which said mortgages are hereby assumed by E as part of the consideration of this deed." Subsequently, B, the first mortgagee, sold the realty under the powers of his mortgage. D, the third mortgagee, then brought *assumpsit* against E, the purchaser from A, for the amount of A's mortgage note to D. *Held*, that E was liable for the amount of the note: *Urquhart v. Brayton*, 12 R. I. 169.

**§ 3042. By Junior Mortgagee.**—Where a subsequent encumbrancer stipulates with the mortgagor to pay the prior mortgage, he does not, generally, incur any personal liability to the senior mortgagee which the latter can enforce directly against him;<sup>1</sup> and it is immaterial that the *puise* mortgage is in the form of an absolute deed.<sup>2</sup> In such cases the promise is for the benefit of the mortgagor only to protect his property by advancing money to pay his debt, and is not a promise made by the mortgagee to the mortgagor for the benefit of the prior mortgagee.<sup>3</sup> Where a prior mortgagee purchases the equity of redemption which is charged with a second mortgage, and he agrees, as part of the consideration, to pay such mortgage, a court of equity will compel him to do so, or order a sale of the land for the purpose.<sup>4</sup> But where the transaction is not one of sale, but only by way of additional security, the first mortgagee is not bound to pay the second mortgage.<sup>5</sup>

<sup>1</sup> *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495; *Garnsey v. Rogers*, 47 N. Y. 233; 7 Am. Rep. 440.

<sup>2</sup> *Arnand v. Grigg*, 29 N. J. Eq. 482; *Garnsey v. Rogers*, 47 N. Y. 233; 7 Am. Rep. 440; *Campbell v. Smith*, 71 N. Y. 26; 27 Am. Rep. 5.

<sup>3</sup> *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495; *Garnsey v. Rogers*, 47 N. Y. 233; 7 Am. Rep. 440.

<sup>4</sup> *Huebsch v. Scheel*, 81 Ill. 281.

<sup>5</sup> *Sidders v. Riley*, 22 Ill. 109; *Booth v. Hynes*, 54 Ill. 363.

§ 3043. **By Married Woman.**—Where a married woman takes a conveyance subject to a mortgage, she may covenant to assume the mortgage, and may be sued upon the covenant. She cannot plead coverture, as her covenant was a contract to pay a portion of the purchase money of land in her own name, which thus became her separate estate, and the covenant was consequently for its benefit.<sup>1</sup> But where the law permits her to contract only in respect of her own property, she is not liable on her covenant in her husband's deed of his land, either as principal or surety.<sup>2</sup>

ILLUSTRATIONS.—A made a deed to B, a married woman, containing a recital that the land therein described was subject to a mortgage, "which the grantee assumes and agrees to pay." The deed was executed to B, without her knowledge or authority, by the direction of her husband, and was by him recorded. Soon after the deed was recorded, she knew that the land had been conveyed to her, and claimed to be the owner of it. She never saw the deed, and knew nothing of its contents until after the land was sold by the mortgagee, when she repudiated the deed. *Held*, that she had assented to the purchase, and was bound by the recital in the deed: *Coolidge v. Smith*, 129 Mass. 554. A. conveyed to S. certain premises, and took back a purchase-money bond and mortgage for twenty thousand dollars. S. subsequently conveyed the premises to C., a married woman, by a deed containing a clause reciting that the premises were conveyed subject to said mortgage, which the party of the second part assumed and agreed to pay. C. subsequently conveyed said premises to H. by a deed containing a similar assumption clause. In an action to foreclose said mortgage, no evidence was offered, outside the deeds themselves, tending to show that the alleged contract of C. to assume payment of the mortgage was charged upon her separate estate, or that such assumption was for the benefit of her separate estate, or that she had any separate estate. *Held*, that C. was never personally liable for the payment of the mortgage: *Cashman v. Henry*, 55 How. Pr. 240.

§ 3044. **Release of Mortgagor by Mortgagee.**—When the grantee of the equity of redemption has assumed the

<sup>1</sup> *Coolidge v. Smith*, 129 Mass. 554; *Am. Rep.* 195; *Cashman v. Henry*, 55 *Flynn v. Powers*, 36 How. Pr. 289; *How. Pr.* 240.  
*Vrooman v. Turner*, 69 N. Y. 280; 25      <sup>2</sup> *Kitchell v. Mudgett*, 37 Mich. 81.

payment of the mortgage, as between himself and the mortgagor, he becomes the principal debtor, and the mortgagor the surety; and it seems that, as a legal consequence, the mortgagee becomes affected by the relationship thus created, so that if he grants to the purchaser of the equity an extension of time for payment of the mortgage, without the consent of the mortgagor, the mortgagor is thereby released from all liability on the mortgage.<sup>1</sup> But where the purchaser does not personally assume the mortgage, he cannot be considered as the surety of the mortgagor, and consequently if the mortgagee, under those circumstances, extends the time for payment of the mortgage, such extension does not operate to discharge the lien of the mortgage in favor of the purchaser.<sup>2</sup>

ILLUSTRATIONS. — A and B, his wife, executed a mortgage to C, which was afterwards assigned to D. M. mortgaged certain other property to D. Afterwards M. and A and B exchanged properties, and mutually assumed the mortgages upon them. Subsequently D, at the request of M., and without the knowledge of A or B, extended the period for payment of the mortgage M. had assumed. *Held*, that A and B were thereby discharged from all liability on that mortgage: *George v. Andrews*, 60 Md. 26; 45 Am. Rep. 706. A made a second mortgage to B. He then sold the land to C, who assumed and agreed to pay the note to B. C subsequently sold to D, with a similar assumption. Afterwards E, at D's request, paid the mortgage, and took an assignment of it. D guaranteed the payment of the note. He afterwards obtained an extension of time from E. Soon afterwards C died insolvent. E then purchased the equity of redemption, and subsequently quitclaimed it to A, and he then brought this action against A for the amount of the note. *Held*, that the fact of E having given time to D for payment had not released the liability of A on the note: *Boardman v. Larrabee*, 51 Conn. 39.

<sup>1</sup> *George v. Andrews*, 60 Md. 26; 45 Am. Rep. 706; *Fish v. Hayward*, 28 Hun, 456; *Paine v. Jones*, 14 Hun, 577; *Calvo v. Davies*, 8 Hun, 222; *Christner v. Brown*, 16 Iowa, 130; *Murray v. Marshall*, 94 N. Y. 611; *Grover v. Fox*, 36 Mich. 473; *Union Mut. Life Ins. Co. v. Hanford*, 27 Fed.

Rep. 588. But see *Boardman v. Larrabee*, 51 Conn. 39, holding that the mortgagee is not bound so to regard the transaction.

<sup>2</sup> *Kuhns v. McGeah*, 38 Ohio St. 468; *Maher v. Lanfrom*, 86 Ill. 513; *Fry v. Shehee*, 55 Ga. 208.

§ 3045. **Release of Purchaser by Mortgagor or Mortgagee.**—Where the mortgagor makes an absolute conveyance, and the purchaser assumes the mortgage, it has been held that such conveyance and assumption are unconditional and irrevocable, and that the parties cannot by mutual agreement cancel the transaction.<sup>1</sup> But it would seem, on principle, that this doctrine should be received with the qualification that the mortgagee must first know of and accept the transaction, and then, having become a party to it, it cannot be rescinded without his consent.<sup>2</sup> And it has been held that where a grantee who has assumed payment of the mortgage reconveys the land in good faith to the mortgagor at any time before the filing of a bill of foreclosure, the liability of the grantee to the mortgagee is thereby terminated.<sup>3</sup> A deed in the nature of a mortgage to secure the payment of certain enumerated debts creates an encumbrance on the whole property conveyed for the whole of the indebtedness secured; and if the mortgagor sells a portion of the land thus encumbered to a purchaser who had constructive, not actual, notice of the mortgage, and transfers the notes of the vendee for the purchase-money, to one of the mortgage creditors, to be applied to the reduction of the mortgage debts, the payment of such notes by the purchaser to one of the mortgage creditors does not release the land thus sold from the mortgage, unless it was so agreed between the purchaser and the parties to the mortgage.<sup>4</sup> If a vendee of land, who has assumed a mortgage on it, makes an arrangement with the mortgagee, whereby he is discharged, and the original mort-

<sup>1</sup> *Garnsey v. Rogers*, 47 N. Y. 333; 7 Am. Rep. 440; *Douglas v. Wells*, 18 Hun, 88; *Bay v. Williams*, 112 Ill. 91; 54 Am. Rep. 209.

<sup>2</sup> *Whiting v. Gearty*, 14 Hun, 498; *Kelly v. Roberts*, 40 N. Y. 432; *Stephens v. Castacker*, 8 Hun, 116; *Douglas v. Wells*, 18 Hun, 88; *Gilbert v. Sanderson*, 58 Iowa, 349; 41 Am.

Rep. 103; *Berkshire Life Ins. Co. v. Hutchings*, 100 Ind. 496; *Biddel v. Brizzolara*, 64 Cal. 354.

<sup>3</sup> *Laing v. Byrne*, 34 N. J. Eq. 52; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *O'Neill v. Clark*, 33 N. J. Eq. 444.

<sup>4</sup> *Colby v. Cato*, 47 Ala. 247.

gagor afterwards makes a payment to the mortgagee, the mortgagor cannot recover this amount from the vendee, even though the mortgagor, when he paid, did not know that the vendee had been released.<sup>1</sup>

ILLUSTRATIONS. — A, having mortgaged several town lots, sold an undivided third to B, who was to pay one third of the notes and have one third of the profits on sale by A, who retained the title in himself, and afterwards sold to C, who sold part of the lots to D, and the remainder to E, to whom D afterwards conveyed his portion, each grantee assuming the mortgage covering his lots. The mortgage becoming due, and being unpaid, A and B furnished money to G to pay the same, and take an assignment as trustee for them. G, having secured an assignment, brought suit against E to foreclose. After D's conveyance to E, and before G had notified E of his acceptance of the assumption of the mortgage debt, C, for a valid consideration, released D from his assumption. *Held*, not to release E: *Ellis v. Johnson*, 96 Ind. 377. Upon the sale of a moiety of mortgaged premises, the vendee took possession, and informed the mortgagee of the conveyance and of his desire to have the mortgage debt paid out of the moiety remaining in the hands of the mortgagor, affirming that it was sufficient security for the entire debt, to which the mortgagee assented. In a suit upon the mortgage by the mortgagee, *held*, that a subsequent release by him of the remaining moiety, for a consideration, discharged the entire premises from the lien of the mortgage: *Shrack v. Shriner*, 100 Pa. St. 451.

<sup>1</sup> *Knobloch v. Zachwetzke*, 53 N. Y. Sup. Ct. 391.

## CHAPTER CXLIV.

## SUBROGATION AND MERGER.

- § 3046. Subrogation — In general.
- § 3047. Who entitled to.
- § 3048. In favor of junior mortgagee.
- § 3049. In favor of surety or guarantor.
- § 3050. When mortgagor entitled to.
- § 3051. Mere stranger or volunteer not entitled to.
- § 3052. Merger as applied to mortgages.
- § 3053. When not applicable.

§ 3046. **Subrogation — In General.**—Subrogation arises by operation of law, on the theory that the mortgage debt has been paid by one entitled to pay it for his own protection, but not under any legal liability to do so. It is the substitution of a new for an old creditor.<sup>1</sup> He who is entitled to an assignment of a mortgage is regarded in equity as being subrogated to the rights of the mortgagee without an assignment, as an assignment implies the continued existence of the debt, and the equitable right would not arise.<sup>2</sup> Where one having the right to redeem obtains an assignment of a note and mortgage, the doctrine of subrogation by operation of law is not invoked, as the assignment affects all the objects which could be attained by the subrogation.<sup>3</sup> The doctrine of subrogation is founded upon the principle that one who pays the mortgage debt is entitled to the mortgage security.<sup>4</sup> It does

<sup>1</sup> *Lamb v. Montague*, 112 Mass. 352; *Gaskill v. Wales*, 36 N. J. Eq. 531; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Carter v. Taylor*, 3 Head, 30; *Robinson v. Urquhart*, 12 N. J. Eq. 524; *Gatewood v. Gatewood*, 75 Va. 407; *Hess's Estate*, 69 Pa. St. 272; *York v. Landis*, 65 N. C. 535; *Fears v. Albee*, 69 Tex. 437; 5 Am. St. Rep. 78.

<sup>2</sup> *Aiken v. Gale*, 37 N. H. 505; *Parkinson v. Welsh*, 19 Pick. 238; *Jenness v. Robinson*, 10 N. H. 219; *Lamb v. Montague*, 112 Mass. 352; *Gibson v. Orehore*, 5 Pick. 152; *McCabe v. Bel- lora*, 7 Gray, 148; 66 Am. Dec. 487; *Hubbard v. Ascutney Co.*, 20 Vt. 405; 50 Am. Dec. 41.

<sup>3</sup> *Ellsworth v. Lockwood*, 42 N. Y. 97.

<sup>4</sup> *Roddy's Appeal*, 72 Pa. St. 98; *Keely v. Cassidy*, 93 Pa. St. 318; *Walker v. King*, 45 Vt. 525; *Robinson v. Urquhart*, 12 N. J. Eq. 524; *Gaskill v. Wales*, 36 N. J. Eq. 531; *Whinston v. McAlpine*, 65 Ala. 377;

not arise by contract, but may be modified or extinguished by contract.<sup>1</sup>

§ 3047. **Who Entitled to.** — As a general rule, where any one, other than a mere volunteer or meddler, satisfies the debt or obligation for which another is liable, he is entitled to be subrogated to all rights held by the original creditor.<sup>2</sup> The usual relations, however, out of which it arises are those of co-creditors, principals and sureties, co-sureties, or co-guarantors.<sup>3</sup> Generally, if a party is interested in a mortgage in such a way that he is not liable on it, but is obliged to pay it to save his estate, and he does pay it, he is, without any assignment, subrogated by operation of law to the rights of the mortgagee, and no proof of any intention on his part to keep the mortgage alive is necessary to give him the benefit of it.<sup>4</sup> So if a third person pays a debt which is secured by mortgage, at the request of the mortgagor, and takes the note and mortgage as security for the money advanced, he is in equity entitled to be subrogated to the rights of the original creditor.<sup>5</sup> And it is said that one who has paid a debt under a colorable obligation to do so, in order to protect his own claim, should be subrogated to the rights of the creditor.<sup>6</sup> Generally speaking, however, it is only in cases where the person paying the debt stands in the position of a surety, or is compelled to pay in order to protect his own interests, that a court of equity will substitute him in the place of the creditor as a matter of

*Tyrell v. Ward*, 102 Ill. 29; *Detroit Fire Ins. Co. v. Aspinwall*, 43 Mich. 238; *Spiller v. Creditors*, 16 La. Ann. 292.

<sup>1</sup> *Hughes v. Hartford Fire Ins. Co.*, 17 Ill. App. 518.

<sup>2</sup> *Gahn v. Niemcewicz*, 11 Wend. 312; *Morris v. Oakford*, 9 Pa. St. 493; *Beall v. Walker*, 26 W. Va. 741.

<sup>3</sup> *Flachs v. Kelly*, 30 Ill. 462; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Brainard v. Cooper*, 10 N. Y. 356;

*Muir v. Berkshire*, 52 Ind. 149; *Low v. Smart*, 5 N. H. 353; *Fields v. Sherrill*, 18 Kan. 365; *Drew v. Lockett*, 32 Beav. 499.

<sup>4</sup> *Gatewood v. Gatewood*, 75 Va. 407; *Ward v. Seymour*, 51 Vt. 320; *Walker v. King*, 44 Vt. 601.

<sup>5</sup> *Hall v. Lambert*, 7 N. J. Eq. 651; 51 Am. Dec. 272; *Caudle v. Murphy*, 89 Ill. 352.

<sup>6</sup> *Muir v. Berkshire*, 52 Ind. 149.

course.<sup>1</sup> If a person who has agreed with a debtor to advance money, to be secured by mortgage on land, to discharge a debt secured by encumbrance on that land, himself pays the debt with the money, and discharges the encumbrance, he will be entitled in equity to the benefit of the security he has satisfied.<sup>2</sup> If one not primarily liable therefor, but who stands in the relation of surety to the mortgagor, pays the mortgage debt, he is undoubtedly entitled to the benefits of subrogation.<sup>3</sup> So where one, to release the premises from two mortgages prior to his own, advanced the money to pay them off, it was held that he was entitled to be subrogated to the rights of the prior mortgagees to the extent of the money paid.<sup>4</sup> But to effect subrogation there must be something more than mere payment and silent receipt of the money by the mortgagee; so that where one pays part of the mortgage debt, but takes no assignment of the mortgage, he is not thereby subrogated to the rights of the mortgagee as against a subsequent mortgage.<sup>5</sup> Where a partnership debt is secured both by a mortgage on the partnership property, and on the private property of one of the partners, such partner is a surety for the partnership, and is entitled to be subrogated to the rights of the mortgagee on paying the mortgage debt, and the creditors of such surety are entitled to the same right.<sup>6</sup> So where a mortgagee insures his mortgage interest at his own expense, upon his own motion, and for his own benefit, the insurer, in making compensation, is entitled to be subrogated to

<sup>1</sup> *Cole v. Malcolm*, 66 N. Y. 363; *National Bank v. Cushing*, 53 Vt. 326; *Sanford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773; *Barnett v. Griffith*, 27 N. J. Eq. 201.

<sup>2</sup> *Denton v. Cole*, 30 N. J. Eq. 244; *Homœopathic Mut. Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Lockwood v. Bassett*, 49 Mich. 546; *Coe v. R. R. Co.*, 27 N. J. Eq. 113.

<sup>3</sup> *Miller v. Winchell*, 70 N. Y. 437; *Pickett v. Merchants' Nat. Bank*, 32

Ark. 346; *Tice v. Armin*, 2 Johns. Ch. 125.

<sup>4</sup> *Holt v. Baker*, 58 N. H. 276; *Barnett v. Griffith*, 27 N. J. Eq. 201.

<sup>5</sup> *Com. of Va. v. Chesapeake etc. Canal Co.*, 32 Md. 501; *Hollingsworth v. Floyd*, 2 Har. & G. 87; *Swan v. Patterson*, 7 Md. 164.

<sup>6</sup> *Warren v. Hayzlett*, 45 Iowa, 235; *National Bank v. Cushing*, 53 Vt. 321; *Layton v. Knox*, 41 Mich. 40; *Barhydt v. Perry*, 57 Iowa, 416.

the rights of the assured.<sup>1</sup> But the doctrine of subrogation has no application where one invoking it will himself eventually be liable, so that he will have no real benefit by being subrogated.<sup>2</sup>

ILLUSTRATIONS.—S. executed bonds secured by a trust mortgage. A. took some of the bonds at a discount of five per cent, under an agreement that sufficient of the sum advanced should be used to pay a prior mortgage on the premises. This was done, and the prior mortgage canceled of record. In an action brought to foreclose the trust mortgage it was adjudged that A.'s bonds were usurious and void. *Held*, that A. could not be subrogated to the rights of the prior mortgagee, as the only right of subrogation was under the agreement to pay off the mortgage, and that was part of and inseparable from the usurious agreement: *Baldwin v. Moffett*, 94 N. Y. 82. A owned land subject to a mortgage made by him to C to secure four notes. Upon one of these notes judgment had been obtained and V. had become replevin bail. A conveyed the land to B, subject to the whole mortgage debt. B agreed by parol to pay the three notes, but not the judgment. V. consented to this agreement. B paid the three notes, and took an assignment; V. paid the judgment. *Held*, that V. could be subrogated to the mortgage security: *Rooker v. Benson*, 83 Ind. 250. A and wife mortgaged a plantation, being the wife's separate property, to secure advances made to enable A to raise a crop. Afterwards they executed a trust deed of the same property to C to secure a debt incurred to him in running the plantation, and also to secure the other debt, which he promised to pay. C paid the other debt, redeemed the land from a tax sale, and paid taxes as they accrued. After a number of years it was discovered that the certificate of acknowledgment in the deed of trust was defective as to the wife. *Held*, that C was entitled to be subrogated to the rights of the first mortgagee: *Chaffe v. Oliver*, 39 Ark. 531.

§ 3048. In Favor of Junior Mortgagee.—The rule is well established that a mortgagee who has paid a prior mortgage, or other encumbrance, is entitled to be subrogated to the rights of the encumbrancer whose charge he

<sup>1</sup> *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; 14 Am. Rep. 271; *Nelson v. Bound Brook Mut. Fire Ins. Co.*, 43 N. J. Eq. 256; 3 Am. St. Rep. 308.  
<sup>2</sup> *Smith v. Cornell*, 52 N. Y. Sup. Ct. 499. And see *Havens v. Willis*, 100 U. S. 25. And see also *Woodruff*, 26 N. J. L. 541; *Ins. Co. v. Stinson*, 103 U. S. 25. And see also *Foster v. Van Reed*, 70 N. Y. 19; 26 Am. Rep. 544; *Sussex Ins. Co. v. Woodruff*, 26 N. J. L. 541; *Ins. Co. v. Stinson*, 103 U. S. 25. And see also *N. Y. 482*.

has paid, whether such encumbrance be a mortgage, judgment, or rent-charge.<sup>1</sup> And after having done so, intermediate or subsequent encumbrancers, before they can enforce their claims, must refund the redemption money, or pay all liens prior to their own.<sup>2</sup> He is also entitled to the benefits of subrogation in respect of taxes paid by him to protect the property and himself from the consequences of a sale for non-payment.<sup>3</sup> But where the payment was not necessary to protect his interests, he is not entitled to subrogation.<sup>4</sup> Equity will presume the assent of the prior encumbrancer to the use of all securities in his hands for the purpose of compelling payment by the party ultimately liable.<sup>5</sup> In New York the holder of a junior mortgage may, upon tender of the amount, compel an assignment of the prior encumbrance, although he does not occupy the position of a surety.<sup>6</sup>

ILLUSTRATIONS.—After a second mortgage had been taken on certain lands, a payment of part of the principal of the first mortgage was made by a brother of the mortgagor, under an agreement between the holder of the mortgage and the mortgagor and his brother that the latter should be subrogated to the rights of the mortgagee under the mortgage for those payments. *Held*, that, as against the holder of the second mortgage, such conventional subrogation could be enforced: *Shreve v. Hankinson*, 34 N. J. Eq. 76. Through the fraudulent representations of a mortgagor that the only claim on the land was one mortgage, A paid the amount of that without taking an assignment, and had record of satisfaction entered, and thereupon took a new mortgage. *Held*, that A was entitled to be subrogated to the rights of the first mortgage, it appearing that there were several liens prior to the second, and to have the record of satisfaction canceled: *Sidener v. Pavey*, 77 Ind. 241.

<sup>1</sup> *Jenness v. Robinson*, 10 N. H. 215; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Patterson v. Birdsall*, 64 N. Y. 294; 21 Am. Rep. 609; *Carpentier v. Brenham*, 40 Cal. 221; *Gilbert v. Gilbert*, 39 Iowa, 657; *Gardner v. Emerson*, 40 Ill. 296; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Chaffe v. Oliver*, 39 Ark. 531; *Twombly v. Cassidy*, 82 N. Y. 159; *Hunt v. Townsend*, 4 Sand. Ch. 510; *Cole v. Malcolm*, 66 N. Y. 363; *Ebert v. Gerding*, 116 Ill. 216.

<sup>2</sup> *Shiner v. Hammond*, 51 Iowa, 401; *Downer v. Fox*, 20 Vt. 388.

<sup>3</sup> *Sidener v. Ely*, 11 Abb. N. C. 354; 90 N. Y. 257; 43 Am. Rep. 163; *Chaffe v. Oliver*, 39 Ark. 531; *Fiacre v. Chapman*, 32 N. J. Eq. 463.

<sup>4</sup> *Bayard v. McGraw*, 1 Ill. App. 134.

<sup>5</sup> *Downer v. Fox*, 20 Vt. 388.

<sup>6</sup> *Twombly v. Cassidy*, 82 N. Y. 155; *Cole v. Malcolm*, 66 N. Y. 363.

§ 3049. **In Favor of Surety or Guarantor.**—A surety is entitled to the benefit of all the securities for the debt which are available for his indemnity; and a person taking any of such securities from the principal debtor with notice of his responsibilities is bound in equity to hold them for the indemnity of the surety, and is subject to all the equities which the surety could originally enforce.<sup>1</sup> A surety who pays the debt, and takes a conveyance of all the creditor's interest in land mortgaged to secure it, becomes, by substitution, in effect, the mortgagee for the security of his advances.<sup>2</sup> If the debt be secured by mortgage, he is entitled to be substituted to the creditor's interest under the mortgage, and proof of payment alone is sufficient to raise this equity;<sup>3</sup> and an assignment of the security is not necessary.<sup>4</sup> Knowledge of the existence of the security when the surety incurred his liability is not necessary, and it is sufficient if it were given after the contract of suretyship was entered into.<sup>5</sup> Upon paying one of several bonds, the surety becomes entitled to be subrogated to a proportionate part of the security, with the mortgagee as his trustee.<sup>6</sup> Where one partner assumes the payment of a firm note, and executes a mortgage to the payee of the note to secure its payment and indemnify his copartner, the latter will be entitled to subrogation to the extent of any payment he may have to make on the note.<sup>7</sup> If a principal has made a mortgage to one of several sureties, the latter are entitled to receive the benefits of such mortgage.<sup>8</sup> And if a debtor has made a mortgage to his surety by way of indemnity, the creditor

<sup>1</sup> *Fawcetts v. Kimmey*, 33 Ala. 261; *Atwood v. Vincent*, 17 Conn. 575; *Ottoman v. Moak*, 3 Sand. 431; *Denny v. Lyons*, 38 Pa. St. 98; 80 Am. Dec. 463; *Watts v. Kinney*, 3 Leigh, 272; 23 Am. Dec. 266; *Stanwood v. Clampitt*, 23 Miss. 371.

<sup>2</sup> *Dearborn v. Taylor*, 18 N. H. 153.

<sup>3</sup> *McNairy v. Eastland*, 10 Yerg. 310; *Motley v. Harris*, 1 Lea, 577.

<sup>4</sup> See § 3046, *ante*.

<sup>5</sup> *Phares v. Barbour*, 49 Ill. 370; *Hardin v. Eames*, 5 Ill. App. 153; *Mayhew v. Crickett*, 3 Swanst. 185; *Muller v. Wadlington*, 5 S. C. 342.

<sup>6</sup> *Lynch v. Hancock*, 14 S. C. 66; *Rice v. Morris*, 82 Ind. 204.

<sup>7</sup> *Conwell v. McCowan*, 81 Ill. 285.

<sup>8</sup> *Hall v. Cushman*, 16 N. H. 462; 43 Am. Dec. 562; *Scribner v. Adams*, 73 Me. 541.

is entitled to the benefit thereof.<sup>1</sup> Where the surety pays the mortgage debt, and receives the note and mortgage without an assignment or discharge written thereon, it is held that he cannot maintain a suit in equity against the owners of the equity for subrogation and foreclosure.<sup>2</sup>

**ILLUSTRATIONS.**—A, B, and C indorsed the notes of a corporation, expressly agreeing between themselves that all should share equally any loss that the indorsement might entail. To secure the carrying out of this agreement, each mortgaged property to a trustee. A, B, C, and the corporation all became insolvent. *Held*, that the holders of the notes could not claim to be subrogated to the benefit of the mortgage security: *Seward v. Huntington*, 94 N. Y. 104. A mortgaged land to secure a loan of school funds, and then conveyed to B, who mortgaged to C, and then conveyed to D, who renewed the original loan, gave a new mortgage therefor, and afterwards borrowed money, E becoming his surety, and paid off the mortgage to C. Subsequently, in a suit by E against B, alleging that he had paid the loan for which he became surety, and that the mortgage had been assigned to him on that account, E secured a decree of foreclosure, under which he bought the land, and died. *Held*, in a suit against the heirs of E to foreclose the second mortgage for the loan of school funds, that no right in equity to rely on the previous mortgage could be considered: *State v. Beal*, 88 Ind. 106. Several notes were secured by one mortgage. Judgment was obtained on the note first due, and A, a surety for stay of execution, had to pay it. *Held*, that he could not be subrogated to the mortgage without paying the other notes: *Rice v. Morris*, 82 Ind. 204.

**§ 3050. When Mortgagor Entitled to.**—When a mortgagor sells the mortgaged premises subject to the mortgage, and afterwards pays off the mortgage, he is entitled to be subrogated to the position of the mortgagee, and to his rights and remedies under the mortgage;<sup>3</sup> for between the mortgagor and the purchaser of the equity, the former then occupies the position of surety, the latter becoming the principal debtor, and the mortgaged premises form the security to which the mortgagor is entitled to resort

<sup>1</sup> *McMullen v. Neal*, 60 Ala. 552; *Curtis v. Tyler*, 9 Paige, 432; *In re Fickett*, 72 Me. 266; *Demott v. Stockton etc. Mfg. Co.*, 32 N. J. Eq. 124.

<sup>2</sup> *Lynn v. Richardson*, 78 Me. 367.

<sup>3</sup> *Baker v. Terrell*, 8 Minn. 195.

for his protection;<sup>1</sup> and where the purchaser assumes the payment of the mortgage as part of the price, the same rule applies, the mortgagor, if he pays off the mortgage debt, becoming subrogated to the rights of the mortgagee against the property.<sup>2</sup> So if a judgment on a mortgage debt has been satisfied out of other property belonging to the mortgagor, such satisfaction is equivalent to a payment of the debt, so as to entitle the mortgagor, when justice requires it to be regarded as assigned to him, and not discharged, to the benefits of subrogation.<sup>3</sup>

ILLUSTRATIONS.—A and B purchased land in common, giving their joint note and mortgage for the purchase-money. A died, and to save the land, B was obliged to pay the note, with interest at more than the legal rate. *Held*, that he was subrogated to the rights of the mortgagee: *Simpson v. Gardiner*, 97 Ill. 237.

§ 3051. **Mere Stranger or Volunteer not Entitled to.**—Voluntary purchasers and strangers, unless there is some peculiar equitable relation in the transaction, are never allowed the benefit of subrogation; but it is held that a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, is entitled thereto.<sup>4</sup> The party paying must stand in such a relation respecting the debt or the property that it becomes his interest or duty to make the payment for his own protection.<sup>5</sup> But where a stranger paid off part of a first mortgage in pursuance of an agreement with the mortgagee and mortgagor that he should have the benefit of subrogation, he is entitled as against the second mort-

<sup>1</sup> Willard v. Worsham, 76 Va. 392; Baker v. Terrell, 8 Minn. 195; Johnson v. Zink, 52 Barb. 396.

<sup>2</sup> Russell v. Pistor, 7 N. Y. 171; 57 Am. Dec. 509; Flagg v. Geltmacher, 98 Ill. 293; Greenwell v. Heritage, 71 Mo. 459; Smith v. Ostermeyer, 68 Ind. 432; Stillman v. Stillman, 21 N. J. Eq. 126.

<sup>3</sup> Woodbury v. Swan, 58 N. H. 380.

<sup>4</sup> Muir v. Berkshire, 52 Ind. 149;

Hudson v. Dismukes, 77 Va. 242; Levy v. Martin, 43 Wis. 198; Bayard v. McGraw, 1 Ill. App. 134; Coe v. R. R. Co., 31 N. J. Eq. 136; Mosier's Appeal, 56 Pa. St. 78; 93 Am. Dec. 783; Binford v. Adams, 104 Ind. 41.

<sup>5</sup> Clark v. Moore, 76 Va. 262; Cox v. Garat, 105 Ill. 342; Detroit Fire etc. Ins. Co. v. Aspinwall, 48 Mich. 233; Suppiger v. Garrels, 20 Ill. App. 625; Morton v. Highleyman, 88 Mo. 621.

gagee to stand in the shoes of the first with respect to such payment.<sup>1</sup> And where a stranger, by the authority and consent of the debtor, and on his agreement that he shall be subrogated to the rights of the creditor, makes payment for the debtor, he will be subrogated, if the payment is made with the express declaration of the subrogation in the release made by the creditor.<sup>2</sup> But one who has taken a mortgage from a married woman, which is void because prohibited by statute, cannot claim to be subrogated to a valid mortgage paid off and satisfied before he took his mortgage.<sup>3</sup> And one lending money to remove a lien on land is not thereby subrogated to the rights of the lienor against the land.<sup>4</sup>

ILLUSTRATIONS. — A party sold land in which he had a homestead interest, subject to a deed of trust, the purchaser assuming the payment of the debt secured by the trust deed as a part of the consideration, such payment being subsequently made, the purchaser taking a release of the trust deed instead of an assignment. Before the sale, but after the execution of the trust deed, a judgment against the owner became a lien upon the land, and after the sale, under an execution issued upon such judgment, the homestead was set off and the residue of the land was sold to satisfy such execution. The original purchaser thereupon filed a bill in equity to set aside the sale under execution, claiming that the trust deed was a prior lien to the judgment, and that he should have the benefit thereof as such. *Held*, that he was entitled to the relief prayed for, and that the payment by him of the debt secured by the trust deed was not a voluntary payment by a stranger: *Young v. Morgan*, 89 Ill. 199. A person advanced money to another to enable him therewith to make a loan to a third person, on the security of an equitable mortgage. *Held*, not entitled to subrogation: *Van Winkle v. Williams*, 38 N. J. Eq. 105. A, at the request of B, advanced his (A's) money to pay off a mortgage in which B had an interest. *Held*, that the doctrine of subrogation applied: *Gans v. Thieme*, 93 N. Y. 225.

<sup>1</sup> *Shreve v. Hankinson*, 34 N. J. Eq. 76; *Sheffy's Appeal*, 97 Pa. St. 317. And see *Hammond v. Barker*, 61 N. H. 53.

<sup>2</sup> *Shreve v. Hankinson*, 34 N. J. Eq. 76; *Dixon on Subrogation*, 164; *Neely v. Jones*, 16 W. Va. 625; 37 Am. Rep. 794; *Robertson v. Mowell*, 66 Md. 530;

*Fievel v. Zuber*, 67 Tex. 275; *Yapel v. Stephens*, 36 Kan. 680; *Rodman v. Sanders*, 44 Ark. 504.

<sup>3</sup> *Ætna Life Ins. Co. v. Buck*, 108 Ind. 174.

<sup>4</sup> *Price v. Courtney*, 87 Mo. 387; 56 Am. Rep. 453.

§ 3052. **Merger as Applied to Mortgages.** — The merger of a mortgage arises only when the entire title, equitable as well as legal, becomes vested in the same person.<sup>1</sup> The doctrine has never been favored at law, and is regarded with even less approval in equity.<sup>2</sup> The intention of the parties, express or implied, and the requirements of substantial justice, are the elements constituting the test of the question whether a merger has taken place or not.<sup>3</sup> Where the benefit to the person entitled to the charge will be greater by continuing its existence than treating it as merged, it will be held that the implied intention is against the merger.<sup>4</sup> At law a mortgage will be upheld in favor of a mortgagee, even though the parties may have undertaken to discharge it, unless injustice would thereby result.<sup>5</sup> In the application of this doctrine, equity does not follow the law, and a merger will sometimes be decreed in equity when at law the mortgage would be held to be subsisting, and at other times equity will preserve the charge where it would be merged at law; the question being as to the intention, actual or presumed, of the person in whom the interests are united, founded upon the reason or necessity of the case.<sup>6</sup> So where a person becomes entitled to an estate, subject to a charge which had been created for his own benefit, he may take the estate without extinguishing the charge, if he manifests his intention of doing so.<sup>7</sup> In the absence of any

<sup>1</sup> Dickason v. Williams, 129 Mass. 182; 37 Am. Rep. 316; Sherman v. Abbot, 18 Pick. 448; Jordon v. Cheney, 74 Me. 359; Gardner v. Astor, 3 Johns. Ch. 53; 8 Am. Dec. 465; Bassett v. Mason, 18 Conn. 131. And see note to Hitchcock v. Harrington, 6 Johns. 290, in 5 Am. Dec. 233. See ante, Title Real Property.

<sup>2</sup> Smith v. Roberts, 91 N. Y. 475; James v. Morey, 2 Cow. 284; 14 Am. Dec. 475, and note.

<sup>3</sup> Franklin v. Hayward, 61 How. Pr. 43; Richardson v. Hockenhuill, 85 Ill. 124; Duncan v. Smith, 31 N. J. L. 325; Hinds v. Ballou, 44 N. H. 619; Simonton v. Gray, 34 Me. 50; McLain

v. Sullivan, 85 Ind. 174; Bostwick v. Frankfield, 74 N. Y. 207; Duncan v. Drury, 9 Pa. St. 332; 49 Am. Dec. 565; Watson v. Dundee Mortgage and Tr. Inv. Co., 12 Or. 474.

<sup>4</sup> Denzler v. O'Keefe, 34 N. J. Eq. 361; Pike v. Gleason, 60 Iowa, 150.

<sup>5</sup> Webb v. Meloy, 32 Wis. 319; Stantons v. Thompson, 49 N. H. 272; Woodward v. Davis, 53 Iowa, 694.

<sup>6</sup> Bullard v. Leach, 27 Vt. 491; Hart v. Chase, 46 Conn. 207; Polk v. Reynolds, 31 Md. 106; Champney v. Coope, 32 N. Y. 543.

<sup>7</sup> Silliman v. Gammage, 55 Tex. 365; Polk v. Reynolds, 31 Md. 106.

expression of intention, it will be presumed that the party intended that which is most for his interest, and it will be held accordingly.<sup>1</sup> Where the mortgagee purchases the equity of redemption, the whole estate is vested in him, and merger takes place whenever the contrary would be inequitable.<sup>2</sup> Where a mortgagee takes a note and mortgage from the purchaser of the equity of redemption, under an agreement to accept the purchaser in lieu of the mortgagor, the mortgage is held to be extinguished.<sup>3</sup> Where land is mortgaged to secure the payment of two notes at different times, and is sold under decree to satisfy the first note, and purchased by the assignee of the mortgagee, expressly subject to the encumbrance of the second note, the mortgage estate merges in the fee, and the assignee of the mortgagee cannot collect the second note against the mortgagor.<sup>4</sup> And where the owner of land subject to two mortgages, made by his predecessors in title, conveys it to the first mortgagee by a warranty deed, wherein such first mortgagee assumes and agrees to pay both mortgages, the first mortgage is merged.<sup>5</sup>

ILLUSTRATIONS.—A junior mortgagee obtained a decree for foreclosure, and also personal judgment, he then received a sheriff's deed of sale under a senior mortgage, and conveyed by warranty. *Held*, that his decree was merged in the superior title of the sheriff's deed: *Thomas v. Simmons*, 103 Ind. 538. A made two mortgages, and then sold the land to B, who bought the first mortgage. *Held*, that that mortgage was merged in B's title as vendee: *Byington v. Fountain*, 61 Iowa, 512. A held a mortgage covering three parcels of land. One of the parcels was sold at a sale under an execution, the lien of which was subject to the mortgage. A bought the parcel. *Held*, that his mortgage was thereby discharged to the extent of the fair value of the parcel so bought, irrespective of the amount of his bid: *Trimmier v. Vise*, 17 S. C. 499; 43 Am. Rep. 624. A conveyed land to B, subject to a mortgage which B assumed and agreed

<sup>1</sup> *Hinds v. Ballou*, 44 N. H. 620; *De Lisle v. Herbs*, 25 Hun, 487; *Huebsch v. Scheel*, 81 Ill. 281; *Bank of Waterloo v. Elmore*, 52 Iowa, 541; *Simonton v. Gray*, 34 Me. 50.

<sup>2</sup> *Jackson v. Tift*, 15 Ga. 557; *Taylor*

*v. Stockdale*, 3 McCord, 302; *Barnes v. Brown*, 71 N. C. 507; *Rogers v. Herron*, 92 Ill. 583.

<sup>3</sup> *Sharp v. Collins*, 74 Mo. 266.

<sup>4</sup> *Weiner v. Heintz*, 17 Ill. 259.

<sup>5</sup> *Kneeland v. Moore*, 138 Mass. 198.

to pay. B conveyed the land to the mortgagee, subject to the mortgage. *Held*, that the mortgage was thereby merged: *Dickason v. Williams*, 129 Mass. 182; 37 Am. Rep. 316.

§ 3053. **When not Applicable.**—The acceptance of the legal title by a mortgagee does not work a merger, where none is intended, and it is against the interest of the purchaser.<sup>1</sup> So where the premises are conveyed by mortgagor to mortgagee in satisfaction of the mortgage, and for the purpose of avoiding the expense of foreclosure, if there is an intervening mortgage or title by levy of execution, no merger takes place.<sup>2</sup> The acquisition by a mortgagee, after his assignment or transfer of the mortgage, of the absolute title, does not merge the mortgage.<sup>3</sup> If the assignee of the mortgage purchase the equity of redemption, no such merger of the legal and equitable estates arises as prevents the assignee from maintaining ejectment against the mortgagor on the mortgage.<sup>4</sup> Where a surety takes a mortgage from the principal debtor to indemnify him on account of the suretyship, and subsequently buys the equity of redemption, no merger arises as against the creditor.<sup>5</sup> So a mortgage which secures several notes maturing at different times, and which has been foreclosed as to the note last falling due, may again be foreclosed for the remaining notes, as against a purchaser after the first foreclosure who had assumed their payment as part of the purchase-money.<sup>6</sup> A mortgage is not merged by the mortgagee becoming a devisee of an undivided half of the mortgaged premises.<sup>7</sup>

<sup>1</sup> *Wickersham v. Reeves*, 1 Iowa, 413; *Mallory v. Hitchcock*, 29 Conn. 127; *Knowles v. Lawton*, 18 Ga. 476; 63 Am. Dec. 290; *Freeman v. Paul*, 3 Me. 260; 14 Am. Dec. 237; *Vanderkemp v. Shelton*, 11 Paige, 28; *Smith v. Swan*, 69 Iowa, 412; *Patterson v. Mills*, 69 Iowa, 755; *Decatur v. Walker*, 137 Mass. 141.

<sup>2</sup> *Warren v. Warren*, 30 Vt. 530; *Southworth v. Scofield*, 51 N. Y. 513; *Brooks v. Rice*, 56 Cal. 428; *Hill v. Pixley*, 63 Barb. 200; *Bell v. Wood-*

*ward*, 34 N. H. 90; *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Denzler v. O'Keefe*, 34 N. J. Eq. 361; *Lournan v. Lournan*, 118 Ill. 582; *Cohn v. Hoffman*, 45 Ark. 376.

<sup>3</sup> *White v. Hampton*, 13 Iowa, 259; *Purdy v. Huntington*, 42 N. Y. 334; 1 Am. Rep. 532.

<sup>4</sup> *Den v. Vanness*, 10 N. J. L. 102; *Boardman v. Larrabee*, 51 Conn. 39.

<sup>5</sup> *Durham v. Craig*, 79 Ind. 117.

<sup>6</sup> *Hill v. Minor*, 79 Ind. 48.

<sup>7</sup> *Sahler v. Signer*, 44 Barb. 606.

Where a mortgagee takes a conveyance of the equity of redemption by quitclaim deed, the greater estate will not be merged in the less, contrary to a declaration in the deed that such deed shall not so operate except at the election of the grantee.<sup>1</sup> And there is no merger where the assignee of a mortgage gives in consideration a note payable when the mortgage debt is paid, and afterwards buys the equity at a sheriff's sale under the mortgage.<sup>2</sup> And under the laws as now obtaining in most of the states, the marriage of a female mortgagee with the mortgagor does not merge her rights under the mortgage.<sup>3</sup> Where the legal and equitable titles unite in the same person, the equitable title does not necessarily become merged in the legal title, and a court of equity will consider the mortgage as subsisting, where the purposes of justice require it.<sup>4</sup> An agreement that there shall be no merger will be respected in equity when consonant with the equitable rights of all concerned.<sup>5</sup> A purchase by a mortgagee at a sale under a junior mortgage does not merge the mortgage, in the absence of the purchaser's intention to give it that effect.<sup>6</sup>

ILLUSTRATIONS. — R. mortgaged certain real estate, the equity of redemption in which was afterwards set off on an execution against him to a creditor, who conveyed the same to the wife of R. She afterwards died intestate. After her death R. remained in possession, and some time later was required to pay, and did pay, the mortgage debt. Upon a bill of foreclosure of the mortgage brought by the executor of R. against his children, who were also the children and heirs at law of R.'s wife, *held*, that the mortgage was not merged: *Hart v. Chase*, 46 Conn. 207. A debtor mortgaged his land to secure the debt and indemnify the surety. Subsequently a creditor obtained a judgment against him. Then the surety paid the debt, and took a conveyance of the land, the conveyance stipulating that it was made subject to the mortgage, which was to remain open to

<sup>1</sup> *Spencer v. Ayrault*, 10 N. Y. 202.

<sup>2</sup> *Fithian v. Corwin*, 17 Ohio St. 118.

<sup>3</sup> *Bemis v. Call*, 10 Allen, 512;

*Power v. Lester*, 23 N. Y. 527.

<sup>4</sup> *Edgerton v. Young*, 43 Ill. 464;

*Lyon v. McIlvaine*, 24 Iowa, 9; *Slocum v. Catlin*, 22 Vt. 137; *Green v.*

*Currier*, 63 N. H. 563.

<sup>5</sup> *Gresham v. Ware*, 79 Ala. 192.

<sup>6</sup> *Hospes v. Almstedt*, 83 Mo. 473.

protect the surety. *Held*, that as against the judgment creditor there was no merger: *Agnew v. R. R. Co.*, 24 S. C. 18; 58 Am. Rep. 237. A holder of a part only of the notes secured by a second mortgage paid a decree foreclosing the first mortgage and purchased the equity of redemption. He intended, and it was for his interest, to keep the first mortgage alive. *Held*, that there was no merger: *Carpenter v. Gleason*, 58 Vt. 244. A took a deed "subject to" a mortgage, without actual notice of any other encumbrance, and subsequently obtained a sheriff's deed under a sale on a prior mortgage. *Held*, that the mortgage lien was not defeated, but that the judgment lien would be preserved for A's protection: *Hancock v. Fleming*, 103 Ind. 533.

## CHAPTER CXLV.

## SATISFACTION AND DISCHARGE.

- § 3054. What constitutes.
- § 3055. What does not.
- § 3056. Who may give.
- § 3057. When satisfied mortgage may be revived.
- § 3058. Form of discharge.
- § 3059. Penalty for not discharging.

§ 3054. **What Constitutes.** — The day prescribed in the mortgage for payment of the money or performance of the obligation is known as the “law day,” and payment on or before that day is a satisfaction and discharge of the mortgage equivalent to a release and cancelment of record.<sup>1</sup> The operation of the mortgage ceases both at law and in equity, and where the title has passed it revests in the mortgagor.<sup>2</sup> So if the mortgagee refuses to receive the money when tendered in due time and manner, the condition is complied with, and the estate revests in the mortgagee, though the obligation of the debt remains.<sup>3</sup> But payment before condition broken releases the land and extinguishes the mortgage without any reconveyance or other release, and the mortgagor, if out of possession, is entitled to re-enter immediately,<sup>4</sup> and payment of part is a satisfaction *pro tanto*.<sup>5</sup> Payment after the law day does not, at common law, revest the title in the mortgagor.<sup>6</sup> But where a mortgage is regarded as a mere lien upon the land, payment after condition broken discharges the

<sup>1</sup> *Caruthers v. Humphrey*, 12 Mich. 270; *Erskine v. Townsend*, 2 Mass. 493; 3 Am. Dec. 71; *Kortright v. Cady*, 21 N. Y. 345; 78 Am. Dec. 145; *Emory v. Keighan*, 88 Ill. 482; *Downer v. Wilson*, 33 Vt. 1; *Wells v. Rice*, 34 Ark. 346; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71.

<sup>2</sup> *Edwards v. Ins. Co.*, 26 Wend. 541; *Wolfe v. Dowell*, 13 Smedes & M. 103; 51 Am. Dec. 147.

<sup>3</sup> *Stewart v. Crosby*, 50 Me. 130;

*Schearff v. Dodge*, 33 Ark. 340; *Crain v. McGoon*, 86 Ill. 431; 29 Am. Rep. 37; *Maynard v. Hunt*, 5 Pick. 240; *Coit v. Houston*, 3 Johns. Cas. 243.

<sup>4</sup> *Hatfield v. Reynolds*, 34 Barb. 612; *Munson v. Munson*, 30 Conn. 425; *Joslyn v. Parlin*, 54 Vt. 670.

<sup>5</sup> *Howard v. Gresham*, 27 Ga. 347; *Champney v. Coope*, 34 Barb. 539.

<sup>6</sup> *Frank v. Pickens*, 69 Ala. 372; *Wade v. Howard*, 11 Pick. 289; *Stewart v. Crosby*, 50 Me. 130.

lien, and the estate is said to revert without a reconveyance;<sup>1</sup> and in New York, Michigan, and Missouri, it is held that a mere tender of the money after condition broken, and at any time before a foreclosure, discharges the lien of the mortgage.<sup>2</sup> The cancellation of a mortgage upon the record is only *prima facie* evidence of its discharge, the mortgagee being entitled to show that such discharge was obtained by accident, mistake, or fraud.<sup>3</sup> Where it appears as a fact that a mortgage has not been paid, there is no presumption of payment on account of the expiration of twenty years.<sup>4</sup> But if nothing appears to the contrary, the presumption attaches.<sup>5</sup> Where a mortgagee obtains a decree of foreclosure, the presumption of payment arising from lapse of time is the same as though there had been no foreclosure.<sup>6</sup> Where one whose duty it is to pay a mortgage pays it, and takes what in form purports to be an assignment, it will, nevertheless, be treated as a release, when the rights of third parties are involved.<sup>7</sup> If the mortgagee purchase the premises on foreclosure for a sum equal to the mortgage note, he thereby satisfies the note, and cannot rescind the sale, and maintain an action on the note.<sup>8</sup>

<sup>1</sup> Shields v. Lozeau, 34 N. J. L. 496; 3 Am. Rep. 256; Hartley v. Tutham, 29 How. Pr. 158; Johnson v. Sherman, 15 Cal. 287; 76 Am. Dec. 481; Griffin v. Lovell, 42 Miss. 402; Le Beau v. Glaze, 8 La. Ann. 474; Jackson v. Stackhouse, 1 Cow. 122; 13 Am. Dec. 514; Smith v. Stanley, 37 Me. 11; 58 Am. Dec. 771; Charter v. Stevens, 3 Denio, 33; 45 Am. Dec. 444; McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655.

<sup>2</sup> Frost v. Yonkers Savings Bank, 70 N. Y. 553; 26 Am. Rep. 627; Farmers' etc. Ins. Co. v. Edwards, 26 Wend. 541; Kortright v. Cady, 21 N. Y. 343; 78 Am. Dec. 145; Hordie v. Volkening, 49 How. Pr. 160; Potts v. Plaisted, 30 Mich. 149; Thornton v. National Exchange Bank, 71 Mo. 221.

<sup>3</sup> Robinson v. Sampson, 23 Me. 388; Middlesex v. Thomas, 20 N. J. Eq.

117; Viele v. Judson, 82 N. Y. 32; Roagan v. Hadley, 57 Ind. 509; Kinnear v. Lowell, 34 Ma. 303; Cobb v. Dyer, 69 Me. 494; Willcox v. Foster, 132 Mass. 320; Stimpson v. Pease, 53 Iowa, 572; Haggerty v. McCanna, 25 N. J. Eq. 48; Brown v. Henry, 106 Pa. St. 262; Burke v. Snell, 42 Ark. 57; Poore v. Price, 5 Leigh, 52; 26 Am. Dec. 582, and note; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; 49 Am. Dec. 189.

<sup>4</sup> Delano v. Smith, 142 Mass. 490.

<sup>5</sup> Wilson v. Albert, 89 Mo. 537; Jackson v. Wood, 12 Johns. 242; 7 Am. Dec. 315; Swart v. Service, 21 Wend. 36; 34 Am. Dec. 211.

<sup>6</sup> Barnard v. Onderdonk, 98 N. Y. 158.

<sup>7</sup> Clay v. Banks, 71 Ga. 363.

<sup>8</sup> Hood v. Adams, 124 Mass. 481; 26 Am. Rep. 687.

ILLUSTRATIONS.—A mortgaged property to B, his father, to secure him for advances and liabilities. B died, having devised his whole estate, giving nothing to A, because he had advanced for his benefit considerable sums. *Held*, in the absence of proof of other advances which could have been intended by the will, that they must be presumed to be the same for which the mortgages were made, and that the liability of A for those advances was thereby extinguished: *Waller v. Todd*, 3 Dana, 503; 28 Am. Dec. 94. A exchanged land with B. B's land was subject to a mortgage, which A assumed. A was induced to deliver personalty to B by the mortgagee's promise to release the mortgage. *Held*, that the mortgage in equity was satisfied: *Burke v. Grant*, 116 Ill. 124. A mortgaged the homestead. His widow paid the mortgage with the proceeds of the growing crops, and took an assignment of it to herself. *Held*, that she could not foreclose it against A's heirs and distributees: *Skinner v. Chapman*, 78 Ala. 376. A testator, a mortgagee, gave to the mortgagor his bond and mortgage, provided that the testator's wife should consent thereto, and authorized and directed the executor to cancel and satisfy it. *Held*, that on the wife's consent, the mortgage was discharged *ipso facto*, without a formal satisfaction by the executor: *Weeks v. Ostrander*, 52 N. Y. Sup. Ct. 512. A mortgagee parted with the possession of a mortgage after having written his name on the back and affixed a seal. A fraudulent entry of satisfaction was written above his name without his consent, and without his having received the money. *Held*, that he, and not an innocent purchaser misled thereby, must bear the loss: *Charleston City Council v. Ryan*, 22 S. C. 339; 53 Am. Rep. 713.

§ 3055. **What does not.**—Tender after condition broken does not, at common law, operate to discharge the lien of the mortgage.<sup>1</sup> The renewal of the note, or its merger into a judgment, or any other change in the condition or nature of the debt not intended to operate as a discharge of the lien, does not so operate, the rule being that so long as the debt exists in any form the mortgage remains to secure it.<sup>2</sup> But where the mortgagee accepts

<sup>1</sup> *Storey v. Krewson*, 55 Ind. 397; 23 Am. Rep. 668; *Rowell v. Mitchell*, 68 Me. 21; *Himmelman v. Fitzpatrick*, 50 Cal. 650.

<sup>2</sup> *Bunker v. Barron*, 79 Me. 62; 1 Am. St. Rep. 282; *Jewett v. Hamlin*, 68 Me. 172; *Torrey v. Cook*, 116 Mass. 163; *Flower v. Elwood*, 66 Ill. 438; *Helmetag v. Frank*, 61 Ala. 67; *Christian v. Newberry*, 61 Mo. 446; *Oliphint v. Eckerley*, 36 Ark. 69; *Gleason v. Wright*, 53 Miss. 247; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Heiveley v. Matteson*, 54 Iowa, 505;

an entirely new note in substitution for the old one, and in payment of it, a mortgage given to secure the old note is discharged.<sup>1</sup> And where the new note is only a renewal of the old one, including an additional sum loaned, no satisfaction or discharge of the mortgage takes place, unless it clearly appears that such was the intention of the parties;<sup>2</sup> and unless the creditor expressly so accepts it, the taking of a second security of equal degree with the first will not discharge the mortgage;<sup>3</sup> and if the mortgagee indorse the note over to a third person, giving him a mortgage to secure it, the land will not be released from the mortgage by the mere failure of the mortgagee to charge the indorser.<sup>4</sup> So where the holder of a first recorded mortgage released his mortgage, and took a new one in ignorance of the existence of a second recorded encumbrance, he was held entitled to have the mortgage restored and given the original priority.<sup>5</sup> And although the mortgage be formally discharged, the payment of the debt may operate as a discharge or an assignment, as will best attain the ends of justice.<sup>6</sup> So where the grantee of land subject to a mortgage pays it to the original mortgagee, who has in fact assigned and transferred the mortgage and bond, and does not produce them on receiving payment, the land still continues subject to the mortgage, notwithstanding the execution of a discharge by the original mortgagee.<sup>7</sup> But even where the assignment has

Mayer v. Grottendick, 68 Ind. 1; Dec. 771; Port v. Robbins, 35 Iowa, 465.

Vick v. Smith, 83 N. C. 80; Swain v. Frazier, 35 N. J. Eq. 326; Brown v. Dunckel, 40 Mich. 29; Nightingale v. Chaffee, 11 R. I. 609; 23 Am. Rep. 531; Bodkin v. Merit, 86 Ind. 560; Citizens' Bank v. Dayton, 116 Ill. 124.

<sup>1</sup> Meyer v. Lathrop, 73 N. Y. 315; Jaffray v. Crane, 50 Wis. 349; Ellsworth v. Mitchell, 31 Me. 247; Hardin v. Branner, 25 Iowa, 364; Iowa County v. Foster, 49 Iowa, 676; Seymour v. Mackay, 21 Ill. App. 449.

<sup>2</sup> Ellsworth v. Mitchell, 31 Me. 247; Smith v. Stanley, 37 Me. 11; 58 Am. Rep. 701.

<sup>3</sup> Gregory v. Thomas, 20 Wend. 17.

<sup>4</sup> Hilton v. Catherwood, 10 Ohio St. 109; Mitchell v. Clark, 35 Vt. 104.

<sup>5</sup> Shaver v. Williams, 87 Ill. 469; Stimpson v. Pease, 53 Iowa, 572; Bruce v. Nelson, 35 Iowa, 157; Young v. Shaner, 73 Iowa, 555; 5 Am. St. Rep. 701.

<sup>6</sup> Kinsley v. Davis, 74 Me. 498; Wheeler v. Willard, 44 Vt. 640.

<sup>7</sup> Windle v. Bonebrake, 23 Fed. Rep. 165; Roberts v. Halstead, 9 Pa. St. 32; 49 Am. Dec. 541.

been duly recorded, if the original mortgagee produces the note and mortgage, the mortgagor may be justified in paying him in good faith, and may have the mortgage declared satisfied as against the assignee.<sup>1</sup> The marginal entry of satisfaction in the record of a mortgage does not estop the mortgagee, as against a *bona fide* purchaser for value without notice, from showing that the entry was made by some unauthorized person by mistake on the wrong mortgage.<sup>2</sup> In an action at law, a mortgagor cannot maintain that the mortgage has been satisfied and discharged by the receipt of rents and profits by the mortgagee. The account must first be taken in a court of equity.<sup>3</sup>

ILLUSTRATIONS.—A and B owned a tract of land in common, and A owned another tract. They mortgaged all for A's accommodation. A sold the tract owned by him in severalty, and covenanted against encumbrances. C purchased A's interest in the tract held in common, and paid the mortgage, not knowing that it had been given by B for A's accommodation. *Held*, that the mortgage was not extinguished by the payment: *Kennelly v. Kelly*, 51 Conn. 329. Husband and wife conveyed her land in mortgage in fee; the husband afterwards granted and released the same premises to the mortgagee, who retained the mortgage in his hands, and, by indorsement thereon, covenanted and agreed not to bring any action against the husband or his representatives for the amount due on the mortgage, and declaring that the mortgage was kept on foot merely to protect the title of the mortgagee in the premises. *Held*, that the covenant was no satisfaction of the mortgage, in law or equity: *Denn v. Wynkoop*, 8 Johns. 168. A mortgage running to "Josepha" A purported in the record to be canceled by "Joseph" A, and signed by "his" mark. *Held*, that the insufficiency of the discharge was patent: *Cerney v. Pawlot*, 66 Wis. 262. A, being unable to pay a mortgage note due B, arranged with C to advance the money and take up the note. C paid to B a part, and told him that a certain bank would give him the rest. B thereupon gave up the note to C, uncanceled, and indorsed in blank, and C got the rest of the money from the bank to which C had taken the note. In a few days C repaid the bank its advance, and took the note. *Held*, that the note was not paid, but transferred only: *Carter v. Burr*, 113 U. S. 737.

<sup>1</sup> *Pettus v. McGowan*, 37 Hun, 409.

<sup>2</sup> *Brown v. Henry*, 106 Pa. St. 262.

<sup>3</sup> *Farris v. Houston*, 78 Ala. 250.

§ 3056. **Who may Give.**—Where there are several joint mortgagees, they may be regarded as one person so far as the mortgagor is concerned, and he may deal with each one as representing all, and each may receive payment and effectually discharge the mortgage.<sup>1</sup> And in the event of the death of any of the mortgagees, the survivors have the exclusive right to receive payment of and discharge the mortgage.<sup>2</sup> But if the mortgage be given to secure several demands, and it is so expressed in the deed, all the mortgagees should join in receiving payment and giving a discharge, and the personal representatives of a deceased mortgagee should join with the survivors.<sup>3</sup> One of two or more executors or administrators can receive and lawfully discharge a mortgage taken by themselves jointly to secure a debt belonging to testator's estate, and that, whether the non-joining executors or administrators are dead or alive.<sup>4</sup> Also, the assignee of a mortgage may receive payment, and give a valid discharge.<sup>5</sup> The execution of the discharge of a recorded mortgage by a person other than the mortgagee casts upon the person making the payment the duty of inquiring into the power and right of such person to give the discharge.<sup>6</sup> So long as an attorney or agent employed to make a loan retains possession of the bond, note, or mortgage, he is empowered to receive payment of them; but when he parts with such possession, he also parts with the authority to receive payment.<sup>7</sup> A receiver empow-

<sup>1</sup> *People v. Keyser*, 28 N. Y. 235; 84 Am. Dec. 338; *Goodwin v. Richardson*, 11 Mass. 409.

<sup>2</sup> *Gilson v. Gilson*, 2 Allen, 115; *People v. Keyser*, 28 N. Y. 235; 84 Am. Dec. 338.

<sup>3</sup> *Burnett v. Pratt*, 22 Pick. 556.

<sup>4</sup> *Douglass v. Satterlee*, 11 Johns. 16; *Wheeler v. Wheeler*, 9 Cow. 34; *People v. Miner*, 37 Barb. 466; *Woodruff v. Mutschler*, 34 N. J. Eq. 33; *Storey v. Kemp*, 51 Ga. 399; *Weir v. Mosher*, 19 Wis. 311; *Dayton v. Dayton*, 7 Ill. App. 136.

<sup>5</sup> *Burhans v. Hutcheson*, 25 Kan. 625; 37 Am. Rep. 274; *Seitz v. Durning*, 8 Mo. App. 208; *Emery v. Gordon*, 33 N. J. Eq. 447.

<sup>6</sup> *Swarthout v. Curtis*, 5 N. Y. 301; 55 Am. Dec. 345; *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826.

<sup>7</sup> *Van Keuren v. Corkins*, 66 N. Y. 77; *Cox v. Cutter*, 28 N. J. Eq. 13; *Hatfield v. Reynolds*, 34 Barb. 612; *Tooker v. Sloan*, 30 N. J. Eq. 394; *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157.

ered by the court to discharge a mortgage is authorized to receive payment and satisfy the mortgage, even before it becomes due.<sup>1</sup>

**§ 3057. When Satisfied Mortgage may be Revived.—**

After payment or performance of condition, the mortgage is *functus officio* and inoperative, and it cannot be held as security for any other debt contrary to the will of the mortgagor.<sup>2</sup> But where the mortgagor and mortgagee desire to keep the mortgage alive as security for other purposes, the courts will sometimes allow it to be done, where the arrangement does not conflict with the rights of other persons.<sup>3</sup> Whether a mortgage once paid can be revived by a mere verbal agreement of the parties is doubtful.<sup>4</sup> As the transaction amounts in substance to the making of a new mortgage, it would seem as though the same formalities were requisite as to constitute the mortgage in the first instance.<sup>5</sup> After a mortgage given by partners to secure a partnership debt has been paid, it cannot be revived as security for the private debt of one of the partners to one of the mortgagees.<sup>6</sup> Nor can a mortgage upon a homestead be revived by the husband alone, where the statute requires the concurrence of the wife in the alienation of the homestead.<sup>7</sup> The main difficulty in the revival or continuance of a mortgage after it has been satisfied generally arises with respect to the rights of intervening persons who would thereby be prejudicially affected; for where a prior encumbrance has been discharged, a subsequent encum-

<sup>1</sup> Heermans v. Clarkson, 64 N. Y. 171.

<sup>2</sup> York Co. Sav. Bank v. Roberts, 70 Me. 384; Mead v. York, 6 N. Y. 449; 57 Am. Dec. 467; Perkins v. Sterne, 23 Tex. 561; 76 Am. Dec. 72; Fewell v. v. Kessler, 30 Ind. 195; Doll v. Rizotti, 20 La. Ann. 263; 96 Am. Dec. 399.

<sup>3</sup> Spencer v. Fredendall, 15 Wis. 666; Darst v. Gale, 83 Ill. 136; Warner v. Blakeman, 36 Barb. 501; Carlton v. Jackson, 121 Mass. 592; McGiven v.

Wheelock, 7 Barb. 22; McClure v. Andrews, 68 Ind. 97; Bowman v. Manter, 33 N. H. 530; 66 Am. Dec. 743.

<sup>4</sup> Johnson v. Anderson, 30 Ark. 745; Walker v. Snediker, Hoff. Ch. 145.

<sup>5</sup> Peckham v. Haddock, 36 Ill. 38; Spencer v. Fredendall, 15 Wis. 666.

<sup>6</sup> McClure v. Andrews, 68 Ind. 97; Thomas's Appeal, 30 Pa. St. 378.

<sup>7</sup> Spencer v. Fredendall, 15 Wis. 666.

brancer is entitled to avail himself of the benefit, and to repel any attempt to introduce new equities prior to his own.<sup>1</sup> In these cases, the question is, whether the original debt has been discharged; and if it has, the original mortgage cannot be dealt with as a subsisting security as against third persons.<sup>2</sup>

§ 3058. **Form of Discharge.**—It is not necessary to state that the money has been paid; a statement that "this mortgage is fully and completely satisfied" is sufficient; but no precise form of words is required, and as long as the language used shows that the mortgage has been paid and discharged, or otherwise satisfied, it will suffice,<sup>3</sup> except, of course, where any statutory form has been provided. This has been done in many of the states, whose laws provide for the discharge of a mortgage by an entry upon the margin of the record of the mortgage, or by the execution and recording of what is known as a "satisfaction piece."<sup>4</sup> But these statutes do not prohibit the use of other forms, and a writing on the back of the deed itself, or a reconveyance by a separate deed, will be effectual in those states where the statutes obtain.<sup>5</sup> Where it is desired to release a part only of the land, it is usual to take a quitclaim deed of that part from the mortgagee, but such a deed is effectual to release the whole of the premises,<sup>6</sup> except where the mortgagee has acquired an independent title by assignment to himself of a subsequent mortgage or otherwise, in which case a quitclaim deed will pass only the title he obtained under the original

<sup>1</sup> Jones v. Brogan, 29 N. J. Eq. 139; Purser v. Anderson, 4 Edw. Ch. 17; Lasselle v. Barnett, 1 Blackf. 150; 12 Am. Dec. 217.

<sup>2</sup> Hodgman v. Hitchcock, 15 Vt. 374.

<sup>3</sup> Richards v. McPherson, 74 Ind. 168; Jordan v. Mann, 57 Ala. 595; Waters v. Waters, 20 Iowa, 363; 89 Am. Dec. 540.

<sup>4</sup> Mass. Gen. Stats., c. 89 secs. 30,

31; Cal. Civ. Code, secs. 2938, 2941; Iowa Rev. Code, sec. 3327; Mo. Rev. Code, p. 410; Valle v. American Iron Mountain Co., 27 Mo. 455; Me. Stats. 1821, c. 39, sec. 1.

<sup>5</sup> Allard v. Lane, 18 Me. 9; Waters v. Waters, 20 Iowa, 363; 89 Am. Dec. 540; Green v. Butler, 26 Cal. 595.

<sup>6</sup> Mason v. Beach, 55 Wis. 607; Mabbie v. Hatinger, 48 Mich. 341; Bacon v. Van Schoonhoven, 19 Hun, 158.

mortgage.<sup>1</sup> A parol release is sufficient, it seems, to discharge the lien of a mortgage in those states where no estate passes by the mortgage, but a lien only is created.<sup>2</sup> In equity a receipt in full is sufficient to constitute a release.<sup>3</sup> It is always to a large extent a question of intention in doubtful cases as to whether the instrument the parties may have signed, or the language they may have used, operates as a release, and this is especially so when the question is whether a bond and mortgage were intended to be included in a general release of all claims and demands whatsoever.<sup>4</sup> Where the insufficiency of the discharge is patent, it imposes no duty of diligence on the mortgagee to have the record of discharge canceled or avoided.<sup>5</sup>

§ 3059. **Penalty for not Discharging Mortgage.** — The neglect or refusal to discharge a mortgage generally renders the mortgagee liable to a penalty in those states having statutes providing for the discharge of mortgages.<sup>6</sup> In an action to recover the penalty, the jury should consider whether the refusal to satisfy the mortgage was the result of an honest doubt, or arose out of mere maliciousness.<sup>7</sup> As respects the enforcement of the penalty, however, it is immaterial whether payment was received voluntarily, or compelled by legal process.<sup>8</sup> And if the failure to discharge the mortgage arose out of mere inadvertence,

<sup>1</sup> *Barnstable Savings Bank v. Barrett*, 122 Mass. 172.

<sup>2</sup> *Howard v. Gresham*, 27 Ga. 347; *Headley v. Goundry*, 41 Barb. 279; *Wallis v. Long*, 16 Ala. 738.

<sup>3</sup> *Marriott v. Handy*, 8 Gill, 31; *Smith v. Durell*, 16 N. H. 344; 41 Am. Dec. 732.

<sup>4</sup> *McIntyre v. Williamson*, 1 Edw. Ch. 34; *Van Bokkelen v. Taylor*, 62 N. Y. 105; *Lacey v. Tomlinson*, 5 Day, 77.

<sup>5</sup> *Cerney v. Pawlot*, 66 Wis. 262.

<sup>6</sup> *Iowa Rev. Stats.*, sec. 3670; *Wis. Rev. Stats.*, c. 59, sec. 39; *Minn. Comp. Stats.*, c. 35, sec. 39; *Mo. Rev. Code*,

1845; *Cal. Civ. Code*, sec. 2941; *Ala. Code* 1876, secs. 2222, 2223; *Mich. Stats.*, sec. 5704; *Deeter v. Crossley*, 26 Iowa, 180; *Galloway v. Litchfield*, 8 Minn. 188; *Phelps v. Relfe*, 20 Mo. 479; *Stone v. Lannon*, 6 Wis. 497; *Collier v. Harrison*, 28 Mich. 518; *Harris v. Swanson*, 67 Ala. 486; *Eaton v. Copeland*, 17 Wis. 218; *Beach v. Cooke*, 28 N. Y. 508; 86 Am. Dec. 260; *Lewis v. Conover*, 21 N. J. Eq. 230; *Scott v. Field*, 75 Ala. 419; *Jarratt v. McCabe*, 75 Ala. 325; *Wilber v. Peirce*, 56 Mich. 169.

<sup>7</sup> *Haubert v. Haworth*, 9 Phila. 123.

<sup>8</sup> *Verges v. Giboney*, 47 Mo. 171.

inattention, or indifference, the penalty is nevertheless incurred.<sup>1</sup> But where the refusal is in good faith, and in reliance upon supposed legal rights, the penalty will not be imposed.<sup>2</sup> He who is authorized to give a legal discharge for the mortgage is the only proper party to be sued.<sup>3</sup> Where a partnership is the mortgagee, notice to one of its members is sufficient to render them all jointly liable for the penalty.<sup>4</sup> But where, under the statute of Missouri, a mortgagee, for indemnity, purchased at sheriff's sale the equity of redemption, and paid the debt he was bound as surety to pay, he was held not to be liable for the penalty on refusal to acknowledge satisfaction of the mortgage.<sup>5</sup>

ILLUSTRATIONS. — In an action for the cancellation of a mortgage, and for the damages provided by the statute of Minnesota for a refusal by a mortgagee, or his assigns, to discharge a mortgage the conditions of which have been fully performed, the mortgagee, his assignee, and another person were joined as defendants, and a general verdict was rendered against all, assessing the statutory damages. *Held*, on appeal, that the verdict was valid against the assignee only, as the party in whose power it was to legally discharge the mortgage: *Galloway v. Litchfield*, 8 Minn. 188. A statute of Missouri enacts that if a mortgagee, having received satisfaction of the mortgage, refuses, on request of the mortgagor, to acknowledge satisfaction thereof on the record, he shall be subject to a penalty. A mortgagee for indemnity purchased at a sheriff's sale the equity of redemption in the land mortgaged to him, and paid the debt he was bound as surety to pay. Having refused on request to acknowledge satisfaction of the mortgage on the record, the mortgagor instituted a suit for the penalty. *Held*, that he was not entitled to recover: *Phelps v. Relfe*, 20 Mo. 479.

<sup>1</sup> *Renfro v. Adams*, 62 Ala. 302.

<sup>2</sup> *Parkes v. Parker*, 57 Mich. 57.

<sup>3</sup> *Ewing v. Shelton*, 24 Mo. 518;  
*Galloway v. Litchfield*, 8 Minn. 188.

<sup>4</sup> *Renfro v. Adams*, 62 Ala. 302.

<sup>5</sup> *Phelps v. Relfe*, 20 Mo. 479.

## CHAPTER CXLVI.

## REDEMPTION.

- § 3060. Who has right of.
- § 3061. When it may be exercised.
- § 3062. Proviso must be complied with.
- § 3063. Against mortgagee in possession.
- § 3064. Improvements and repairs.
- § 3065. Expenses of management.

§ 3060. **Who has Right of.**—The mortgagor and any other person who has any lien on or interest in the land has, as a rule, the right to redeem, provided his claim is in privity of estate with the mortgagor.<sup>1</sup> So it has been held that any of the following persons may exercise the right, viz.: A tenant for years;<sup>2</sup> a tenant in dower;<sup>3</sup> a tenant by the curtesy;<sup>4</sup> a jointress;<sup>5</sup> a junior mortgagee;<sup>6</sup> a judgment creditor;<sup>7</sup> an attaching creditor of the mortgagor;<sup>8</sup> a judgment creditor of an heir of an intestate mortgagor;<sup>9</sup> a married woman who has relinquished her dower;<sup>10</sup> a person having only an easement in the land;<sup>11</sup>

<sup>1</sup> *Moore v. Beason*, 44 N. H. 215; *Lyon v. Robbins*, 45 Conn. 513; *Morse v. Smith*, 83 Ill. 396; *Dings v. Parshall*, 7 Hun, 522; *Gatewood v. Gatewood*, 75 Va. 407; *Goodman v. White*, 26 Conn. 317; *Rice v. Nelson*, 27 Iowa, 148.

<sup>2</sup> *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Bacon v. Bowdoin*, 2 Met. 591.

<sup>3</sup> *Trenholm v. Wilson*, 43 S. C. 174; *Mills v. Van Voorhies*, 20 N. Y. 412; *Eaton v. Simonds*, 14 Pick. 98; *Rossiter v. Cossitt*, 15 N. H. 38; *McCabe v. Bellows*, 7 Gray, 148; 66 Am. Dec. 467; *Opdyke v. Bartles*, 11 N. J. Eq. 133.

<sup>4</sup> *Lamson v. Drake*, 105 Mass. 564; *Davis v. Wetherell*, 13 Allen, 60; 90 Am. Dec. 177.

<sup>5</sup> *Rice v. Puett*, 81 Ind. 230.

<sup>6</sup> *Smith v. Conner*, 65 Ala. 371; *Lee v. Stone*, 5 Gill & J. 1; 23 Am. Dec. 589; *Duke v. Beeson*, 79 Ind. 24; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; 26 Am. Rep. 627; *Rogers v. Her-*

*ron*, 92 Ill. 583; *Lamb v. Jeffrey*, 41 Mich. 719; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Frink v. Murphy*, 21 Cal. 108; 81 Am. Dec. 149; *Johnson v. Hosford*, 110 Ind. 572; *Sterling Mfg. Co. v. Early*, 69 Iowa, 94.

<sup>7</sup> *Schuck v. Gerlach*, 101 Ill. 338; *Lauriat v. Stratton*, 9 Saw. 339; *Bellden v. Slade*, 26 Hun, 635; *Burton v. Robinson*, 9 Baxt. 364; *Bartleson v. Thompson*, 30 Minn. 161; *Worthington v. Wilmot*, 59 Miss. 608.

<sup>8</sup> *Briggs v. Davis*, 108 Mass. 322; *Chandler v. Dyer*, 37 Vt. 345; *Bridgeport v. Blum*, 43 Conn. 274. But the contrary is held in Missouri: See *Fisher v. Tallman*, 74 Mo. 39.

<sup>9</sup> *Willis v. Jelineck*, 27 Minn. 18.

<sup>10</sup> *Davis v. Wetherell*, 13 Allen, 60; 90 Am. Dec. 177; *Lamb v. Montague*, 112 Mass. 352; *Gatewood v. Gatewood*, 75 Va. 407.

<sup>11</sup> *Bacon v. Bowdoin*, 2 Met. 591; 22 Pick. 401.

a purchaser of the equity of redemption;<sup>1</sup> an assignee of the mortgage when also a judgment creditor;<sup>2</sup> the heir at law, or devisee of the mortgagor;<sup>3</sup> the guardian of an infant heir;<sup>4</sup> a part owner, or tenant in common;<sup>5</sup> a tenant for life.<sup>6</sup> But no person can exercise this right unless he is entitled to the legal estate of the mortgagor, or claims a subsisting interest under it.<sup>7</sup> So one claiming merely under a contract of purchase from the mortgagor has no right to redeem;<sup>8</sup> nor has the mortgagor after he has conveyed the mortgaged premises by deed of warranty to a third person;<sup>9</sup> nor the holder of a tax title, where he is also trustee for a minor.<sup>10</sup>

§ 3061. **When it may be Exercised.**—Unless the mortgagee consent, he is not bound to accept redemption before the date stipulated in the mortgage, even though the debt, with interest up to the agreed date, and costs, be tendered to him;<sup>11</sup> though if no objection be taken to the prematurity of the bill, it will be regarded as waived, if the debt is due and owing when the case is heard on the merits.<sup>12</sup> If the proviso for redemption be expressed to be on or before a certain day, redemption may be made at any time, and the party cannot be compelled to wait and pay interest until the day named.<sup>13</sup> When foreclosure has been duly had, the right to redemption is barred upon the expiration of the time allowed by statute for its exercise.<sup>14</sup>

<sup>1</sup> *Rogers v. Meyers*, 68 Ill. 92; *White v. Bond*, 16 Mass. 400; *Scott v. Henry*, 13 Ark. 112; *Punderson v. Brown*, 1 Day, 93; 2 Am. Dec. 53; *Harms v. Palmer*, 73 Iowa, 446; 5 Am. St. Rep. 691.

<sup>2</sup> *Skinner v. Miller*, 5 Litt. 84.

<sup>3</sup> *Zugel v. Kuster*, 51 Wis. 31; *Pym v. Bowerman*, 3 Swanst. 241, note; *Hunter v. Dennis*, 112 Ill. 568.

<sup>4</sup> *Pardee v. Van Anken*, 3 Barb. 534.

<sup>5</sup> *Taylor v. Porter*, 7 Mass. 355; *Merritt v. Hosmer*, 11 Gray, 276; 71 Am. Dec. 713; *Lyon v. Robbins*, 45 Conn. 513; *Norton v. Tharp*, 53 Mich. 146.

<sup>6</sup> *Lamson v. Drake*, 105 Mass. 564.

<sup>7</sup> *Rapier v. Gulf City Paper Co.*, 64

Ala. 330; *Scott v. Henry*, 13 Ark. 112; *Grant v. Duane*, 9 Johns. 612.

<sup>8</sup> *Rogers v. Rutter*, 11 Gray, 410; *Dukes v. Turner*, 44 Iowa, 575.

<sup>9</sup> *Phillips v. Leavitt*, 54 Me. 405.

<sup>10</sup> *Witt v. Mewhirter*, 57 Iowa, 545.

<sup>11</sup> *Moore v. Cord*, 14 Wis. 213; *Abbe v. Goodwin*, 7 Conn. 377.

<sup>12</sup> *Stinchfield v. Milliken*, 71 Me. 567.

<sup>13</sup> *Tucker v. White*, 2 Dev. & B. Eq. 289; *Matter of John and Cherry Streets*, 19 Wend. 659.

<sup>14</sup> *Mayer v. Farmers' Bank*, 44 Iowa, 212; *Seligman v. Laubheimer*, 58 Ill. 124; *Barley v. Flint*, 105 U. S. 247; *Bugbee v. Howard*, 32 Ala. 713; *Weiner v. Heints*, 17 Ill. 259.

But a contract between the parties extending the time of redemption beyond the period limited by statute will be enforced, and a redemption allowed within the time stipulated in the agreed extension;<sup>1</sup> though the rights of a subsequent encumbrancer cannot be prejudiced by any such arrangement;<sup>2</sup> and where there is no statute to the contrary, redemption may be had after foreclosure by one entitled to redeem, who was not a party to the foreclosure suit.<sup>3</sup> Under a mortgage with a power of sale, the mortgagor may, after breach of the condition, but before a sale without a previous tender, bring a bill to redeem the land, offering in it to pay what is due.<sup>4</sup>

§ 3062. **Proviso must be Complied with.** — The mortgagee's claim must be paid in full, or the condition of the mortgage, whatever it may be, must be fully performed, before the party is entitled to redemption.<sup>5</sup> But where the right of some only of the plaintiffs to redeem is barred, those not barred are entitled to redeem their share of land on payment of their proportion of the debt.<sup>6</sup> Not only must the principal, interest, and costs be paid, but insurance premiums and attorney's fees, if provided for in the mortgage, must be included in the offer to redeem.<sup>7</sup> And a purchaser of part of the equity of redemption cannot redeem that part by paying a due proportion of the mortgage debt, as the mortgagee is entitled to retain his lien on the whole of the premises until the whole of his claim is discharged.<sup>8</sup> Where the mortgagor

<sup>1</sup> *Chase v. McLellan*, 49 Me. 375; *Meacham v. Steele*, 93 Ill. 135; *Lyon Davis v. Dresback*, 81 Ill. 393; *Pensoneau v. Pulliam*, 47 Ill. 58.

<sup>2</sup> *Sager v. Tupper*, 35 Mich. 134.

<sup>3</sup> *Gower v. Winchester*, 33 Iowa, 303; *Mayer v. Farmers' Bank*, 44 Iowa, 212; *Miner v. Beekman*, 50 N. Y. 337; *Pratt v. Frear*, 13 Wis. 462; *Wiley v. Ewing*, 47 Ala. 418; *Anson v. Anson*, 20 Iowa, 55; 89 Am. Dec. 514; *Evans v. Pike*, 118 U. S. 241.

<sup>4</sup> *Way v. Mullett*, 143 Mass. 49.

<sup>5</sup> *Ryer v. Gass*, 130 Mass. 227;

*Rowell v. Jewett*, 73 Me. 365; *Bradley v. George*, 2 Allen, 392.

<sup>7</sup> *Harper v. Ely*, 70 Ill. 581; *Hosford v. Johnson*, 74 Ind. 479; *Montague v. R. R. Co.*, 124 Mass. 242.

<sup>8</sup> *Eiseman v. Finch*, 79 Ind. 511; *Meacham v. Steele*, 93 Ill. 135; *Rowell v. Jewett*, 73 Me. 365; *Merritt v. Hosmer*, 11 Gray, 276; 71 Am. Dec. 713.

brings his bill to redeem, the mortgagee is entitled to be paid all sums he may have advanced for the purpose of satisfying a prior encumbrance.<sup>1</sup> And after the property has been sold under foreclosure, any person claiming to exercise the right to redeem must pay not only the amount of the sale, but the whole amount of the mortgage debt.<sup>2</sup> And a junior mortgagee seeking to redeem a prior mortgage must redeem it entirely.<sup>3</sup> The mortgagor must also pay all further advances which may have been made to him, with interest, and all assessments for public improvements and taxes paid by the mortgagee are chargeable against one claiming to redeem.<sup>4</sup>

**§ 3063. Against Mortgagee in Possession.**—When the mortgagee has taken possession of the premises, and gone into receipt of the rents and profits thereof, he is liable to account for them in equity,<sup>5</sup> and upon redemption must apply them in or towards satisfaction of the principal and interest owing on the mortgage, after deducting the amount of all necessary and proper allowances made by him in the management of the property.<sup>6</sup> The mortgagee's liability thus to account arises from the equitable rule of considering him as occupying the position of trustee towards the mortgagor or other person interested in the equity of redemption, and that the rents and profits constitute a trust fund applicable to the payment of

<sup>1</sup> *Moshier v. Norton*, 83 Ill. 519; *Kortright v. Cady*, 23 Barb. 490; 78 Am. Dec. 145.

*Redmond v. Burroughs*, 63 N. C. 242; *Grigg v. Banks*, 59 Ala. 311; *McCormick v. Knox*, 105 U. S. 122; *Hubbell v. Moulson*, 53 N. Y. 225; *Sidenberd v. Ely*, 90 N. Y. 257; 43 Am. Rep. 163; *13 Am. Rep. 519*; *Seaver v. Durant*, 39 Vt. 103; *Toomer v. Randolph*, 60 Ala. 356; *Harrison v. Wyse*, 24 Conn. 1; 63 Am. Dec. 151.

<sup>2</sup> *Raynor v. Selmes*, 52 N. Y. 579; *Iowa County v. Beeson*, 55 Iowa, 262; *Robinson v. Ryan*, 25 N. Y. 320; *Martin v. Fridley*, 23 Minn. 13.

<sup>3</sup> *Knowles v. Rablin*, 20 Iowa, 101; *Smith v. Conner*, 65 Ala. 371.

<sup>4</sup> *Ogle v. Ship*, 1 A. K. Marsh. 287; *McCormick v. Knox*, 105 U. S. 122; *Strong v. Burdick*, 52 Iowa, 630;

<sup>5</sup> *Wood v. Whelen*, 93 Ill. 153; *Dawson v. Drake*, 30 N. J. Eq. 601; *Haskins v. Hawkes*, 108 Mass. 379; *Milliken v. Bailey*, 61 Me. 316; *Chapman v. Porter*, 69 N. Y. 276; *Watford v. Oates*, 57 Ala. 290; *Caldwell v. Hall*, 49 Ark. 508; 4 Am. St. Rep. 64.

the mortgage debt.<sup>1</sup> And the amount payable on redemption is the balance remaining unpaid after crediting the net proceeds of the rents and profits against the amount of the principal, interest, and costs due on the mortgage.<sup>2</sup> Possession before the law day renders the mortgagee equally liable to account as possession after that day.<sup>3</sup> And an equitable mortgagee must account the same as the holder of a legal mortgage.<sup>4</sup> The mortgagee is liable to account for fair and reasonable rents and profits from the time of his actually taking possession,<sup>5</sup> and which include not only such rents and profits as he may have actually collected, but also such as he might have collected but for his own fraud, default, or gross negligence.<sup>6</sup> A mortgagee in possession is regarded as owner, and as such is accountable for the profits which a reasonably provident and prudent owner would have made.<sup>7</sup> The value of the property when the mortgagee took possession, and not the increased value arising from improvements made by him, is the basis upon which the rents are to be estimated.<sup>8</sup> Damage done to the property by a tenant without the knowledge of the mortgagee, and provided the tenant was one to whom the estate might properly be leased, is not chargeable against the mortgagee; nor is he liable for wood cut and used on the premises for firewood and repairs by such tenant.<sup>9</sup> Unless the property be an insufficient security, the mortgagee is not entitled to open and work mines or cut timber, and if he does so,

<sup>1</sup> *Hunt v. Maynard*, 6 Pick. 489; 62 Me. 574; *Sanders v. Wilson*, 34 Vt. 318; *Daniel v. Coker*, 70 Ala. 260.  
<sup>2</sup> *Dozier v. Mitchell*, 65 Ala. 511;  
<sup>3</sup> *Greer v. Turner*, 36 Ark. 17; *Worthington v. Wilmot*, 59 Miss. 608;  
<sup>4</sup> *Mosier v. Norton*, 83 Ill. 519; *Dawson v. Drake*, 30 N. J. Eq. 601.  
<sup>5</sup> *Shaeffer v. Chambers*, 6 N. J. Eq. 548; 47 Am. Dec. 211; *Montague v. R. R. Co.*, 124 Mass. 242; *Clark v. Finlon*, 90 Ill. 245.  
<sup>6</sup> *Dozier v. Mitchell*, 65 Ala. 511;  
<sup>7</sup> *Raynor v. Raynor*, 21 Hun, 36.  
<sup>8</sup> *Hubbard v. Shaw*, 12 Allen, 120;  
<sup>9</sup> *Onderdonk v. Gray*, 19 N. J. Eq. 68.

<sup>1</sup> *Hunt v. Maynard*, 6 Pick. 489; *Bell v. Mayor etc.*, 10 Paige, 40; *Downs v. Hopkins*, 65 Ala. 508; *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519.  
<sup>2</sup> *Moshier v. Norton*, 100 Ill. 63; *Harrison v. Wyse*, 24 Conn. 1; 63 Am. Dec. 151; *McConnel v. Holobuah*, 11 Ill. 61; *Walton v. Withington*, 9 Mo. 545.  
<sup>3</sup> *Ross v. Boardman*, 22 Hun, 527; *Davis v. Lassiter*, 20 Ala. 561.  
<sup>4</sup> *Brayton v. Jones*, 5 Wis. 117.  
<sup>5</sup> *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183; *Dela v. Stanwood*,

<sup>6</sup> *Ross v. Boardman*, 22 Hun, 527; *Davis v. Lassiter*, 20 Ala. 561.  
<sup>7</sup> *Brayton v. Jones*, 5 Wis. 117.  
<sup>8</sup> *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183; *Dela v. Stanwood*,

<sup>9</sup> *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183; *Dela v. Stanwood*,

he will be chargeable with the gross receipts, and allowed nothing for expenses.<sup>1</sup> But he is not bound to engage in speculation or adventure for the benefit of the mortgagor, or to spend more than a prudent owner would do under the circumstances. And where he personally occupies the premises, or any portion of them, he is chargeable with a fair rent for so much as he occupies.<sup>2</sup> A mortgagor is entitled to all rents and profits accruing after tender of redemption.<sup>3</sup>

§ 3064. **Improvements and Repairs.**—A mortgagee in possession is bound to keep the property in proper repair, and is liable for any neglect of his duty in this respect, without regard to the motives of his conduct.<sup>4</sup> For the cost of all necessary and proper repairs he will be allowed in his accounts, although such cost may exceed the amount of the income from the property;<sup>5</sup> but for merely ornamental or costly and permanent improvements the mortgagee will not be allowed, unless the expenditure was incurred with the consent of the mortgagor, or he otherwise acquiesced therein.<sup>6</sup> When the purchaser under the foreclosure of a senior mortgage makes permanent improvements in good faith, with the consent, express or implied, of a junior encumbrancer, who was not a party to the foreclosure, the latter, on redeeming, must pay for the improvements.<sup>7</sup>

§ 3065. **Expenses of Management.**—When the mortgagee in possession manages the estate himself, he is not allowed to charge for his own time and trouble in the

<sup>1</sup> *Irwin v. Davidson*, 3 Ired. Eq. 311.

<sup>2</sup> *Sanders v. Wilson*, 34 Vt. 318.

<sup>3</sup> *Parmer v. Parmer*, 74 Ala. 285.

<sup>4</sup> *Cumber v. Gilman*, 15 Ill. 381; *Dozier v. Mitchell*, 65 Ala. 511; *Moshier v. Norton*, 100 Ill. 63; *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183.

<sup>5</sup> *Hosford v. Johnson*, 74 Ind. 479; *Adkins v. Lewis*, 5 Or. 292; *Harper's Appeal*, 64 Pa. St. 315; *Barthell v. Syverson*, 54 Iowa, 160; *Rowell v. Jewett*, 73 Me. 365.

<sup>6</sup> *Hidden v. Jordan*, 32 Cal. 397;

*Harper's Appeal*, 64 Pa. St. 315;

*Miner v. Beekman*, 50 N. Y. 337;

*McSorley v. Lavissa*, 100 Mass. 270;

*Hubbell v. Moulson*, 53 N. Y. 225; 13

Am. Rep. 519; *Troost v. Davis*, 31

Ind. 34; *Roberts v. Fleming*, 53 Ill.

196.

<sup>7</sup> *American Button Hole etc. Co. v.*

*Burlington Mutual Loan Association*,

68 Iowa, 326.

matter.<sup>1</sup> And this is so, notwithstanding that he may have agreed with the mortgagor to the contrary, when the rights of third parties would be affected;<sup>2</sup> but he may appoint an agent to collect the rents, and may be allowed in his accounts for the fees and commissions of such agent in so doing.<sup>3</sup> In Connecticut and Massachusetts, however, the rule appears to be different, and in those states it is held that the mortgagee in possession is entitled to compensation for his personal services in renting the premises and collecting the rents.<sup>4</sup> And in New York it is held that there is no fixed rule on the subject, but that it is a matter for the discretion of the court or referee trying the action.<sup>5</sup> As to disbursements generally, made by the mortgagee in possession, and necessary for the preservation and protection of the property, he is entitled to charge them against rents and profits, or against the proceeds of a sale, as may be necessary.<sup>6</sup> As to taxes, assessments, and similar liens, the rule is, that when the mortgagor refuses or neglects to pay them, the mortgagee is entitled to do so, and to be reimbursed on redemption.<sup>7</sup> When the mortgage provides for the property being insured by the mortgagor, and he neglects to do so, the mortgagee in possession is entitled to effect the insurance, and charge the amount against rents collected,<sup>8</sup> and the mortgagee's assignee has the same rights in these respects as the mortgagee himself.<sup>9</sup> In taking the account between the mortgagee and mortgagor, the rents and profits

<sup>1</sup> *Venderhaise v. Hugues*, 13 N. J. Eq. 410; *Eaton v. Simonds*, 14 Pick. 105; *Moore v. Cable*, 1 Johns. Ch. 388.

<sup>2</sup> *Elmer v. Loper*, 25 N. J. Eq. 482.

<sup>3</sup> *Hubbard v. Shaw*, 12 Allen, 120; *Harper v. Ely*, 70 Ill. 581.

<sup>4</sup> *Waterman v. Curtis*, 26 Conn. 241; *Montague v. R. R. Co.*, 124 Mass. 242; *Gerrish v. Black*, 104 Mass. 400; *Tucker v. Buffum*, 16 Pick. 46.

<sup>5</sup> *Green v. Lamb*, 24 Hun, 87.

<sup>6</sup> *Casenove v. Cutler*, 4 Met. 246; *Rowan v. Sharp's Rifle Mfg. Co.*, 29 Conn. 282; *Marshall v. Davies*, 78 N.

Y. 414; *Dozier v. Mitchell*, 65 Ala. 511.

<sup>7</sup> *Davis v. Bean*, 114 Mass. 360; *Sidenberg v. Ely*, 90 N. Y. 257; 43 Am. Rep. 163; *Harper v. Ely*, 70 Ill. 581; *Leland v. Collver*, 34 Mich. 418; *Allison v. Armstrong*, 28 Minn. 276; 41 Am. Rep. 281; *Matter of Bogart*, 28 Hun, 466; *Williams v. Townsend*, 31 N. Y. 414.

<sup>8</sup> *Carr v. Hodge*, 130 Mass. 55; *Hosford v. Johnson*, 74 Ind. 479; *Allen v. Watertown Ins. Co.*, 132 Mass. 480.

<sup>9</sup> *Montague v. R. R. Co.*, 124 Mass. 242.

should first be charged against the interest accruing for a like period as such rents and the balance in reduction of the principal.<sup>1</sup> If the rents exceed the interest, rests should be made, and interest allowed on the surplus.<sup>2</sup> Simple interest only will be allowed upon the debt, and the mortgagor in a redemption suit is not chargeable with compound interest, even though the note secured by the mortgage may in terms require it.<sup>3</sup> The rule as to rests is as follows: 1. State the gross rents received by mortgagee to the end of the period for making the rest; 2. State the sums paid by him for repairs, taxes, insurance, and a commission for collecting the rents during the same period, and the balance will show the net rents to the end of the year; 3. Compute the interest on the note for the period, add it to the principal, and the amount will show the sum due thereon at the end of the period; 4. If the net rent exceeds the interest on the note, deduct that rent from the total amount due, and the balance will show the amount due at the end of the period; 5. At the end of the second period, go through the same process, taking the amount due at the beginning of the period as the new capital to compute the interest upon; and so on up to the time of judgment.<sup>4</sup> The rate at which interest is to be charged up to the date of judgment is that which the parties have agreed on, but after judgment the legal rate is substituted for the rate contracted for.<sup>5</sup>

<sup>1</sup> *Blum v. Mitchell*, 59 Ala. 535; *Elmer v. Loper*, 25 N. J. Eq. 475; *Gladding v. Warner*, 36 Vt. 54.

<sup>2</sup> *Green v. Wescott*, 13 Wis. 606; *Reed v. Reed*, 10 Pick. 398; *Greer v. Turner*, 36 Ark. 17; *Moshier v. Norton*, 100 Ill. 63; *Shaaffer v. Chambers*, 6 N. J. Eq. 548; 47 Am. Dec. 211.

<sup>3</sup> *Parkhurst v. Cummings*, 56 Me. 155; *Reed v. Reed*, 10 Pick. 398.

<sup>4</sup> *Van Vronker v. Eastman*, 7 Met. 157; *Jencks v. Alexander*, 11 Paige, 625; *Snavely v. Pickle*, 20 Gratt. 27; *Staton v. Bryant*, 55 Miss. 261. See *ante*, Title Contracts, Interest.

<sup>5</sup> *Corcoran v. Doll*, 32 Cal. 82; *Cecil v. Hicks*, 39 Gratt. 1; 26 Am. Rep. 391; *Overton v. Bolton*, 9 Heisk. 762; 24 Am. Rep. 367; *Union Inst. v. Boston*, 129 Mass. 82; 37 Am. Rep. 305; *Shaw v. Rigby*, 84 Ind. 375; 43 Am. Rep. 96; *Monnett v. Sturges*, 25 Ohio St. 384; *Seymour v. Continental Ins. Co.*, 44 Conn. 300; 26 Am. Rep. 469; *Mobley v. Davega*, 16 S. C. 73; 42 Am. Rep. 632; *Duran v. Ayer*, 67 Me. 145; *Holden v. Trust Co.*, 100 U. S. 72; *Burnes v. Anderson*, 68 Ind. 202; 34 Am. Rep. 250; *Ritter v. Phillips*, 53 N. Y. 586; *Taylor v. Wing*, 84 N. Y. 471.

## CHAPTER CXLVII.

## FORECLOSURE.

- § 3066. In general.
- § 3067. When right arises.
- § 3068. By whom may be exercised.
- § 3069. Operation of decree.
- § 3070. Title passes by deed thereunder.
- § 3071. Delivery of possession to purchaser.
- § 3072. Right to pursue concurrent remedies.
- § 3073. Deficiency after sale.
- § 3074. Effect of mortgagor's bankruptcy.

§ 3066. **In General.**—Strict foreclosure is the shutting off or foreclosing of the rights of the mortgagor or other owner of the equity of redemption in the mortgaged estate, and by means whereof the mortgagee becomes absolutely entitled to the property both at law and in equity.<sup>1</sup> Its effect is to extinguish the right of redemption, and to vest the absolute title in the mortgagee without any sale, and without regard to the value of the property.<sup>2</sup> The doctrine is founded upon the principle that it is inequitable for the mortgagee to be compelled to remain forever liable to account or to be perpetually caring for and managing the property, subject always to the liability to hand it over to the mortgagor whenever he might think fit to come in and pay off the mortgage; but that the mortgagor should have a fair and reasonable time given him to discharge the debt, and failing his doing so, he should be deprived of his right to redeem or in any way to interfere with the mortgagee in his absolute enjoyment of the property.<sup>3</sup> This proceeding of strict foreclosure is still the

<sup>1</sup> *Ross v. Shurtleff*, 55 Vt. 177; *Bradley v. R. R. Co.*, 36 Pa. St. 149; *Schenck v. Conover*, 13 N. J. Eq. 220; 78 Am. Dec. 95. Strict foreclosure is not recognized in California: *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655.

<sup>2</sup> *Bolles v. Duff*, 43 N. Y. 474; *Johnson v. Donnell*, 15 Ill. 97.

<sup>3</sup> *Stoddard v. Forbes*, 13 Iowa, 296; *Johnson v. Donnell*, 15 Ill. 97; *Swift v. Edson*, 5 Conn. 531.

proper remedy in some cases; but in general it is to be adopted only where required by the interests of both parties.<sup>1</sup> The usual method of foreclosure is by a sale of the property at public auction under the decree made in the foreclosure suit, the purchase-money being applied in discharging the encumbrances, and the balance, if any, paid over to the mortgagor.<sup>2</sup> But the mode in which foreclosure is effected is so different both in principle and detail in the various states and territories of the Union that special reference to them would be beyond the limits of this chapter.<sup>3</sup> When the mode of foreclosure is prescribed by statute, the statute must be strictly followed, and an agreement to substitute any other mode will not be regarded.<sup>4</sup>

**§ 3067. When Right Arises.**—The right of foreclosure arises as soon as the condition of the defeasance is broken.<sup>5</sup> Such a breach occurs when the note is made payable by installments, and default is made in payment of an installment;<sup>6</sup> and if the mortgage is to secure several notes payable at different dates, a failure to pay any note as it becomes due will entitle the mortgagee to foreclose, if the condition provides that the mortgage shall be null and void on the punctual payment of all the notes as they be-

<sup>1</sup> *Stephens v. Bichnell*, 27 Ill. 444; 81 Am. Dec. 242; *Ross v. Boardman*, 22 Hun, 527; *Bean v. Whitcomb*, 13 Wis. 431; *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540; *Boyer v. Boyer*, 89 Ill. 447; *Shaw v. Heisey*, 48 Iowa, 468; *Bresnahan v. Bresnahan*, 46 Wis. 385; *O'Fallon v. Clopton*, 89 Mo. 284; *Griesbaum v. Baum*, 18 Ill. App. 614.

<sup>2</sup> *Langdon v. R. R. Co.*, 54 Vt. 613; *Lansing v. Goelet*, 9 Cow. 352; *Higgins v. West*, 5 Ohio, 554; *Wilder v. Haughey*, 21 Minn. 101; *Kyger v. Ruby*, 2 Neb. 20; *Beloe v. Rogers*, 9 Cal. 123; *Dubose v. Dubose*, 7 Ala. 235; 42 Am. Dec. 588.

<sup>3</sup> The subject is fully treated in 2 *Jones on Mortgages*, 3d ed., secs. 1317-1366.

<sup>4</sup> *Buckner v. Sessions*, 27 Ark. 225; *Monadnock R. R. Co. v. Felt*, 52 N. H. 387; *Holmes v. Taylor*, 48 Ind. 169; *Champanois v. Fort*, 45 Miss. 355; *Reading v. Waterman*, 46 Mich. 107; *Martin v. Somerville Water Power Co.*, 27 How. Pr. 161; *McQuat v. Cathcart*, 84 Ind. 567; *Chase v. McLellan*, 49 Me. 375.

<sup>5</sup> *Richards v. Holmes*, 18 How. 143; *West Branch Bank v. Chester*, 11 Pa. St. 282; 51 Am. Dec. 547; *Pomeroy v. Winship*, 12 Mass. 513; 7 Am. Dec. 91.

<sup>6</sup> *Adams v. Essex*, 1 Bibb, 149; 4 Am. Dec. 623; *Estabrook v. Moulton*, 9 Mass. 258; *Johnson v. Buckhaults*, 77 Ala. 276; *Hatchler v. Chancey*, 71 Ga. 689; *McClelland v. Bishop*, 42 Ohio St. 113.

come due;<sup>1</sup> also, default in payment of interest, though the principal be not due, is sufficient to give rise to the right to foreclose.<sup>2</sup> But if there is no stipulation forfeiting the estate on failure to pay any installment of the debt, the mortgagee, as a rule, must wait until the maturity of the last installment before foreclosing.<sup>3</sup> Where the mortgage debt is made payable on demand, no demand is necessary, and foreclosure may be brought at once.<sup>4</sup> The parties may stipulate that upon failure to pay any installment of the debt, or the taxes, or interest, the whole amount of the debt shall become due, and in such cases, upon breach of the condition, the right to foreclose follows.<sup>5</sup> An indemnity mortgage cannot be foreclosed until the surety has in some way been damnified.<sup>6</sup> Where a conveyance absolute in form is in fact a mortgage, a foreclosure may be had as though the mortgage were such in form.<sup>7</sup>

ILLUSTRATIONS.—M. engaged L. to furnish money to buy up a mortgage against M., with an agreement that M. would execute a new mortgage to secure the money advanced, and after the purchase of the old mortgage by L., M. refused to execute a new one to secure the money advanced. *Held*, that L. might foreclose and enforce the old mortgage: *Lockwood v. Marsh*, 3 Nev. 138. A mortgage purporting to be for money

<sup>1</sup> *McLean v. Presley*, 56 Ala. 211; *Gibbons v. Hoag*, 95 Ill. 45.

<sup>2</sup> *Austin v. Burbank*, 2 Day, 474; 2 Am. Dec. 119; *Dederick v. Barber*, 44 Mich. 19; *Doran v. Dickerson*, 33 N. J. Eq. 388; *Roddy v. Williams*, 3 Jones 1; *Brodribb v. Tibbets*, 58 Cal. 6; *Butler v. Blackman*, 45 Conn. 159. But see *Adams v. Ruth-erford*, 13 Or. 78; *Hoodless v. Reid*, 112 Ill. 105; *Scheibe v. Kennedy*, 64 Wis. 564; *Lowenstein v. Phelan*, 17 Neb. 429; *Dean v. Applegarth*, 65 Cal. 391.

<sup>3</sup> *Brodribb v. Tibbets*, 58 Cal. 6; *Harshaw v. McKesson*, 66 N. O. 266.

<sup>4</sup> *Union etc. Ins. Co. v. Curtis*, 35 Ohio St. 357; *Gillett v. Balcom*, 6 Barb. 370. But see *Bolman v. Loh-man*, 79 Ala. 63.

<sup>5</sup> *Hosie v. Gray*, 71 Pa. St. 198; *O'Conner v. Shipman*, 48 How. Pr. 126; *Stillwell v. Adams*, 29 Ark. 346; *Poweshick County v. Dennison*, 36 Iowa, 244; 14 Am. Rep. 521; *Mow-bray v. Leckie*, 42 Md. 474; *Magruder v. Eggleston*, 41 Miss. 284; *Savannah etc. R. R. Co. v. Lancaster*, 62 Ala. 555; *Wisner v. Chamberlin*, 117 Ill. 568; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510.

<sup>6</sup> *Nat. St. Bank v. Davis*, 24 Ohio St. 190; *Ketchum v. Quincy*, 23 Conn. 123; *Ross v. Worthington*, 11 Minn. 438; 87 Am. Dec. 95; *Francis v. Por-ter*, 7 Ind. 213; *Butler v. Ladue*, 12 Mich. 178. And compare *Griswold v. Barker*, 57 Vt. 53; *Malott v. Goff*, 96 Ind. 496; *Reynolds v. Shirk*, 98 Ind. 480.

<sup>7</sup> *Lyon v. Powell*, 78 Ala. 351.

lent was made payable on demand, interest payable semi-annually. There was a provision for foreclosure in case of a failure to pay interest, and it was declared that on the mortgagee's death, the money lent should belong to the mortgagor. *Held*, that a foreclosure was contemplated only in the event of default in paying interest: *Bolman v. Lohman*, 79 Ala. 63. A mortgage given to secure a third person's note stipulated that the mortgagee "should not institute any proceedings to foreclose" until the maker and indorser had been sued. *Held*, that he could not take possession or maintain ejectment until this was done: *Grandin v. Hurt*, 80 Ala. 116.

**§ 3068. By Whom may be Exercised.**—All parties interested in the mortgage money must be joined as plaintiffs, unless they are very numerous, when, for the sake of convenience, one or more may bring the suit on behalf of all.<sup>1</sup> The personal representatives of a deceased mortgagee, and not his heirs, are the proper parties plaintiff.<sup>2</sup> Where there are joint mortgagees, upon the death of one of them, the survivor alone should sue, unless it appears that some other person is interested.<sup>3</sup> A mortgagee who has mortgaged his mortgage is a necessary party, but not if he has absolutely assigned it.<sup>4</sup> Though a junior mortgagee is a party to a suit to foreclose a senior mortgage, he is not thereby estopped from afterwards foreclosing his own mortgage.<sup>5</sup> Where two mortgages on the same property are given at the same time to different

<sup>1</sup> *Hinson v. Adrian*, 86 N. C. 61; *Pine v. Shannon*, 30 N. J. Eq. 501; *Emigrant etc. Bank v. Goldman*, 75 N. Y. 127; *Mason v. R. R. Co.*, 52 Me. 82; *Duffy v. Duncan*, 32 Barb. 587; *Metropolitan Trust Co. v. R. R. Co.*, 18 Abb. N. C. 368; *Chicago and Great Western R. R. Land Co. v. Peck*, 112 Ill. 408.

<sup>2</sup> *Merrin v. Lewis*, 90 Ill. 505; *Griffin v. Lovell*, 42 Miss. 402; *Woodruff v. Mutschler*, 34 N. J. Eq. 33; *Grattan v. Wiggins*, 23 Cal. 16; *Procter v. Robinson*, 35 Mich. 284; *Etheridge v. Vernoy*, 71 N. C. 184; *Dayton v. Dayton*, 7 Ill. App. 136; *Osborne v. Tunia*, 25 N. J. L. 633; *Plummer v. Doughty*, 78 Me. 341; *Citizens' Bank v. Dayton*, 116 Ill. 257.

<sup>3</sup> *Williams v. Hilton*, 35 Me. 547; 58 Am. Dec. 729; *Higgs v. Hanson*, 13 Nev. 356; *Freeman v. Schofield*, 16 N. J. Eq. 28; *McAllister v. Plant*, 54 Miss. 106.

<sup>4</sup> *Miller v. Henderson*, 10 N. J. Eq. 320; *Whitney v. McKinney*, 7 Johns. Ch. 144; *Newman v. Chapman*, 2 Rand. 93; 14 Am. Dec. 766; *Hoyt v. Martense*, 16 N. Y. 231; *Denby v. Mellgrew*, 58 Ala. 147; *Briggs v. Hannowald*, 35 Mich. 474; *Prout v. Hoge*, 57 Ala. 28; *Bolles v. Carli*, 12 Minn. 113; *Cerf v. Ashley*, 68 Cal. 419; *In re Gilbert*, 104 N. Y. 200.

<sup>5</sup> *Coleman v. Witherspoon*, 76 Ind. 285.

mortgagees to secure separate debts, both are proper parties plaintiff to the suit;<sup>1</sup> and if a mortgage to secure a partnership debt is taken in the name of one of the partners, the others should join in bringing the suit.<sup>2</sup> But where several persons take a mortgage to secure a separate debt to each, all made payable at the same time, the holder of any one of the obligations can bring a foreclosure suit without affecting the right of the others.<sup>3</sup> Where a wife holds a mortgage as her own separate property, her husband is not a proper co-plaintiff.<sup>4</sup> A second mortgagee, while a proper, is not a necessary party to the first mortgagee's foreclosure suit.<sup>5</sup> One having two mortgages upon the same property, which is indivisible, one of which is due and the other not, may have a decree of foreclosure of both.<sup>6</sup>

ILLUSTRATIONS. — A mortgage was from a corporation to trustees for the benefit of such persons as should thereafter furnish materials. *Held*, that any one of the material-men might enforce the mortgage to the extent of his debt, without joining the trustees or any one else, unless they had existing interests which required to be adjusted: *Tyler v. Yreka etc. Co.*, 14 Cal. 212. In a bill to foreclose a mortgage assigned to A and B, which is filed by A as a surviving obligor, *held*, that the executor of the deceased co-obligor need not necessarily be joined as a complainant: *Freeman v. Scofield*, 16 N. J. Eq. 28. A mortgage was given to A to secure the support of himself and his wife. After A's death the mortgagor failed to support the wife. *Held*, that A's administrator was the proper party plaintiff in foreclosure: *Plummer v. Doughty*, 78 Me. 341. A receiver brought a suit in equity to foreclose a mortgage given to A in trust for B. It not appearing that the receiver had any legal title, *held*, that A was a necessary party plaintiff: *Tyson v. Applegate*, 40 N. J. Eq. 305.

<sup>1</sup> *Shirkey v. Hanna*, 3 Blackf. 403; 26 Am. Dec. 426; *Pogue v. Clark*, 25 Ill. 351; *Ætna Life Ins. Co. v. Finch*, 84 Ind. 301; *Cochran v. Goodell*, 131 Mass. 464; *Dial v. Gary*, 14 S. C. 573; 37 Am. Rep. 737.

<sup>2</sup> *De Greiff v. Wilson*, 30 N. J. Eq. 435; *Pomeroy v. Latting*, 2 Allen, 221; *Noyes v. Sawyer*, 3 Vt. 160; *Shelden v. Bennett*, 44 Mich. 634.

<sup>3</sup> *Moffitt v. Roche*, 76 Ind. 75; *Minor*

*v. Hill*, 58 Ind. 176; 26 Am. Rep. 71; *Myers v. Wright*, 33 Ill. 284; *Wiley v. Pierson*, 23 Tex. 486; *Issett v. Lucas*, 17 Iowa, 503; 85 Am. Dec. 572; *Tyler v. Yreka etc. Co.*, 14 Cal. 212.

<sup>4</sup> *Bartlett v. Boyd*, 34 Vt. 256; *Shockley v. Shockley*, 20 Ind. 108.

<sup>5</sup> *Douthitt v. Hipp*, 23 S. C. 205.

<sup>6</sup> *Hawkins v. Hill*, 15 Cal. 499; 76 Am. Dec. 499.

§ 3069. **Operation of Decree.**—The decree operates as a final adjustment of the rights of all persons who are properly made parties to the suit; but it does not affect those who have been erroneously omitted.<sup>1</sup> The scope of a decree in foreclosure is to determine the interests in the equity of redemption, and it can have no effect upon rights superior to those of the mortgagor and mortgagee.<sup>2</sup> So that a claim to dower paramount to the mortgage cannot be adjudicated upon in a foreclosure suit.<sup>3</sup> But the validity of the decree, however erroneous, cannot be questioned on collateral attack.<sup>4</sup> And even though the decree should be set aside for error or irregularity, so long as the court had jurisdiction of the subject-matter and the parties, the sale under the decree will transfer whatever title the mortgagor had.<sup>5</sup> Though the title of a *bona fide* purchaser for value without notice cannot be affected by any error in the decree, yet where it appeared that the mortgage had been fraudulently altered so as to embrace other land, it was held that the decree as to that land was erroneous, and passed no title to the purchaser.<sup>6</sup> Under the general principle that fraud will vitiate anything, a decree obtained by fraud is void, and the party prejudicially affected by it can have it so declared, and no title

<sup>1</sup> *Saunders v. Frost*, 5 Pick. 259; 16 Am. Dec. 394; *Murrill v. Smith*, 51 Ala. 301; *Shores v. Scott River Co.*, 21 Cal. 135; *Potter v. Dooley*, 55 Vt. 512; *Gerrish v. Bragg*, 55 Vt. 329; *Schrivver v. Schriver*, 86 N. Y. 575; *Suffern v. Johnson*, 1 Paige, 450; 19 Am. Dec. 440; *Hunt v. Acre*, 28 Ala. 580; *De Lashmott v. Sellwood*, 10 Or. 319; *Payn v. Grant*, 23 Hun, 134; *Emigrant etc. Ins. Sav. Bank v. Goldman*, 75 N. Y. 127; *Thompson v. Paris*, 63 N. H. 421; *Barton v. Anderson*, 104 Ind. 578; *Craighead v. Dalton*, 105 Ind. 72.

<sup>2</sup> *Rathbone v. Hooney*, 58 N. Y. 467; *Banning v. Bradford*, 21 Minn. 308; 18 Am. Rep. 398; *Hecla Fire Ins. Co. v. Morrison*, 56 Wis. 133;

*Helck v. Reinheimer*, 105 N. Y. 470; *Weil v. Uzzell*, 92 N. C. 515.

<sup>3</sup> *Lewis v. Smith*, 9 N. Y. 502; 61 Am. Dec. 706; *Wade v. Miller*, 32 N. J. L. 296; *Merchants' Bank v. Thompson*, 55 N. Y. 7; *Brackett v. Baum*, 59 N. Y. 8.

<sup>4</sup> *Burford v. Rosenfeld*, 37 Tex. 42; *Adams v. Cameron*, 40 Mich. 506; *Brown v. Phillips*, 40 Mich. 264; *Miller v. Sharp*, 49 Cal. 235; *Meyer v. R. R. Co.*, 3 Utah, 280.

<sup>5</sup> *Bank of United States v. Voorhees*, 1 McLean, 221; *Markel v. Evans*, 47 Ind. 326; *Wood v. Johnson*, 8 Wend. 9; 22 Am. Dec. 603.

<sup>6</sup> *Horner v. Zimmerman*, 45 Ill. 14; *Daub v. Englebach*, 9 Ill. App. 99.

claimed under it is valid.<sup>1</sup> A foreclosure decree finally fixes the amount due, and no objections can be made to the issue of execution for a deficiency, unless they arose after confirmation of the foreclosure sale, and recognize the decree and go to its discharge.<sup>2</sup> But the decree does not change the character of any surplus there may be after the claims under the mortgage, such surplus remaining impressed with the character of realty, and passing to the mortgagor's heir, not to his administrator.<sup>3</sup>

ILLUSTRATIONS. — A decree of foreclosure did not set forth that any proceedings had been had at law to recover the mortgage debt. *Held*, that the decree was invalid: *Edwards v. Hough*, 5 Ind. 149. A mortgage of realty contained the assent of the mortgagor to the passage of a decree of foreclosure, as authorized by 2 Maryland Code, article 4, section 782. *Held*, that a decree passed after default was within the meaning and purview of the law: *Brooks v. Hays*, 24 Md. 507. C. sold land to Q., who paid for it, taking a mortgage back, wherein C. stipulated to pay an outstanding mortgage. To proceedings to foreclose the outstanding mortgage which C. failed to pay, Q. was made a party. *Held*, that he was entitled to a judgment for payment from the surplus, and to a personal decree against C.: *Clay v. Hildebrand*, 34 Kan. 694. In a suit to foreclose, to which the mortgagor and several junior mortgagees were made parties, and wherein one of the junior mortgagees filed a cross-bill, though at the time of filing the bill nothing was due him, *held*, that a personal judgment for such of the claims as were due at the time of trial, and a decree of foreclosure for such as were not, with rebate of interest, were proper: *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510. A mortgage described the estate as an "undivided fourth interest, being all the interest which the mortgagor owns." *Held*, that a decree of sale of all the interest which the mortgagor had in the premises at the time the mortgage was given was erroneous: *Schwartz v. Palm*, 65 Cal. 54.

§ 3070. **Title Passes by Deed thereunder.**—The purchaser acquires all the right, title, and interest of both mortgagor and mortgagee in the property sold.<sup>4</sup> The court

<sup>1</sup> *Eslava v. Eslava*, 50 Ala. 32; *United States v. The Ormistad*, 15 Pet. 518.

<sup>2</sup> *Haldane v. Sweet*, 58 Mich. 429.

<sup>3</sup> *Dunning v. The Ocean Nat. Bank*, 61 N. Y. 497; 19 Am. Rep. 293.

<sup>4</sup> *Stoney v. Shultz*, 1 Hill (S. C.), 465; 27 Am. Dec. 429; *Westbrook v. Glea-*

undertakes to sell it, and, whatever it may be, it passes to the purchaser,<sup>1</sup> and it so passes as soon as the deed has been duly executed and delivered by the proper officer, although the sale may not be confirmed until afterwards,<sup>2</sup> as the subsequent confirmation of the sale relates back and gives effect to the deed from the time of its delivery.<sup>3</sup> The purchaser becomes entitled to all crops growing at the time of the sale,<sup>4</sup> and to all fixtures permanently attached to the freehold,<sup>5</sup> and to the rents from the delivery of the deed and demand of possession,<sup>6</sup> the owner of the equity of redemption being entitled to the rents up to that time.<sup>7</sup> But if the purchaser is already in possession under a former purchase at a sale not confirmed, he is entitled to the rents from the date of the confirmation of the last report of sale.<sup>8</sup> The effect of a deed by the proper officer is equivalent to a quitclaim deed by the mortgagor and mortgagee, and completely bars all parties to the suit.<sup>9</sup> As the judgment of the court is conclusive so long as it stands unreversed and without appeal, a sale made before appeal taken and execution stayed is not affected by an

son, 79 N. Y. 23; *Taylor v. Kearns*, 66 Ill. 339; *Poweshiek Co. v. Dennison*, 36 Iowa, 244; 14 Am. Rep. 521; *Christ Church v. Mack*, 93 N. Y. 488; 45 Am. Rep. 260; *Childs v. Childs*, 10 Ohio St. 339; 75 Am. Dec. 512.

<sup>1</sup> *Zollman v. Moore*, 21 Gratt. 313; *Tallman v. Ely*, 6 Wis. 244; *Racine etc. R. R. Co. v. Farmers' etc. Co.*, 49 Ill. 331; 95 Am. Dec. 595; *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540.

<sup>2</sup> *Jackson v. Warren*, 32 Ill. 331; *Fuller v. Van Geesen*, 4 Hill, 173; *Fort v. Burch*, 6 Barb. 60.

<sup>3</sup> *Lathrop v. Ferguson*, 22 Wend. 116; *Bissell v. Payn*, 20 Johns. 3; *Stout v. Keyes*, 2 Doug. (Mich.) 184; 43 Am. Dec. 465; *Walker v. Schurn*, 42 Ill. 462.

<sup>4</sup> *Anderson v. Strauss*, 98 Ill. 485; *Howell v. Schenck*, 24 N. J. L. 89; *Mut. Life Ins. Co. v. Bigler*, 79 N. Y. 568; *Jones v. Thomas*, 8 Blackf. 428; *Parker v. Storts*, 15 Ohio St. 351;

*Beckman v. Sikes*, 35 Kan. 120. In Wisconsin the mortgagor is entitled to crops up to confirmation of sale: *Allen v. Elderkin*, 62 Wis. 627.

<sup>5</sup> *Wight v. Gray*, 73 Me. 297; *Gardner v. Finley*, 19 Barb. 317; *Lackas v. Bahl*, 43 Wis. 53; *Sands v. Pfeiffer*, 10 Cal. 258.

<sup>6</sup> *Taliaferro v. Gay*, 78 Ky. 496. In Indiana the purchaser is entitled to the rents from the date of the decree of foreclosure: *Bryson v. McCreary*, 102 Ind. 1.

<sup>7</sup> *Astor v. Turner*, 11 Paige, 436; 43 Am. Dec. 766; *Mitchell v. Bartlett*, 52 Barb. 319; *Mut. Life Ins. Co. v. Balch*, 4 Abb. N. C. 200; *Clason v. Corley*, 5 Sand. 447.

<sup>8</sup> *Mitchell v. Bartlett*, 52 Barb. 319; *Taliaferro v. Gay*, 78 Ky. 496.

<sup>9</sup> *Emig. Indus. Sav. Bank v. Goldman*, 75 N. Y. 127; *Holden v. Sackett*, 12 Abb. Pr. 473; *McGee v. Smith*, 16 N. J. Eq. 462; *Patton v. Smith*, 113 Ill. 499.

appeal subsequently taken.<sup>1</sup> But if the sale is set aside on appeal, all the proceedings are thereby vacated and annulled, and the mortgage restored to the position it occupied before their commencement,<sup>2</sup> and the title of the purchaser is rendered invalid; but he must be restored to the position he was in before he purchased, and is entitled to reimbursement of the purchase-money and any payments properly made by him for the benefit or relief of the property.<sup>3</sup> The defendant cannot resist a motion to put the purchaser under the decree into possession, on grounds known to him when the sale was confirmed, but the purchaser should not be put into possession pending an appeal from the order confirming the sale.<sup>4</sup> The purchaser takes the land free from all secret equities, and the holders of such must enforce their claims against the fund on its distribution.<sup>5</sup> If all the owners of the equity of redemption are not made parties to the foreclosure suit, the purchaser may foreclose against those not made parties.<sup>6</sup>

**ILLUSTRATIONS.**—Several distinct parcels of land were sold together; in foreclosure of a mortgage upon all the parcels, *held*, that a resale should be ordered by separate parcels, and the former sale set aside: *Lay v. Gibbons*, 14 Iowa, 377; 81 Am. Dec. 487. A mortgagee became the purchaser of the mortgaged premises under a sale in foreclosure, under circumstances rendering the purchase inequitable. *Held*, that a distinct transaction between the parties by which the mortgagee had sustained an injury afforded no ground for refusing a resale: *Tripp v. Cook*, 26 Wend. 143. Land was leased by an instrument providing that a building to be erected should at the end of the term be taken by the lessor at two thirds of its appraised value, and also mortgaging the building as security for the monthly rent. *Held*, that a purchaser on foreclosure would acquire the

<sup>1</sup> *Blakeley v. Calder*, 15 N. Y. 617; 672; *Freeman v. Munns*, 15 Abb. Pr. 468; *Trotter v. White*, 20 Miss. 88; *Armstrong v. Humphreys*, 5 S. C. 128; *Buckmaster v. Jackson*, 4 Ill. 104; *Fort v. Roush*, 104 U. S. 142; *Boggs v. Sackett*, 12 Abb. Pr. 473; *Breese v. Burge*, 2 E. D. Smith, 474; *Fergus v. Woodworth*, 44 Ill. 374, 384.

<sup>2</sup> *Stackpole v. Robbins*, 47 Barb. 212.

<sup>3</sup> *Ina. Co. v. Sampson*, 38 Ohio St.

<sup>4</sup> *Le Conte v. Irwin*, 23 S. C. 106.

<sup>5</sup> *Landell's Appeal*, 105 Pa. St. 152.

<sup>6</sup> *Curtis v. Gooding*, 99 Ind. 45.

right to the two thirds, but not to present possession, and with no liability for rent: *Barroilhet v. Battelle*, 7 Cal. 450. A purchaser of land from the state, having a certificate and possession, but no patent, mortgaged the land, and the mortgagee purchased at the sale, and brought an action against an assignee of the original purchaser's certificate to compel a conveyance of the land. *Held*, that the plaintiff had no legal title, but had acquired an equitable lien by the foreclosure which might be enforced in equity: *Stewart v. Hutchinson*, 29 How. Pr. 181. A grantor conveyed land on conditions subsequent, and then took a mortgage making no mention of the conditions, and afterwards assigned the mortgage. *Held*, that a purchaser under a foreclosure of the mortgage took the land freed from the conditions: *Wheeler v. Dunning*, 33 Hun, 205. After a decree of foreclosure the mortgagor planted a crop. *Held*, that by selling it growing a day before the sale under the foreclosure, he could not pass the title to it as against the purchaser of the land at the foreclosure sale: *Beckman v. Sikes*, 35 Kan. 120.

**§ 3071. Delivery of Possession to Purchaser.**—When the purchaser has complied with the conditions of the sale, and the officer has delivered the deed to him, if possession is wrongfully withheld from him he is entitled to sue out a writ of assistance which directs the sheriff or other proper officer to put him into possession of the property.<sup>1</sup> But no writ of assistance or possession can be issued if the decree do not contain an order for the surrender of possession, in which case an order for possession must be obtained on notice to the party in possession, and service of such order with a demand of possession.<sup>2</sup> And where the party in possession claims by title paramount to the mortgage, the court will not, where such party appears to have a reasonable foundation for his claim, exercise its summary powers to put the purchaser into possession, but will leave him to his proper remedy at law.<sup>3</sup> If the party in possession did not enter under

<sup>1</sup> *Battershall v. Davis*, 23 How. Pr. 383; *Howard v. Bond*, 42 Mich. 131; *Bennett v. Matson*, 41 Ill. 332; *Montgomery v. Middlemiss*, 21 Cal. 103; 81 Am. Dec. 146; *O'Brian v. Fay*, 82 Ill. 67; *Van Hook v. Throckmorton*, 8 Paige, 33; *Cochran v. Fogler*, 116 Ill. 194; *Bird v. Belz*, 33 Kan. 391.

<sup>2</sup> *Lynde v. O'Donnell*, 21 How. Pr. 34; *Kessinger v. Whittaker*, 82 Ill. 22; *Ballinger v. Waller*, 9 B. Mon. 67.

<sup>3</sup> *Thomas v. De Baum*, 14 N. J. Eq. 37; *Emig, etc. Bank v. Goldman*, 75 N. Y. 127; *Toll v. Hiller*, 11 Paige, 223; *Kinsley v. Scott*, 58 Vt. 470.

any party to the suit or under any one deriving title from or through any such party, he cannot be ejected under the decree.<sup>1</sup> The right to the exercise of this summary jurisdiction of the court is not exclusive of the remedy at law, but is regarded merely as a step in the foreclosure suit, and a means of carrying the decree into effect analogous to the common-law writs of execution.<sup>2</sup>

ILLUSTRATIONS. — A decree of foreclosure required possession to be delivered to the purchaser on his production of the master's deed, and a certified copy of the order of confirmation. Without producing these, the purchaser brought forcible entry and detainer, and was defeated. *Held*, that this did not preclude the issue of a writ of assistance to put him in possession, after his production of the papers required by the decree: *Cochran v. Fogler*, 116 Ill. 194.

**§ 3072. Right to Pursue Concurrent Remedies Simultaneously.** — In many of the states a mortgagee is entitled to avail himself simultaneously of all his remedies to recover payment of the mortgage debt, so that in those states he may, in addition to bringing his suit to foreclose, maintain ejectment after condition broken, and sue on the note or other obligation at the same time.<sup>3</sup> And after having recovered a judgment at law, the mortgagee may institute a suit for foreclosure, though of course he is not entitled to be paid twice over.<sup>4</sup> In Minnesota and Nevada the mortgage security must first be exhausted before an action can be maintained on the promissory note.<sup>5</sup> And it is provided by statute in California that

<sup>1</sup> *Van Hook v. Throckmorton*, 8 Paige, 33; *Bell v. Birdsall*, 19 How. Pr. 491.

<sup>2</sup> *Haynes v. Meek*, 14 Iowa, 320; *Kessinger v. Whittaker*, 82 Ill. 22; *Cook v. Wiles*, 42 Mich. 439.

<sup>3</sup> *Hughes v. Edwards*, 9 Wheat. 489; *Brown v. Cascadin*, 43 Iowa, 103; *Lansing v. Goellet*, 9 Cow. 354; *Draper v. Mann*, 117 Mass. 439; *Jones v. Conde*, 6 Johns. Ch. 77; *Schoole v. Sall*, 1 Schoales & L. 176; *Gilman v. Illinois etc. Tel. Co.*, 91 U. S. 603; *Jackson v. Hill*, 10 Johns. 481; *Van-*

*sant v. Allmon*, 23 Ill. 30; *Stephens v. Greene Co. Iron Co.*, 11 Heisk. 71; *Thayer v. Mann*, 19 Pick. 537; *Mann v. Earle*, 4 Gray, 299; *Harkins v. Forsyth*, 11 Leigh, 294; *Shufelt v. Shufelt*, 9 Paige, 137; 37 Am. Dec. 381.

<sup>4</sup> *Karnes v. Lloyd*, 52 Ill. 113; *Duck v. Wilson*, 19 Ind. 190; *Banta v. Wood*, 32 Iowa, 469; *Thornton v. Pigg*, 24 Mo. 249; *L'Engle v. L'Engle*, 21 Fla. 131.

<sup>5</sup> *Johnson v. Lewis*, 13 Minn. 364; *Weil v. Howard*, 4 Nev. 384.

there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate, and which action must be in accordance with the provisions of the statute.<sup>1</sup> In New York and some other states there are statutory provisions requiring leave of the court to be first obtained before commencing an action to recover the mortgage debt during the pendency of a foreclosure suit.<sup>2</sup> But in Connecticut an action at law may be maintained on a mortgage bond given in New York in respect of a mortgage on property there, although no leave, as required by the New York statute, has been obtained.<sup>3</sup>

§ 3073. **Deficiency after Sale.** — If a sale of the mortgaged property has realized a sum less than sufficient to satisfy the mortgage, and there is no judgment for a deficiency in the foreclosure suit, an action at law will lie at the suit of the mortgagee to recover the balance owing.<sup>4</sup> A decree of foreclosure and a sale under it operates as a payment of the mortgage debt only to the extent of the proceeds of the sale; or where there is no sale, to the extent of the value of the premises.<sup>5</sup> But where the debt is payable in installments, and the mortgage is foreclosed before all are due, and the sale of the whole of the property realizes less than the whole amount of the debt, but more than the installments overdue, personal judgment for the deficiency cannot be had, as there was nothing owing under the terms of the contract.<sup>6</sup> And where the mortgagee has acquired the title of the mortgagor, it is

<sup>1</sup> Cal. Code Civ. Proc., sec. 726; *Ould v. Stoddard*, 54 Cal. 613; *Bartlett v. Cottle*, 63 Cal. 366.

<sup>2</sup> N. Y. Code Civ. Proc., sec. 1628; *Scotfield v. Doscher*, 72 N. Y. 491; *Goodrich v. White*, 39 Mich. 489.

<sup>3</sup> *Belmont v. Cornen*, 48 Conn. 338.

<sup>4</sup> *Duval v. Johnson*, 39 Ark. 182; *Mattair v. Card*, 18 Fla. 767; *Williams v. Gillies*, 28 Hun, 175; *Globe Ins. Co. v. Lansing*, 5 Cow. 380; 15 Am. Dec. 474; *Dunkley v. Van Buren*, 3 Johns. Ch. 331.

<sup>5</sup> *Hood v. Adams*, 124 Mass. 481; 26 Am. Rep. 687; *Duval v. McLoskey*, 1 Ala. 708; *Deare v. Carr*, 3 N. J. Eq. 513; *Mott v. Clark*, 9 Pa. St. 399; 49 Am. Dec. 566; *Johnson v. Candage*, 31 Me. 28; *Hunt v. Stiles*, 10 N. H. 466; *Leland v. Loring*, 10 Met. 122.

<sup>6</sup> *Danforth v. Coleman*, 23 Wis. 528; *James v. Fisk*, 9 Smedes & M. 144; 47 Am. Dec. 111. See also *Wood v. Trask*, 7 Wis. 566; 76 Am. Dec. 230.

tantamount to foreclosure; and if the value of the property be not equal to the sum due on the notes secured by the mortgage, the holder has a claim on the mortgagor for the balance.<sup>1</sup> The complaint in an action to recover from heirs and their grantee the amount of a deficiency on the ancestor's mortgage must allege that leave to bring the action has been granted.<sup>2</sup> No judgment for deficiency can be entered up in a foreclosure suit against the estate of a deceased mortgagor, although the debt has been presented and duly allowed.<sup>3</sup>

ILLUSTRATIONS.—The New York code, section 1628, provides that pending a foreclosure suit no other action for the debt shall be maintained without leave. *Held*, that this does not prevent a junior mortgagee from suing for the debt due him, although at his own instance he has been made a party to proceedings for the distribution of the surplus arising from the sale under the senior mortgage: *Wyckoff v. Devlin*, 12 Daly, 144. An incorporated benevolent society was authorized to convey certain land "for the use of the Roman Catholic Church." A deed was accordingly made, for the expressed consideration of one dollar, to C., who was described therein as "archbishop of New York," the grantee covenanting therein to assume and pay an outstanding mortgage. *Held*, that after a foreclosure of the mortgage C. was not chargeable with a deficiency, there being nothing except the record of the deed to connect him with the transaction: *Gifford v. Corrigan*, 105 N. Y. 223. After the date of the decree, and before the date for redemption, the mortgagor in possession executed a fictitious conveyance of the land to an irresponsible person for the sole purpose of relieving himself from liability for taxes to be assessed. *Held*, that the mortgagee, being compelled to pay the taxes, could recover the amount from the mortgagor: *New Haven Savings Bank v. Atwater*, 51 Conn. 429. Pending a foreclosure suit by a second mortgagee, a sale was had in a foreclosure suit under a first mortgage. The second mortgagee bid in the premises and applied the surplus bid in excess of the amount in reduction of the second mortgage. *Held*, that without another sale he was entitled to judgment for the balance due: *Siewert v. Hamel*, 83 Hun, 44.

<sup>1</sup> *Marston v. Marston*, 45 Me. 412; *Culver v. Superior Court Judge*, 57 Wadsworth v. Lyon, 93 N. Y. 201; 45 Mich. 25.

<sup>2</sup> *Fallon v. Butler*, 21 Cal. 24; 81

<sup>3</sup> *Hauselt v. Fine*, 18 Abb. N. C. 142; Am. Dec. 140.

§ 3074. **Effect of Mortgagor's Bankruptcy.**—The jurisdiction of a state court over an action commenced to foreclose a mortgage on land is not affected by the subsequent commencement of bankruptcy proceedings against the owner of the equity of redemption,<sup>1</sup> but the mortgagor's discharge in bankruptcy prevents a personal judgment against him for a deficiency on foreclosure;<sup>2</sup> and where the decree is against the property only, and does not charge the mortgagor with any personal liability, the objection that the mortgagor was a bankrupt, and the decree does not discharge him from personal liability, is untenable.<sup>3</sup> So where the principal debtor gives a mortgage to his surety, which the latter transfers for value to the creditor, his right to foreclose it is not affected by the subsequent bankruptcy of the principal and surety.<sup>4</sup> In the event of the mortgagor's bankruptcy, it has been said that the proper tribunal to enforce the mortgage lien is the court of bankruptcy in which such proceedings are pending; but that court may give leave to the mortgagee to institute proceedings in the state court.<sup>5</sup> Where the foreclosure proceedings are commenced after the institution of the bankruptcy proceedings, the assignee should be made a party to the foreclosure suit in place of the mortgagor, as the equity of redemption vests by operation of law in such assignee, even though he were appointed after the suit began;<sup>6</sup> and where the bankruptcy proceedings are pending in a state other than that in which the mortgaged property is, and when the mortgagee is entitled to

<sup>1</sup> McGready v. Harris, 54 Mo. 137.

<sup>2</sup> Oliphint v. Eckerly, 36 Ark. 69; Gibson v. Warden, 14 Wall. 244; Roberts v. Wood, 38 Wis. 60.

<sup>3</sup> Cockrill v. Johnson, 28 Ark. 193.

<sup>4</sup> Carlisle v. Wilkins, 51 Ala. 371.

<sup>5</sup> Levy v. Haake, 53 Cal. 267; Blum v. Ellis, 73 N. C. 293; Brown v. Hoover, 77 N. C. 40; Hatcher v. Jones, 53 Ga. 208; Mays v. Fritton, 20 Wall. 414; McHenry v. La Soc. Franc., 95 U. S. 58; Soc. D'Epargnes v. McHenry,

49 Cal. 351. But it is held in California under the Insolvency Act of 1880 that an order in insolvency staying proceedings does not prevent the mortgagee from foreclosing if he waives all personal claim against the insolvent mortgagor: Montgomery v. Merrill, 62 Cal. 385.

<sup>6</sup> Winslow v. Clark, 47 N. Y. 261; Burnham v. De Bevoise, 8 How. Pr. 159; Eyster v. Gaff, 2 Col. 228; Anonymous, 10 Paige, 20.

foreclosure upon the adjudication in the bankruptcy being had, he must proceed in the court of the state where the land is, as that court can afford a remedy by foreclosure or sale, and at the same time allow the assignee to have the full benefit of the equity of redemption;<sup>1</sup> and the interest of the assignee will be bound, although he is not described as assignee, he having in no other capacity an interest in the property.<sup>2</sup>

<sup>1</sup> *Whitridge v. Taylor*, 66 N. C. 273.      <sup>2</sup> *Wagner v. Hodge*, 34 Hun, 524.

## PART II. — CHATTEL MORTGAGES.

### CHAPTER CXLVIII.

#### GENERAL PRINCIPLES.

- § 3075. Definition and nature.
- § 3076. Distinction between mortgage, pledge, and conditional sale.
- § 3077. Form and contents.
- § 3078. Who may be parties.
- § 3079. What may be mortgaged.

§ 3075. **Definition and Nature.**—A chattel mortgage is an instrument of sale conveying the title of the property to the mortgagee with terms of defeasance, and if those terms are not complied with, then at law the title becomes absolute in the mortgagee. The nature of the agreement must be such that by the mere non-performance of the condition by the mortgagor the title will be transferred to the mortgagee by the force of the agreement. This test is decisive.<sup>1</sup> As between the parties, a conveyance of chattels absolute in form, but made to secure the payment of a loan of money, and defeasible on payment of a note given for the amount loaned, is a mortgage.<sup>2</sup> An agreement for the sale and purchase of personal property, containing a stipulation that the vendor shall have a "lien" upon the property until payment, amounts to a chattel mortgage.<sup>3</sup> Upon breach of the condition, the mortgagee may assume possession of the property, and

<sup>1</sup> Parshall v. Eggert, 52 Barb. 371; Langdon v. Buel, 9 Wend. 83; Miner v. Judson, 2 Hun, 441; Almy v. Wilbur, 2 Wood. & M. 371; Mitchell v. Roberts, 17 Fed. Rep. 776; Conner v. Carpenter, 28 Vt. 237; Ferguson v. Clifford, 37 N. H. 86; Luckett v. Townsend, 3 Tex. 119; 49 Am. Dec. 723; Everman v. Robb, 52 Miss. 653; 24 Am. Rep. 684; Charter v. Stevens,

3 Denio, 33; 45 Am. Dec. 444; Lacey v. Giboney, 36 Mo. 320; 88 Am. Dec. 145.

<sup>2</sup> Carpenter v. Snelling, 97 Mass. 452; Taber v. Hamlin, 97 Mass. 489; 93 Am. Dec. 113; State v. Bell, 2 Mo. App. 102.

<sup>3</sup> Yenni v. McNamee, 45 N. Y. 614; Whiting v. Eichelberger, 16 Iowa, 422.

deal with it as his own, so far as the legal rights of the parties are concerned;<sup>1</sup> but before breach the mortgagor is entitled to the possession and use of the property, and on performing the condition the legal title reverts in him,<sup>2</sup> and after breach the mortgagor has an equitable right to redeem, notwithstanding his default,<sup>3</sup> and this right continues until it has been foreclosed by judicial proceedings, or otherwise barred by lapse of time or public sale.<sup>4</sup> The interest of the mortgagor in the property is such that execution may be levied on it even though in possession of the mortgagee, but the chattels cannot be taken out of the mortgagee's possession without an offer to pay the mortgage debt.<sup>5</sup>

ILLUSTRATIONS.—A executed to B a bill of sale for a negro man, at the price of \$250 in hand paid; it was agreed at the same time by the vendee, in writing, that, in consideration of such sale, he would sell to the vendor the slave in question at the price stated in the bill, "if applied for on the first day of January next," thereafter. *Held*, that these several writings did not constitute a mortgage: *Sewall v. Henry*, 9 Ala. 24. F. sold to B. personal property, and gave a bond for title (which was assented to by B), in which he reserved a "lien" for the payment of the purchase-money upon the property. *Held*, that this did not amount to a mortgage: *Freeman v. Bass*, 34 Ga. 355; 89 Am. Dec. 255. A agreed in writing with B that the amount due for rent of land should be paid before the crops were removed. *Held*, to operate as a mortgage upon the crops: *Weed v. Standley*, 12 Fla. 166. "For value received, we promise to pay J. K., or order, forty-two dollars, etc., it being part payment for a mare, to be holden to J. G. (one of the signers) for the amount that he may pay for the same." *Held*, not a mortgage: *Gushee v. Robinson*, 40 Me. 412. A executed to B a bill of sale of a negro, and B executed an instrument as follows: "Received of A, his negro fellow C. I promise to account to him for the amount thereof in three years from this date, or return the fellow, without being accountable for any wages; and if he should

<sup>1</sup> *Porter v. Parmley*, 52 N. Y. 185. *v. Crary*, 47 N. Y. 423; *Boyd v. Beaudin*, 54 Wis. 193.

<sup>2</sup> *Cortelyou v. Lansing*, 1 Caines Cas. 202; *Stoddard v. Denison*, 38 How. Pr. 296. <sup>4</sup> *In re Haake*, 2 Saw. 240; *Charter v. Stevens*, 3 Denio, 33; 45 Am. Dec. 444.

<sup>3</sup> *Lavigne v. Naramore*, 52 Vt. 267; *Davis v. Hubbard*, 38 Ala. 185; *West* <sup>5</sup> *Fox v. Cronan*, 47 N. J. L. 493; 54 Am. Rep. 190.

die in this time, A is to be the loser." *Held*, a mortgage: *Berry v. Glover*, 1 Harp. Eq. 153. A writing was in the following words: "Burlington, February 12, 1833. Turned out and delivered to P. A. one white and red cow, which he may dispose of in fourteen days to satisfy an execution, J. M. v. me. (Signed) W. M." *Held*, the writing was a mortgage with power to sell: *Atwater v. Mower*, 10 Vt. 75. A purchaser of a safe gave to the seller a note for the price, stipulating that the seller did not part with the title until the money should be paid. *Held*, "an instrument of writing in the nature of a mortgage," which, under the South Carolina statute, must be recorded to constitute a protection against third persons: *Herring v. Cannon*, 21 S. C. 212; 53 Am. Rep. 661.

§ 3076. **Distinction between Mortgage, Pledge, and Conditional Sale.** — The main distinction between a chattel mortgage and a pledge is, that in the former the title in the chattel passes to the mortgagee, whether he has possession of the chattel or not, and reverts in the mortgagor on his performing the condition;<sup>1</sup> while in the latter a special property only passes to the pledgee, the general property remaining in the pledgor.<sup>2</sup> In the case of a pledge, moreover, it is essential to its validity that the pledgee should have possession of the goods, but the transfer of possession is not a necessary ingredient in a chattel mortgage.<sup>3</sup> A special contract is necessary to the existence of either a mortgage or a pledge, and as these contracts differ in their terms, they cannot be substituted, the one for the other, without the consent of the parties;<sup>4</sup> but if the mortgagor of chattels makes a new contract with the mortgagee to deliver to him the mortgaged chattels, and also other chattels, to be held as security for payment of the debt which the mortgage was made to secure, and delivers them accordingly, and the mortgagee takes

<sup>1</sup> *Conner v. Carpenter*, 28 Vt. 237; *Wright v. Ross*, 36 Cal. 414; *Patchin v. Pierce*, 12 Wend. 61; *Locketts v. Townsend*, 3 Tex. 119; 49 Am. Dec. 723; *Tannahill v. Tuttle*, 3 Mich. 104; 61 Am. Dec. 480; *Palmer v. Howard*, 72 Cal. 293; 1 Am. St. Rep. 60. See *ante*, Title Bailments, Pledges.

<sup>2</sup> *Eastman v. Avery*, 23 Me. 248; *Brown v. Bement*, 8 Johns. 96.

<sup>3</sup> *Brownell v. Hawkins*, 4 Barb. 491; *Ward v. Sumner*, 5 Pick. 59; *Eastman v. Avery*, 23 Me. 248.

<sup>4</sup> *Janvrin v. Fogg*, 49 N. H. 351.

and holds possession of them under such new contract, he thereby becomes pledgee of all the chattels so delivered.<sup>1</sup> But the courts have construed contracts similar in their terms sometimes as mortgages and sometimes as pledges, as it was deemed would best carry out the intention of the parties, and accomplish the ends of justice.<sup>2</sup> And, as a rule, where the transaction is one of security for a debt, and the agreement is that the property is to remain in the possession of the owner, it is regarded as a mortgage, and not as a pledge.<sup>3</sup> The distinction between a mortgage and a conditional sale is frequently of a very refined nature, and the intention of the parties, rather than the language of the instrument, affords the rule of guidance in its construction.<sup>4</sup> Where the transaction resolves itself into security for a debt, it is construed as a mortgage; but where it is a purchase to become absolute on the happening of a specified event, it is a conditional sale.<sup>5</sup> If the grantor is indebted to the grantee, and if that indebtedness is in any manner kept alive, the transaction is a mortgage;<sup>6</sup> in cases of doubt the facts of adequacy of the consideration and the extinguishment or continuance of the debt are the points upon which the question mainly turns;<sup>7</sup> and where the instrument is absolute in form, parol evidence is admissible both at law and in equity to show that the transaction was intended as a mortgage as between the parties;<sup>8</sup> but such evidence is admissible

<sup>1</sup> Rowley v. Rice, 10 Met. 7.

<sup>2</sup> Wright v. Bircher, 5 Mo. App. 322.

<sup>3</sup> Hauselt v. Harrison, 105 U. S. 401; Coty v. Barnes, 20 Vt. 78; Whitney v. Lowell, 33 Me. 318.

<sup>4</sup> Rockwell v. Humphrey, 57 Wis. 410; Wetheraly v. Wethersly, 40 Miss. 462; Thompson v. Davenport, 1 Wash. (Va.) 125; Snively v. Pickle, 29 Gratt. 34; Locke v. Palmer, 26 Ala. 312; Dunman v. Coleman, 59 Tex. 199.

<sup>5</sup> Chapman v. Turner, 1 Call, 280; Earp v. Boothe, 24 Gratt. 374.

<sup>6</sup> Sewall v. Henry, 9 Ala. 33.

<sup>7</sup> Williamson v. Culpepper, 16 Ala.

211; 50 Am. Dec. 175; McNamara v. Culver, 22 Kan. 661; Parish v. Gates, 29 Ala. 254; Cooper v. Brock, 41 Mich. 488; Clayton v. Hester, 80 N. C. 275; Haynie v. Robertson, 58 Ala. 37; Nash v. Weaver, 23 Hun, 513; Wethersly v. Wethersly, 40 Miss. 462.

<sup>8</sup> Smith v. Beattie, 31 N. Y. 542; Dadney v. Green, 4 Hen. & M. 101; Tyler v. Strong, 21 Barb. 198; Clark v. Washington etc. Ins. Co., 100 Mass. 509; 1 Am. Rep. 135; Laeber v. Langhor, 45 Md. 477; Love v. Blair, 72 Ind. 281; Rogers v. Vaughan, 31 Ark. 62; McAnnulty v. Seick, 59 Iowa, 586; Jackson v. Lodge, 36 Cal. 28; Stokes

only as between the parties, and not to the prejudice of creditors,<sup>1</sup> and it must be of an absolute and conclusive character.<sup>2</sup> The leaning, however, of courts of equity is decidedly against conditional sales, the reason assigned being that an erroneous construction of the instrument as a mortgage is not so injurious as a contrary decision.<sup>3</sup>

ILLUSTRATIONS. — A contract as follows: Sold and delivered to A such property, for such a sum, as his own property. The condition of this bill of sale is such that if I redeem said property within such a time, and pay the intervening expense, then this bill of sale to be void; otherwise, of full force to convey said property to A. *Held*, a mortgage, and not a pledge: *Wood v. Dudley*, 8 Vt. 435. A written instrument in the following form: "This day received of R. two hundred and twenty dollars, for the payment of which, by the 25th December next, I hereby assign over to said R. the free and full title to a certain negro girl, named Hulda." *Held*, a mortgage, and not a bill of sale: *Ross v. Ross*, 21 Ala. 322. An agreement between A and B that if B would advance money to redeem A's negroes from an encumbrance, the said negroes should become B's property, subject to the right of A to redeem them within a short space of time on repayment of the advance, with interest. *Held*, to be a mortgage, and not a conditional sale: *Morrow v. Turney*, 35 Ala. 131. A transferred several slaves to B, receiving from the latter a sum of money, and signed an instrument under seal acknowledging the receipt of the money. The form of the conveyance was absolute, no separate security was taken for the money, no interest stipulated for, nor any reservation made as to hiring increase, or death. But it was stipulated that if C or his legal representatives should repay the purchase-money within twelve months, "then the above deed of bargain and sale to be void in law, else to be and remain in full force." *Held*, a conditional sale, and not a mortgage: *Johnson v. Clark*, 5 Ark.

*v. Hollis*, 43 Ga. 262; *Horne v. Puckett*, 22 Tex. 201; *National Ins. Co. v. Webster*, 83 Ill. 470; *Cooper v. Brock*, 41 Mich. 488; *Frost v. Allen*, 57 Ga. 326; *Blodgett v. Blodgett*, 48 Vt. 32. On the question of whether parol evidence is admissible in an action at law to show that a bill of sale absolute on its face was in fact intended as a mortgage, the authorities are conflicting, the cases of *Fuller v. Parish*, 3 Mich. 211, and *Despard v. Walbridge*, 15 N. Y. 374, holding in favor of its admissibility; and *Bryant v. Crosby*, 36 Me.

562, 58 Am. Dec. 767, *Harper v. Ross*, 10 Allen. 332, *Montany v. Rock*, 10 Mo. 506, and *Pennock v. McCormick*, 120 Mass. 275, supporting the contrary.

<sup>1</sup> *Gaither v. Mumford*, 2 Tayl. 167; *State v. Bell*, 2 Mo. App. 102.

<sup>2</sup> *Triebler v. Andrews*, 31 Ark. 163; *Brantley v. West*, 27 Ala. 542; *Purington v. Akhurst*, 74 Ill. 490.

<sup>3</sup> *Pioneer Gold M. Co. v. Baker*, 23 Fed. Rep. 258; *Parish v. Gates*, 29 Ala. 254.

321. S. owned certain machines. He entered into an agreement with A and B as follows: A and B agree to pay S. for the above machines and belting, time, service, and expenses, the sum of \$810.75 within five months, and S. agrees to take the above amount as above stated, but lends to said A and B the property above stated; and if they fail to pay, he is at liberty to take the property away, to enable him to realize the amount and interest. *Held*, a conditional sale, and not a mortgage: *Grant v. Skinner*, 21 Barb. 581. A firm executed a conveyance of its stock of merchandise to A and B "as co-trustees," to be sold at their discretion, and the proceeds to be paid to certain creditors, the instrument then to be of no effect. *Held*, a mortgage, and not an assignment: *Jackson v. Harby*, 65 Tex. 710.

§ 3077. **Form and Contents.**—A chattel mortgage may be by deed under seal, or by instrument under hand only;<sup>1</sup> and, as between the parties, it may be merely verbal, unless required by statute to be in writing, but in such case it would not be valid against creditors or *bona fide* purchasers for value without notice.<sup>2</sup> It may be absolute in form, accompanied by either a written or verbal defeasance, and such defeasance, if written, may be given on a separate paper, and at a subsequent date, and even if the defeasance be only verbal, the instrument may be construed as a chattel mortgage as against third persons with notice.<sup>3</sup> A chattel mortgage under seal may be waived or altered by a subsequent parol agreement.<sup>4</sup> No specific form of words is necessary to create a chattel mortgage,<sup>5</sup> and it is not necessary that it should empower the mortgagee to take possession after default or confer on him any power of sale.<sup>6</sup> The date which the instrument bears is not

<sup>1</sup> *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Gerrey v. White*, 47 Me. 504; *Gibson v. Warden*, 14 Wall. 247; *Milton v. Mosher*, 7 Met. 244.

<sup>2</sup> *Brooks v. Ruff*, 37 Ala. 371; *Day v. Swift*, 48 Me. 368; *Couchman v. Wright*, 8 Neb. 1; *Bardwell v. Roberts*, 66 Barb. 433; *Crain v. Paine*, 4 Cush. 483; 50 Am. Dec. 807; *Bates v. Wiggin*, 37 Kan. 44; 1 Am. St. Rep. 234.

<sup>3</sup> *Gold v. Marshall*, 76 Va. 668;

*Omaha Book Co. v. Sutherland*, 10 Neb. 334; *Blakeslee v. Rossman*, 43 Wis. 116; *Glover v. McGilvray*, 63 Ala. 508.

<sup>4</sup> *Acker v. Bender*, 33 Ala. 230; *Burns v. Campbell*, 71 Ala. 271, 286.

<sup>5</sup> *Thompson v. Blanchard*, 4 N. Y. 304; *Langdon v. Buel*, 9 Wend. 80; *Merrill v. Reasler*, 37 Minn. 82; 5 Am. St. Rep. 822.

<sup>6</sup> *Ellington v. Charleston*, 51 Ala. 166; *Mervine v. White*, 50 Ala. 388.

conclusive evidence of the time of its execution,<sup>1</sup> and an error in the date may be corrected by parol evidence if the mortgage is not under seal;<sup>2</sup> and if the mortgage is undated, such evidence is permissible to show the date of its execution.<sup>3</sup> The statutory forms of chattel mortgage which are provided in some of the states are not exclusive, but are in addition to other sufficient forms.<sup>4</sup> In most of the states statutory provisions exist as to the mode of executing a chattel mortgage, and the parties are also required to make an affidavit as to the *bona fides* of the transaction, and that it is not intended to hinder or delay creditors.<sup>5</sup> In New Hampshire, there is a statute forbidding the making of a second mortgage, unless reference is made in it to the first one;<sup>6</sup> but a mortgage not containing the statutory reference is not held to be void, as the object of the statute, which is to protect the mortgagee, would thereby be defeated. The mortgagee is permitted to avoid the mortgage if he sees fit, but it is valid as against the mortgagor.<sup>7</sup> There is a similar statute in Vermont.<sup>8</sup> As between the parties, a chattel mortgage need not contain a specific description of the various items of property included in it so as to identify them from other similar property belonging to the mortgagor;<sup>9</sup>

<sup>1</sup> *Orcutt v. Moore*, 134 Mass. 48; *Stonebreaker v. Kerr*, 40 Ind. 186.

<sup>2</sup> *Shaughnessey v. Lewis*, 130 Mass. 355; *Partridge v. Swazey*, 46 Me. 414; *Clark v. Houghton*, 12 Gray, 38.

<sup>3</sup> *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289.

<sup>4</sup> Cal. Civ. Code, sec. 2957; Dak. Civ. Code, sec. 1742; Md. Code 1878, art. 44, secs. 51, 65.

<sup>5</sup> Dak. Civ. Code, sec. 1749; Ga. Code 1882, sec. 1955; *Nichols v. Hampton*, 46 Ga. 253; *Janes v. Penny*, 76 Ga. 796; *Ariz. Rev. Stats.* 1887, sec. 2364; Cal. Civ. Code, sec. 2957; *Ede v. Johnson*, 15 Cal. 53; *Del. Laws* 1877, c. 477, sec. 4; *Idaho Rev. Stats.* 1887, sec. 3386; *Mont.*, sec. 215; *Nev.*, sec. 217; *Utah*, sec. 229 a; *Md. Rev. Code* 1878, art. 44, sec. 54; *N. J. Sup.*

*to Rev.* 1886, p. 491, sec. 11; *Field v. Silo*, N. J. L. 355; *Ohio Rev. Stats.* 1880, sec. 4154; *Blandy v. Benedict*, 42 Ohio St. 295; *N. H. Gen. Stats.* 1878, c. 137, secs. 1-18; *Stone v. Marvel*, 45 N. H. 481; *Lovell v. Osgood*, 60 N. H. 71; *Comey v. Pickering*, 63 N. H. 126; *Vt. Laws* 1878, p. 58, secs. 3, 4, 5; *Rev. Laws* 1880, secs. 1967-1969.

<sup>6</sup> *N. H. Gen. Laws* 1878, c. 137, sec. 14.

<sup>7</sup> *Leach v. Kimball*, 34 N. H. 568.

<sup>8</sup> *Vt. Laws* 1878, p. 59, sec. 9; *Rev. Laws* 1880, sec. 1973.

<sup>9</sup> *Call v. Gray*, 37 N. H. 428; 75 Am. Dec. 141; *Leighton v. Stuart*, 19 Neb. 546. But see *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; 38 Am. Dec. 368.

but to render the mortgage valid as against third persons, it must contain such a description as will enable them to identify the property without other aid than what may be suggested by the instrument itself.<sup>1</sup> But a defective description will be cured by the actual delivery of the property to the mortgagee, before third parties have acquired any rights in it.<sup>2</sup> A description of the debt or liability which it is given to secure should, in general, be contained in a chattel mortgage, but if it is executed in good faith, it is valid, though the liability intended to be secured is misstated in the condition.<sup>3</sup> But when the mortgage is given to secure the performance of a written agreement, the latter is no part of the mortgage.<sup>4</sup> Future indebtedness expressly contemplated at the time of the making of the mortgage may be secured by it, but not advances not then intended.<sup>5</sup> The note which the mortgage was given to secure need not be copied into the mortgage, though it is the usual and better practice to do so; a general description will suffice, and parol evidence is admissible for further identification, if necessary.<sup>6</sup> In the case of an indemnity mortgage the description of the debt is sufficient, though it is described as being payable to the mortgagee.<sup>7</sup>

ILLUSTRATIONS.—A gave a mortgage to B, in which the property intended to be mortgaged was described as “ten new bug-

<sup>1</sup> *Tindall v. Wasson*, 74 Ind. 495; *Griffiths v. Wheeler*, 31 Kan. 17; *Yant v. Harvey*, 55 Iowa, 421; *Eggert v. White*, 59 Iowa, 464; *Kimball v. Sattley*, 55 Vt. 285; 45 Am. Rep. 614; *Lawrence v. Everts*, 7 Ohio St. 194; *Golden v. Cockril*, 1 Kan. 259; 81 Am. Dec. 510; *Warner v. Wilson*, 73 Iowa, 719; 5 Am. St. Rep. 710; *New v. Sailors*, 114 Ind. 407; 5 Am. St. Rep. 632.

<sup>2</sup> *Morrow v. Reed*, 30 Wis. 81; *Parsons Sav. Bank v. Sargent*, 20 Kan. 576. <sup>3</sup> *Kayaing v. Hughes*, 64 Ill. 123; *Manor v. Sheehan*, 30 Minn. 419; *Cushman v. Luther*, 53 N. H. 562; *Kennard v. Gray*, 58 N. H. 51; *Varney v. Hawes*, 68 Me. 442.

<sup>4</sup> *Byram v. Gordon*, 11 Mich. 531.

<sup>5</sup> *Ackerman v. Hunsicker*, 85 N. Y. 43; 39 Am. Rep. 621; *Collier v. Faulk*, 69 Ala. 58; *Gray v. Helm*, 60 Miss. 131; *Jones v. Guaranty etc. Co.*, 101 U. S. 622; *Davenport v. McChesney*, 86 N. Y. 242; *Morris v. Tillson*, 81 Ill. 607; *Monnot v. Ibert*, 33 Barb. 24.

<sup>6</sup> *Page v. Ordway*, 40 N. H. 253; *Clark v. Hyman*, 55 Iowa, 14; 39 Am. Rep. 160; *Holmes v. Hinkle*, 63 Ind. 518; *Sweetser v. Lowell*, 33 Me. 446; *Paine v. Benton*, 32 Wis. 491.

<sup>7</sup> *Blincoe v. Lee*, 12 Bush, 358.

gies." Possession was not delivered to B. A had at the time more than ten buggies on hand. *Held*, ineffectual to pass title to any particular buggies, or to any interest in the buggies on hand; and that B could not maintain an action for the recovery of ten new buggies in the possession of A or his personal representatives: *Blakeley v. Patrick*, 67 N. C. 40; 12 Am. Rep. 600. In another case the description was "one bay mare, two mare mules, one horse mule." *Held*, not sufficient to put a *bona fide* purchaser from the mortgagor of one black horse mule nine years old, and one black mare mule four years old, on notice by its record that the property mortgaged was the same as that purchased: *Stewart v. Jaques*, 77 Ga. 365; 4 Am. St. Rep. 86. A gave a mortgage to B upon cattle and their increase. The mortgage contained a statement of the colors, ages, and names of the cattle, but not of their present or past ownership, nor of the place where they were or had been kept. *Held*, insufficient: *Warner v. Wilson*, 73 Iowa, 719; 5 Am. St. Rep. 710. The description was "all of the goods now in the shop occupied by me in Bangor." *Held*, sufficient: *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289. "All and singular the stock, tools, and chattels belonging to me in and about the wheelwright shop occupied by me." *Held*, a sufficient description: *Harding v. Coburn*, 12 Met. 333; 46 Am. Dec. 680. A mortgage being made of the "following goods and chattels," a separate piece of paper containing a list of articles was attached by a wafer to the mortgage. *Held*, the presumption was that the paper was annexed before execution of the mortgage: *Belknap v. Wendell*, 21 N. H. 175. "One horse" may be a sufficient description if the mortgagor has only one horse: *Spivey v. Grant*, 96 N. C. 214. A mortgage of "one bay horse named Billy, ten years old, one one-seated buggy, and one set of single harness," *held*, a sufficient description, the mortgage showing the county of the mortgagor's residence: *Brock v. Barr*, 70 Iowa, 399. A mortgage of "twenty-three head of horses and mules," *held*, a sufficient description, they being all the mortgagor had: *Wiley v. Shars*, 21 Neb. 712. A mortgage of "ten steers," *held*, as against an attachment, insufficient as to description, the mortgagor having ninety-eight steers, to any ten of which the description would apply: *Price v. McComas*, 21 Neb. 195. A gave B an absolute bill of sale of certain lumber, and B gave A a writing providing that B should sell and dispose of all the lumber and apply the proceeds, first, to paying A's indebtedness to B and the expenses of sale, and second, to paying over to A the remainder of such proceeds. *Held*, that these transactions did not constitute a mortgage: *Camp v. Thompson*, 25 Minn. 175.

§ 3078. **Who may be Parties.**—As a general rule, a chattel mortgage may be made by any person who is *sui juris*, and capable of entering into other species of contracts, and the rules of law affecting the validity or invalidity of a chattel mortgage, when given by an infant, married woman, or insane person, are the same as those which obtain with regard to conveyances and mortgages of realty made by such persons.<sup>1</sup> So chattel mortgages may be given by corporations and joint-stock associations;<sup>2</sup> by partners,<sup>3</sup> it being considered that the general authority which a partner has to transact the partnership business includes a power to mortgage the partnership property for that purpose;<sup>4</sup> by tenants in common;<sup>5</sup> by a duly authorized agent, and such authorization may be by parol.<sup>6</sup> But a power to sell does not include a power to mortgage, and the power must be exercised in the name of the principal.<sup>7</sup> An agent may take and enforce a mortgage in his own name, and in so doing will be regarded as the trustee of his principal.<sup>8</sup>

<sup>1</sup> See page 0000, *ante*, § 0000; Green v. Wilding, 59 Iowa, 679; 44 Am. Rep. 696; Chapin v. Shafer, 49 N. Y. 407; Harner v. Dipple, 31 Ohio St. 72; 27 Am. Rep. 496; State v. Plaisted, 43 N. H. 413; Miller v. Smith, 26 Minn. 248; 37 Am. Rep. 407; State v. Howard, 88 N. C. 650; Green v. Green, 69 N. Y. 553; 25 Am. Rep. 233; Riley v. Mallory, 33 Conn. 201; Knaggs v. Green, 48 Wis. 601; 33 Am. Rep. 838; Skinner v. Maxwell, 66 N. C. 45; Curtiss v. McDougall, 26 Ohio St. 66; Lancaster Co. Nat. Bank v. Moore, 78 Pa. St. 407; 21 Am. Rep. 24; Schuff v. Ransom, 79 Ind. 458; Fay v. Burditt, 81 Ind. 433; 42 Am. Rep. 142; Fenelon v. Hogoboom, 31 Wis. 172; Talman v. Hawkshurst, 4 Duer, 221; Schoenrock v. Farley, 17 Jones & S. 302.

<sup>2</sup> Ward v. Johnson, 95 Ill. 215; Nelson v. Neil, 15 Hun, 383; Sherman v. Fitch, 98 Mass. 59; Hamilton v. McLaughlin, 145 Mass. 20; Eureka Iron and Steel Works v. Bresnahan, 60 Mich. 332; Amerman v. Wiles, 24

N. J. Eq. 13; Moran v. Strauss, 6 Ben. 249; Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547; Badger v. Batavia Paper Mfg. Co., 70 Ill. 302.

<sup>3</sup> Kennedy v. Nat. Union Bank, 23 Hun, 494; Ogden v. Arnot, 29 Hun, 146; Richardson v. Lester, 83 Ill. 55; Gates v. Bennett, 33 Ark. 475; Clark v. Houghton, 12 Gray, 38; Woodruff v. King, 47 Wis. 261; Cutler v. Hake, 47 Mich. 80; Walker v. White, 60 Mich. 427.

<sup>4</sup> Tapley v. Butterfield, 1 Met. 515; 35 Am. Dec. 374; Fromme v. Jones, 13 Iowa, 474.

<sup>5</sup> Gaar v. Hurd, 92 Ill. 315; Smith v. Rice, 56 Ala. 417; Melin v. Reynolds, 32 Minn. 52.

<sup>6</sup> Cook v. Harrison, 19 Ill. App. 402; Despatch Line of Packets v. Bellamy etc. Co., 12 N. H. 205; 37 Am. Dec. 203; Brownell v. Hawkins, 4 Barb. 491.

<sup>7</sup> Switzer v. Wilvers, 24 Kan. 384; 36 Am. Rep. 259. See *ante*, Title Real Property.

<sup>8</sup> Varney v. Hawes, 68 Me. 442.

The unpaid vendor of chattels, who has parted with the possession on condition that the title is not to pass until the price is paid, may mortgage them, and the title of such mortgagee takes precedence of that of the conditional buyer.<sup>1</sup>

ILLUSTRATIONS.—C., as trustee for E. C., executed a chattel mortgage, and an affidavit to foreclose alleged that the mortgage note was given for the purchase-money of the mortgaged property, due from E. C.; that she promised to execute a mortgage, having C. sign for her, but he signed his own name as trustee, and all parties intended the property of E. C. to be bound. *Held*, that the mortgagee's remedy, if he had any, was in equity: *Duke v. Culpepper*, 72 Ga. 842.

§ 3079. **What may be Mortgaged.**—In most of the states every species of personal property which is capable of absolute sale, and which has any actual or prospective existence, may be the subject-matter of a chattel mortgage;<sup>2</sup> but a mortgage of personal property of which the mortgagor has no possession or right of possession, and which is not the natural product of property of which he has possession or right of possession, is invalid against prior creditors subsequently obtaining judgment and levying upon the property before delivered.<sup>3</sup> So all claims for damages *ex contractu*, interests in pending actions, and claims growing out of property, may be mortgaged.<sup>4</sup> And the interest which a conditional vendee takes in the property may be mortgaged, subject to the prior claims of the unpaid vendor.<sup>5</sup> But the mere possession of property on behalf of the true owner confers no power to mortgage

<sup>1</sup> *Everett v. Hall*, 67 Me. 497; *Kingsland v. Drumm*, 80 Mo. 646; *Winchester v. King*, 46 Mich. 102; *Goodwin v. May*, 23 Ga. 205.

<sup>2</sup> *Dorsey v. Hall*, 7 Neb. 460; *Kimball v. Sattley*, 55 Vt. 290; 45 Am. Rep. 614; Vt. Rev. Laws 1880, sec. 1965; Wash. Code, sec. 1986; Wyoming Act 1882, c. 11, sec. 7; N. H. Gen. Laws 1878, c. 137, sec. 1; Nev. Act 1885, c. 54; N. M. Comp. Laws,

sec. 1586; but in California, section 2055 of the Civil Code defines what species of personal property may be mortgaged: *Morrill v. Noyes*, 56 Me. 458; 98 Am. Dec. 486.

<sup>3</sup> *Parker v. Jacobs*, 14 S. C. 112; 37 Am. Rep. 724.

<sup>4</sup> *Pindell v. Grooms*, 18 B. Mon. 501; *Forman v. Proctor*, 9 B. Mon. 124.

<sup>5</sup> *Crompton v. Pratt*, 105 Mass. 255.

it, even in favor of a *bona fide* purchaser for value without notice;<sup>1</sup> but where an unpaid vendor permits his vendee to have the possession and apparent ownership of the property, and the contract of conditional sale is not recorded, a mortgage given by such conditional vendee will take precedence over the secret lien of the vendor.<sup>2</sup> Where fixtures which would otherwise be part of the realty are treated by the parties as personalty, or otherwise severed from the freehold, they may be the subject of a chattel mortgage.<sup>3</sup> And where a mortgage is given on chattels about to be annexed to the freehold, notwithstanding they are so annexed they will retain their character of personalty, and the mortgage will be valid.<sup>4</sup> So where it is agreed that a building erected on the land of another may be removed at any time, it is personal property, and may be mortgaged as such.<sup>5</sup> It has also been held that the rolling stock of a railroad company is personal property, and so may be mortgaged in that character;<sup>6</sup> but the contrary is held in a large number of decisions, so that no general rule can be laid down on the subject,<sup>7</sup> though the constitutions and statutes of many of the states have dealt with the matter and defined the *status* of such property. A chattel mortgage may also be given upon crops, both while growing and after they have been gathered in.<sup>8</sup> In this connection a crop is said to

<sup>1</sup> Glaze v. Blake, 56 Ala. 379; Jewell v. Simpson, 38 Kan. 362.

<sup>2</sup> Moline Plow Co. v. Braden, 71 Iowa, 141; Manning v. Cunningham, 21 Neb. 288; Ohio and Miss. R. R. Co. v. Kerr, 49 Ill. 458.

<sup>3</sup> Smith v. Waggoner, 50 Wis. 155; Shell v. Haywood, 16 Pa. St. 523; Kinsey v. Bailey, 9 Hun. 452; Tift v. Horton, 53 N. Y. 377; 13 Am. Rep. 537.

<sup>4</sup> Eaves v. Estes, 10 Kan. 314; 15 Am. Rep. 345; Sisson v. Hibbard, 75 N. Y. 542.

<sup>5</sup> Lanphere v. Lowe, 3 Neb. 131; Smith v. Benson, 1 Hill, 176.

<sup>6</sup> Stevens v. R. R. Co., 31 Barb. 590; Beardsley v. Ontario Bank, 31 Barb.

619; Hoyle v. R. R. Co., 54 N. Y. 314; 13 Am. Rep. 595; Williamson v. R. R. Co., 29 N. J. Eq. 311; Randall v. Elwell, 52 N. Y. 521; 11 Am. Rep. 747; Boston R. R. Co. v. Gilmore, 37 N. H. 410; 22 Am. Dec. 336; Meyer v. Johnston, 53 Ala. 352.

<sup>7</sup> Strickland v. Parker, 54 Me. 263; Palmer v. Forbes, 23 Ill. 300; Titus v. Mabee, 25 Ill. 257; Farmers' L. & T. Co. v. Commercial Bank, 11 Wis. 207; Pennock v. Coe, 23 How. 117; Youngman v. R. R. Co., 65 Pa. St. 278.

<sup>8</sup> Moore v. Byrum, 10 S. C. 452; 30 Am. Rep. 58; Adams v. Tanner, 5 Ala. 740; Cook v. Steel, 42 Tex. 53; Wintermute v. Light, 46 Barb. 278;

be "growing" as soon as it is sown or planted,<sup>1</sup> and it has been held that a valid mortgage may be given on a crop even before it has been planted;<sup>2</sup> but on the other hand, it is held in some cases that such a mortgage is void, and conveys no title whatever.<sup>3</sup> If part of a growing crop is so described as to be capable of identification, a valid mortgage may be made of it.<sup>4</sup> The purchaser of growing wood and timber may mortgage it as personal property, to take effect when severed from the freehold.<sup>5</sup> With respect to after-acquired property, the rule in equity is, that if the language of the mortgage covers it, and it is in existence at the date of the mortgage, a lien valid as between the parties may be given on it;<sup>6</sup> but it is invalid as against attaching creditors or subsequent purchasers,<sup>7</sup> though if after the acquisition of the property, and before the intervention of other rights, the mortgagee acquires possession of the property, the title thereto will vest in him as against all persons.<sup>8</sup> With regard to accessions to or improvements on the chattels, the rule is, that they are covered by

*Orcutt v. Moore*, 134 Mass. 48; 45 Am. Rep. 278; *Quirique v. Dennis*, 24 Cal. 124; *Everman v. Robb*, 52 Miss. 653; 24 Am. Rep. 682.

<sup>1</sup> *Wilkinson v. Ketler*, 69 Ala. 435; *Cotten v. Willoughly*, 83 N. C. 75; 35 Am. Rep. 564.

<sup>2</sup> *Apperson v. Moore*, 30 Ark. 56; 21 Am. Rep. 170; *Argues v. Wasson*, 61 Cal. 620; 21 Am. Rep. 718; *Harris v. Jones*, 83 N. C. 317; *Watkins v. Wyatt*, 9 Bart. 250; 40 Am. Rep. 90; *Conderman v. Smith*, 41 Barb. 404; *Rawlings v. Hunt*, 90 N. C. 270; *Senter v. Mitchell*, 16 Fed. Rep. 206; *Thrash v. Bennett*, 57 Ala. 156.

<sup>3</sup> *Hutchinson v. Ford*, 9 Bush, 318; 15 Am. Rep. 711; *Cressey v. Sabie*, 17 Hun, 120; *Comstock v. Scales*, 7 Wis. 159; *Milliman v. Neher*, 20 Barb. 37.

<sup>4</sup> *Williamson v. Steele*, 3 Lea, 527; 31 Am. Rep. 652; *Overton v. Hollinshead*, 4 Heisk. 683; *Stephens v. Tucker*, 55 Ga. 543; *Thurman v. Jenkins*, 2 Bart. 426.

<sup>5</sup> *Sheldon v. Conner*, 43 Me. 584;

*Clafin v. Carpenter*, 4 Met. 580; 38 Am. Dec. 381; *Wood v. Lester*, 29 Barb. 145.

<sup>6</sup> *Beall v. White*, 94 U. S. 382; *Hughes v. Wheeler*, 66 Iowa, 641; *Argues v. Wasson*, 51 Cal. 620; 21 Am. Rep. 718; *Case v. Fish*, 58 Wis. 56; *Yates v. Olmsted*, 56 N. Y. 632; *Allen v. Goodnow*, 71 Me. 420; *Deering v. Cobb*, 74 Me. 332; 43 Am. Rep. 596; *Mitchell v. Winslow*, 2 Story, 630; *McCaffrey v. Woodin*, 65 N. Y. 459; 22 Am. Rep. 644, and note.

<sup>7</sup> *Jones v. Richardson*, 10 Met. 481; *Farmers' L. & T. Co. v. Long Beach Imp. Co.*, 27 Hun, 89; *Griffiths v. Douglas*, 73 Me. 532; 40 Am. Rep. 395; *Roy v. Goings*, 96 Ill. 361; *Wilson v. Wilson*, 37 Md. 1; 11 Am. Rep. 518; *Goodrich v. Williams*, 50 Ga. 425; *Looker v. Peckwell*, 38 N. J. L. 253; *Gregg v. Sanford*, 24 Ill. 17; 76 Am. Dec. 719.

<sup>8</sup> *Chapin v. Cram*, 40 Me. 561; *Cook v. Corthell*, 11 R. I. 482; 23 Am. Rep. 518; *Williams v. Briggs*, 11 R. I. 476; 23 Am. Rep. 518.

the mortgage when it is so specified.<sup>1</sup> The following are instances: The young of animals;<sup>2</sup> the growth of cuttings from plants and shrubs;<sup>3</sup> the shoes manufactured out of leather cut and prepared at the date of the mortgage;<sup>4</sup> a completed locomotive which was unfinished when mortgaged;<sup>5</sup> new printing materials so mingled with the old specified in the mortgage as to be incapable of separation.<sup>6</sup>

ILLUSTRATIONS.—The proprietor of a cotton factory, by an instrument duly recorded, in consideration of and as security for advances made and to be made by T. for the purchase of materials and for other expenses of the manufacturing, covenanted to deliver the manufactured product to T., and not to sell any of it himself without T.'s written authority, T. to receive a commission on the entire product. *Held*, a mortgage valid in equity to secure T. for all such advances, as against a subsequent creditor of the proprietor: *First Nat. Bank of Alexandria v. Turnbull*, 32 Gratt. 695; 34 Am. Rep. 791. A mortgaged to B a crop of corn to be planted. The corn was duly planted and levied on as A's, B not having taken possession. *Held*, that the levy was good as against the mortgagee: *Cole v. Kerr*, 19 Neb. 553. A mortgaged to B an elevator which was built on land owned by a railroad company, under a license allowing A to operate it for the mutual benefit to himself and the company. *Held*, a chattel mortgage: *Deering v. Ladd*, 22 Fed. Rep. 575. A, being tenant at will of a store owned by B as real property, mortgaged to B a building annexed to and connected with the store, which building was owned by A as personal property. *Held*, that the description of the mortgaged premises as "a building and appurtenances" did not have the effect to surrender or transfer to B the right A had to occupy the store: *Goodenow v. Allen*, 68 Me. 308.

<sup>1</sup> *Sumner v. Hamlet*, 13 Pick. 76; *Pulcifer v. Page*, 32 Me. 404; 54 Am. Dec. 582; *Hamlin v. Jerrard*, 72 Mo. 62.

<sup>2</sup> *Kellogg v. Lovely*, 46 Mich. 131; 41 Am. Rep. 151; *Sawyer v. Gerrish*, 70 Me. 254; 35 Am. Rep. 323; *Winter v. Landphere*, 42 Iowa, 471; *Funk v. Paul*, 64 Wis. 35; 54 Am. Rep. 576;

*Rogers v. Highland*, 69 Iowa, 504; 58 Am. Rep. 230.

<sup>3</sup> *Bryant v. Pennell*, 61 Me. 108; 14 Am. Rep. 550.

<sup>4</sup> *Putnam v. Cushing*, 10 Gray, 334.

<sup>5</sup> *Jenckes v. Goffe*, 1 R. I. 511; *Ex parte Ames*, 1 Low. Dec. 561.

<sup>6</sup> *Fowler v. Hoffman*, 31 Mich. 215.

## CHAPTER CXLIX.

## REGISTRATION.

- § 3080. In general.
- § 3081. Filing and refiling.
- § 3082. Precedence of unrecorded mortgages.
- § 3083. Actual notice.

§ 3080. **In General.**—As a supplement to the system prevailing throughout the Union with regard to the recording of documents affecting realty,<sup>1</sup> it is provided in nearly all the states that chattel mortgages shall be filed, recorded, or registered in accordance with the various statutes, in order that they may be valid as against creditors of the mortgagor or subsequent purchasers or encumbrancers without notice, unless the property is delivered to and retained by the mortgagee.<sup>2</sup> As between the parties a chattel mortgage is effectual without registration, filing, or recording, and even though the possession of the chattels remains unchanged;<sup>3</sup> but as against attaching creditors, or execution creditors who levy before the

<sup>1</sup> As to which, see *ante*, Title Real Property.

<sup>2</sup> Ala. Code, sec. 2162; Ark. Dig., secs. 4742, 4750; Cal. Civ. Code, sec. 2957; Col. Gen. Stats., secs. 163, 172; Dak. Civ. Code, sec. 1744; Fla. Dig. 1881, c. 31, sec. 1; Ga. Code 1882, sec. 1956; Ill. Rev. Stats., art. 95, sec. 1; Ind. Rev. Stats., sec. 4913; Iowa Rev. Code, sec. 1923; Kan. Comp. Laws 1879, c. 68, sec. 9; Me. Rev. Stats., c. 91, sec. 1; Mass. Pub. Stats. 1882, c. 192, sec. 1; Md. Rev. Code 1878, art. 44, sec. 45; Mo. Rev. Stats., sec. 2503; Mich. Annot. Stats., sec. 6193; Minn. Gen. Stats. 1878, c. 39, sec. 1; Mont. Act 1881, p. 3, secs. 1-4; N. H. Gen. Laws 1878, c. 137, sec. 2; N. Y. Act 1833, c. 279, sec. 1; N. J. Act 1878, c. 234; Act 1881, c. 179, sec. 4; Act 1885, c. 244, sec. 4; N. C. Code 1883, sec. 1254; Neb. Comp. Stats., pt. 1, c. 32, sec. 14;

Nev. Comp. Laws, sec. 294; Ohio Rev. Stats. 1880, sec. 4150; Or. Gen. Laws 1872, c. 6, sec. 46; Pa. Pub. Laws 1855, p. 369; 1887, p. 73; R. I. Pub. Stats. 1882, c. 176, sec. 9; S. C. Gen. Stats. 1882, sec. 4346; Tenn. Code 1884, sec. 2809; Tex. Rev. Stats. 1879, sec. 4341; Utah Comp. Laws 1888, secs. 2801-2814; Vt. Rev. Laws 1880, sec. 1966; Va. Code 1873, c. 114, sec. 5; W. Va. Rev. Stats. 1878, art. 96, sec. 5; Wis. Rev. Stats., sec. 2313; Wash. Code, sec. 1987; Wyo. Act 1882, c. 11, sec. 2.

<sup>3</sup> Williamson v. R. R. Co., 26 N. J. Eq. 398; Stewart v. Platt, 101 U. S. 731; Morrow v. Reed, 30 Wis. 81; Pancoast v. Am. Heating Co., 66 How. Pr. 49; Merrick v. Avery, 14 Ark. 370; Fuller v. Paige, 26 Ill. 358; 79 Am. Dec. 379; Bismarck Bldg. & L. Ass'n v. Bolster, 92 Pa. St. 123.

mortgage is recorded, it is void.<sup>1</sup> The registration is for the benefit of the mortgagee only, and for his protection against the possible claims of subsequent *bona fide* purchasers, or creditors acquiring a lien without notice, and he ought to pay the cost of it.<sup>2</sup> The registration of a bill of sale, apparently absolute, but shown by parol to be a mortgage, is effectual as to third parties as notice of a mortgage.<sup>3</sup>

§ 3081. **Filing and Refiling.**—The object of filing a chattel mortgage is to give notice of its existence to creditors and subsequent purchasers, when the chattels remain in the possession of the mortgagor, so that if the possession be transferred filing is not requisite.<sup>4</sup> The filing is generally required to be in the office of the town clerk or in the county where the mortgagor resides.<sup>5</sup> But the statutes of the various states provide for matters of this nature, and must be complied with. Where the mortgagor has removed from the town or county where he resided when the mortgage was executed, and where it was recorded, and taken the property with him, it is not necessary to record the mortgage again in the town or county to which he has removed.<sup>6</sup> Where there are several mortgagors, residing in different towns, the mortgage is invalid unless recorded in all of such towns.<sup>7</sup> In the case of corporations, the proper place to record the mortgage is where the principal office of the corporation within

<sup>1</sup> *Cass v. Rothman*, 42 Ohio St. 380; *Garland v. Plummer*, 72 Me. 397; *Waite v. Mathews*, 50 Mich. 392; *Parshall v. Eggart*, 52 Barb. 367.

<sup>2</sup> *Simon v. Sewell*, 64 Ala. 241.

<sup>3</sup> *Nicklin v. Betts Spring Co.*, 11 Or. 406; 50 Am. Rep. 477.

<sup>4</sup> *Cooper v. Brock*, 41 Mich. 488; *Morrow v. Reed*, 30 Wis. 81; *Gregg v. Sanford*, 24 Ill. 17; 76 Am. Dec. 719; *Wescott v. Gunn*, 4 Duer, 107; *Steele v. Benham*, 84 N. Y. 634; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62.

<sup>5</sup> *Hicks v. Williams*, 17 Barb. 523; *Stowe v. Meserve*, 13 N. H. 46; *Bither v. Buswell*, 51 Me. 601; *Smith v. Jenks*, 1 Denio, 580.

<sup>6</sup> *Offut v. Flagg*, 10 N. H. 46; *Barrows v. Turner*, 50 Me. 127; *Elson v. Barrier*, 56 Miss. 394; *Hoit v. Remick*, 11 N. H. 285; *Pease v. Odenkirchen*, 42 Conn. 415; *Griffith v. Morrison*, 58 Tex. 46; *Harris v. Jones*, 83 N. C. 317.

<sup>7</sup> *Aultman v. Guy*, 41 Ohio St. 598; *Morrill v. Sanford*, 49 Me. 566; *Rich v. Roberts*, 50 Me. 395.

the state is situated, and not the place where the property is.<sup>1</sup> Where a joint-stock association is the mortgagor, the mortgage should be filed where the business of the association is principally conducted, and not wherever the stockholders reside.<sup>2</sup> When the mortgagor is non-resident, the statute sometimes requires the mortgage to be filed in the town or county where the chattels are at the date of the mortgage.<sup>3</sup> If the statute provides for the filing of the mortgage where the mortgagor resides at the time of the execution of the mortgage, and the mortgagor is resident out of the state at that time, then the mortgage cannot be recorded, unless the statute also provides for its being recorded where the chattels are, and the mortgagee must resort to his common-law rights to hold the property against other creditors.<sup>4</sup> Some of the statutes require the mortgage to be filed or recorded "forthwith" after its execution, and others at periods varying from ten to forty days.<sup>5</sup> But the validity of the mortgage is not affected, as between the parties, by any delay in recording it, and if recorded after the statutory time it is valid as against an encumbrance created after the recording.<sup>6</sup> The effect of the filing in many of the states continues only for a limited period as provided by the various statutes, usually a year; and if the mortgagee desires to retain the benefit of the statute, he must refile or record the mortgage within the prescribed time, and repeat the operation from time to time as may be necessary.<sup>7</sup> A

<sup>1</sup> *Wright v. Bundy*, 11 Ind. 398.

<sup>2</sup> *Nelson v. Neil*, 15 Hun, 383.

<sup>3</sup> *De Courcoy v. Collins*, 21 N. J. Eq. 357.

<sup>4</sup> *Hammers v. Dole*, 61 Ill. 307; *Smith v. Moore*, 41 N. H. 55.

<sup>5</sup> "Forthwith": Kan. Comp. Laws 1879, c. 68, sec. 9; Tex. Rev. Stats. 1879, sec. 4341; N. M. Comp. Laws, sec. 1587. Ten days: Ind. Rev. Stats., sec. 4913; 15 Del. Laws, c. 477, sec. 1. Fifteen days: Mass. Pub. Stats., c. 192, sec. 1; Act of 1883, c. 73. Twenty days: Md. Rev. Code 1878,

art. 44, sec. 50. Forty days: S. C. Gen. Stats. 1882, sec. 2346.

<sup>6</sup> *McVay v. English*, 30 Kan. 368; *Wescott v. Gunn*, 4 Duer, 107.

<sup>7</sup> Kan. Comp. Laws, c. 68, sec. 11; Mich. Rev. Stats., sec. 6196; Mont. Laws 1885, c. 4; N. Y. Laws 1873, c. 501, p. 767; 1833, c. 279, sec. 3; N. J. Rev. Stats., Mortgages, 41; Nev. Laws 1885, c. 54; N. M. Comp. Laws, sec. 1589; Or. Gen. Stats., c. 6, sec. 48; Ohio Rev. Stats., sec. 4155; Utah Laws 1885, c. 5; in which states the refile must be within one year. In

chattel mortgage must be refiled within the hour of the prescribed time from the next preceding filing, as fractions of a day are to be taken into account in reckoning the period.<sup>1</sup> But a subsequent encumbrancer with actual notice obtains no additional rights by an omission to refile.<sup>2</sup> When the refiling is not made until after the prescribed period, the lien of the mortgage is restored, as against an encumbrance arising after the refiling.<sup>3</sup> The statutes frequently provide that the refiling must be had within thirty days prior to the expiration of the prescribed time, and a refiling before the commencement of that period would be entirely nugatory.<sup>4</sup> The object of the law in requiring a refiling is to supply information to all persons interested therein regarding the position of the property with regard to encumbrances upon it.<sup>5</sup> As to the mode of filing, the certificate of the recording officer is conclusive of that fact.<sup>6</sup> But a certificate of such officer that a paper is a copy of the original mortgage is not proof of the existence of the mortgage, which must be produced and proved, or its absence accounted for, to admit of the introduction of secondary evidence.<sup>7</sup> The filing is complete from the moment the mortgage is left with the proper officer for record, and the public is charged with notice before the document is actually copied into the records.<sup>8</sup>

**ILLUSTRATIONS.** — A mortgaged chattels to B and C. They employed him to file the mortgage, and he, at the time of filing it, for his own purposes, and without their knowledge, requested

Colorado, Illinois, and Minnesota it must be within two years; in Dakota within three years; and in Nebraska within five years.

<sup>1</sup> *Seamen v. Eager*, 16 Ohio St. 209. *Contra* in Michigan: *Griffin v. Forrest*, 49 Mich. 309.

<sup>2</sup> *Wetherell v. Spencer*, 3 Mich. 123; *Hill v. Beebe*, 13 N. Y. 556; *Mack v. Phelan*, 92 N. Y. 20; *Nat. Bank v. Sprague*, 21 N. J. Eq. 530.

<sup>3</sup> *Nixon v. Stanley*, 33 Hun. 247.

<sup>4</sup> *Newell v. Warner*, 44 Barb. 258;

*Nat. Bank v. Sprague*, 21 N. J. Eq. 530.

<sup>5</sup> *Maraden v. Cornell*, 62 N. Y. 219; *Briggs v. Mette*, 42 Mich. 12.

<sup>6</sup> *Head v. Goodwin*, 37 Me. 181; *Adams v. Pratt*, 109 Mass. 59.

<sup>7</sup> *Fellows v. Hyring*, 23 How. Pr. 230; *Bissell v. Pearce*, 28 N. Y. 252; *Hewitt v. Morris*, 5 Jones & S. 18.

<sup>8</sup> *Jordan v. Farnsworth*, 15 Gray, 517; *Craig v. Dimock*, 47 Ill. 308; *Gorham v. Summers*, 25 Minn. 81; *Merlin v. Oaks*, 67 Cal. 57.

the clerk "to place it at the bottom of the pile, so that nobody would see it," and said that he did not want anybody to know that he had given it: *Held*, that such request was not within the scope of his agency for the mortgagees, and did not prejudice their rights: *Case v. Jewett*, 13 Wis. 498; 80 Am. Dec. 752. The California code makes chattel mortgages good as against *bona fide* purchasers, etc., when recorded "in like manner as are grants of real property." Grants of real property are deemed recorded in that state when deposited for record. *Held*, sufficient in the case of a chattel mortgage: *Meherin v. Oaks*, 67 Cal. 57. A, in pursuance of a previous agreement to secure the indorser of his notes, executed and filed for record a mortgage on his chattels, and at the same time executed another mortgage on the same chattels to secure a creditor, this mortgage being filed the next day. *Held*, that the mortgage first filed constituted a first lien: *Capital City Bank v. Hodgins*, 24 Fed. Rep. 1. In Virginia, a mortgage of slaves was recorded in the county of A, the slaves being at the time of the execution and recording of the deed in the county of B. Afterwards the slaves were removed to A, but the deed was not recorded anew after such removal. The mortgagor then mortgaged the same slaves to another person while the slaves were thus in A, and this mortgage was recorded in A. *Held*, that the first mortgage was not duly recorded, and so was void as against the second mortgagee: *Lane v. Mason*, 5 Leigh, 520. A livery-stable keeper who resided in Vermont bought horses, which he kept and used during the traveling season of three months in New Hampshire. *Held*, that the losses were "situate" in New Hampshire under New Hampshire General Laws, requiring a mortgage of personalty to be recorded in the town where the property is situate: *Lathe v. Schaff*, 60 N. H. 34. A sold and delivered to B certain personal property, taking from him a mortgage on the same, which was not recorded until the next day. At the time of the delivery of the property to B, a constable had in his hands an execution against B. *Held*, that on delivery to B, the lien of the judgment attached as against the lien of the mortgage, which did not attach until the same was recorded: *Self v. Sanford*, 4 Ill. App. 328. New York Act, 1883, chapter 279, provides that mortgages not accompanied by delivery shall be void as against the mortgagor's creditors, unless filed. *Held*, that a bill of sale duly filed may be good as a mortgage, although the agreement that it shall be a mortgage rests in parol, and is not filed: *Preston v. Southwick*, 42 Hun, 291. A gave to B a mortgage upon chattels in the town of Flatbush, Kings County, New York. *Held*, that such mortgage should be filed in the office of the clerk of that town, and not in the office of the register of Kings County: *Martin v. Roths-*

*child*, 42 Hun, 410. The Texas statute requires the clerk to indorse on a chattel mortgage "the time of receiving it." *Held*, that the use of the words "filed for record" sufficiently indicated the time of receiving the mortgage: *Cook v. Halsell*, 65 Tex. 1.

§ 3082. **Precedence of Unrecorded Mortgages.**—The general rule is, that the order of precedence follows the order of execution.<sup>1</sup> But where by statute a prior unrecorded mortgage is made absolutely void as against a subsequent *bona fide* mortgage, it is held that the latter takes priority over the former, though neither of them is recorded.<sup>2</sup> Where the consideration for the second mortgage is a past debt, and that for the first, though unrecorded, mortgage is a present advance, the rule in New York is, that the second mortgage is not *bona fide*, and even though recorded before the first one, does not take precedence of it.<sup>3</sup>

ILLUSTRATIONS.—A manufacturing company gave to a creditor a paper acknowledging that the company had pledged to him certain chattels in its factory. The superintendent of the company agreed to hold possession for the pledgee. The chattels remained in the factory, and the superintendent exercised the same control over them after the pledging as before. A took a mortgage on the chattels to secure a debt and loan, the superintendent informing A that there were no liens on them, and A not knowing that there were. *Held*, that A could hold as against the pledgee: *Dirigo Tool Co. v. Woodruff*, 41 N. J. Eq. 336. L. bought a mule from R., agreeing that title should remain in R. until payment was made. L. mortgaged to R. another mule as collateral security. Afterwards L. authorized R. to take possession. H., who had the possession, paid what was due, and took an assignment of the mortgage. *Held*, that his rights were paramount to those of one to whom L. afterwards gave a mortgage: *Grice v. Haskins*, 73 Ga. 700.

§ 3083. **Actual Notice.**—This includes also implied and constructive notice, and such knowledge, whether

<sup>1</sup> *Tiffany v. Warren*, 24 How. Pr. 293.

<sup>2</sup> *Bank of Farmington v. Ellis*, 30 Minn. 270; *De Courcey v. Collins*, 21 N. J. Eq. 357; *Coster v. Bank of Georgia*, 24 Ala. 37, 63.

<sup>3</sup> *Jones v. Graham*, 77 N. Y. 628; *Wiles v. Clapp*, 41 Barb. 645; *Tiffany v. Warren*, 24 How. Pr. 293. And a similar rule obtains in Alabama: *Craft v. Russell*, 67 Ala. 9.

direct or such as may be acquired by fair inference from surrounding facts and circumstances, as would put a man of ordinary prudence upon inquiry. The neglect to make inquiry, where there are indications of its necessity, raises a presumption of *mala fides*.<sup>1</sup> So that if the property is in the possession of a third person not the intending mortgagor, it is held to be sufficient to put the mortgagee upon inquiry, and to charge him with notice of everything which it may be fairly supposed would have been ascertained by such inquiry.<sup>2</sup> There is no difference in the doctrine of notice and its application, whether the subject-matter of the mortgage is real or personal property. To be effectual, actual notice should embrace notice of everything which the statute requires to be recorded.<sup>3</sup> Where the words in a mortgage, "free and clear from all encumbrances, liens," etc., had been erased, it was held that evidence of such erasure was properly admitted upon the question of the mortgagee's actual notice of a prior mortgage subsequently recorded.<sup>4</sup> Also if the notice is received by a creditor when he is about attaching the property, it is too late, and he may proceed with his attachment and obtain priority over the mortgage.<sup>5</sup> But if notice of an unrecorded mortgage is given to a purchaser or mortgagee before the completion of the sale or mortgage, and he goes on and parts with his money, it is evidence of *mala fides* on his part, and he will be postponed to the holder of the unrecorded mortgage.<sup>6</sup> Where, however, the statute makes unrecorded mortgages void against persons other than the parties, subsequent purchasers and mortgagees, even with

<sup>1</sup> Mack v. Phelan, 92 N. Y. 20; Mo-line Plow Co. v. Braden, 71 Iowa, 141; Oliver v. Sanborn, 60 Mich. 346; Millar v. Olney, 69 Mich. 560; Allen v. McCalla, 25 Iowa, 464; 96 Am. Dec. 56.

<sup>2</sup> Manl v. Rider, 56 Pa. St. 167; Williamson v. Brown, 15 N. Y. 354; Buck v. Paine, 50 Miss. 648; Riley v. Hoyt, 29 Hun, 114.

<sup>3</sup> Sawyer v. Pennell, 19 Me. 167.

<sup>4</sup> Williams v. Bresnahan, 66 Mich. 634.

<sup>5</sup> Stow v. Meserve, 13 N. H. 46; Brown v. Smith, 55 Iowa, 31.

<sup>6</sup> Boyd v. Beck, 29 Ala. 703; Bray v. Flickinger, 69 Iowa, 167; Paulus v. Munn, 48 Mich. 190; Clark v. Tarbell, 57 N. H. 323; Williamson v. R. R. Co., 26 N. J. Eq. 398; Gildersleeve v. Landon, 73 N. Y. 609; Honk v. Condon, 40 Ohio St. 569; Coble v. Nonemaker, 78 Pa. St. 501.

actual notice, are not bound by them.<sup>1</sup> And in New York and New Jersey, even though a creditor knows of the existence of a prior mortgage which has not been filed, such knowledge does not estop him from raising the objection of its invalidity for want of filing.<sup>2</sup>

ILLUSTRATIONS.—A mortgaged chattels to B, and then to C. C knew of the mortgage to B, but first put his own mortgage on record. After both mortgages were recorded, C sold his mortgage to D. *Held*, that B's rights were paramount to D's: *Hoagland v. Shampanore*, 37 N. J. Eq. 588. A had an unrecorded mortgage on a vessel, which had not been acknowledged before an authorized person; B had a subsequent mortgage duly recorded, but had actual knowledge of A's mortgage. *Held*, that the proceeds from the sale of the vessel should be applied first to A's mortgage: *The John T. Moore*, 3 Woods, 61. A bought a steamboat from B, and gave his notes in payment. It was agreed that these notes should constitute a first lien on the boat, and if not paid at maturity, should be satisfied out of the proceeds of the boat, to be sold by C as trustee. This agreement was not recorded. *Held*, that it was a mortgage, and void against a purchaser from A without notice, although he did not register his conveyance until he had notice of B's claim: *Byrd v. Wilcox*, 8 Baxt. 65.

<sup>1</sup> *Rawlings v. Bean*, 80 Mo. 614; <sup>2</sup> *Sayre v. Hewes*, 32 N. J. Eq. 652; *Gassner v. Patterson*, 23 Cal. 299; *Farmers' Loan etc. v. Hendrickson*, *Travis v. Bishop*, 13 Met. 304; *Garland* 25 Barb. 484. *v. Plummer*, 72 Me. 397.

## CHAPTER CL.

## RIGHTS AND LIABILITIES OF THE PARTIES.

§ 3084. The mortgagor.

§ 3085. The mortgagee.

§ 3086. The mortgagor's assignee.

§ 3087. The assignee of the mortgagee.

§ 3084. **The Mortgagor.**—So long as the mortgagor remains in possession of the property, and before default, he is entitled to deal with it, subject to the rights of the mortgagee, as he could have done before the mortgage. But in the absence of any stipulation to the contrary, the mortgagee can take possession at any time.<sup>1</sup> Until the title of the mortgagee become absolute by breach of condition, the mortgagor has an interest in the property which can be levied on and sold under execution, the purchaser standing in the shoes of the mortgagor.<sup>2</sup> Where the circumstances entitling the mortgagee to possession are specified in the mortgage, the presumption is that in the mean time the mortgagor is to retain the possession.<sup>3</sup> But in the absence of any such stipulation, the mortgagee has the right to the immediate possession, and if he does not enforce this right, the possession of the mortgagor, or of his assignee, is held to be that of the mortgagee, and it is immaterial whether the mortgage debt is due or to become due.<sup>4</sup> In Michigan it is held

<sup>1</sup> Hamill v. Gillespie, 48 N. Y. 556; Robinson v. Fitch, 26 Ohio St. 659; Hathaway v. Brayman, 42 N. Y. 322; 1 Am. Rep. 524; Sargent v. Usher, 55 N. H. 287; 20 Am. Rep. 208.

<sup>2</sup> Durfee v. Grinnell, 69 Ill. 371; Champlin v. Johnson, 39 Barb. 606; Nelson v. Ferris, 30 Mich. 497; Judson v. Easton, 58 N. Y. 664.

<sup>3</sup> Hall v. Sampson, 35 N. Y. 274; 91 Am. Dec. 56; Landon v. Emmons, 97 Mass. 37; Fletcher v. Newdeck, 30 Minn. 125; Stewart v. Hanson, 35 Me. 506.

<sup>4</sup> Boswell v. Carlisle, 70 Ala. 244;

Woodruff v. Halsey, 8 Pick. 333; 19 Am. Dec. 329; Boise v. Knox, 10 Met. 40; Lee v. Fox, 113 Ind. 98; Lippincott v. Shaw Carriage Co., 34 Fed. Rep. 570, 574; Ramsdell v. Tewkesbury, 73 Me. 197; Fay v. Burditt, 81 Ind. 433; 42 Am. Rep. 142; Heflin v. Slay, 78 Ala. 180; McGuire v. Benoit, 33 Md. 181; Wilson v. Brannan, 27 Cal. 258; Smith v. Acker, 23 Wend. 654; Furguson v. Clifford, 37 N. H. 86; Miller v. Pancoast, 29 N. J. L. 250; Chipron v. Feikert, 68 Ill. 284; Longey v. Leach, 57 Vt. 377; Daggett v. McClintock, 56 Mich. 51.

that the title does not pass, and that the mortgagee has no right of possession until after default, but that he is in the position of a creditor with a lien on the property, and does not become absolute owner until after foreclosure.<sup>1</sup> In Mississippi the code provides that the mortgagor is the owner of the legal title, except as against the mortgagee, after breach of condition.<sup>2</sup> In Missouri the mortgagor is considered to be the owner and to be entitled to possession, until after default made or condition broken, whereupon the mortgagee becomes entitled to immediate possession.<sup>3</sup> Trover or trespass will lie at the suit of the mortgagor against the mortgagee, where the latter wrongfully disturbs the mortgagor in the possession of the property, and the measure of damages is the value of the possession until breach of condition and of the interest in the property after paying off the mortgage.<sup>4</sup> And if a third person wrongfully deprives the mortgagor of the property, he is entitled to sue for its recovery and for substantial damages.<sup>5</sup> Either the mortgagor or mortgagee may maintain an action for damages for injury to the mortgaged chattels, but the bringing of one such action is a bar to any other for the same cause of action.<sup>6</sup> When the mortgagor is in receipt of the profits arising from the use of the mortgaged property, he is not liable

<sup>1</sup> *Carpenter v. Graham*, 46 Mich. 531; *People v. Bristol*, 35 Mich. 28; *Lucking v. Wesson*, 25 Mich. 443; *Kohl v. Lynn*, 34 Mich. 360. The case of *Daggett v. McClintock*, 56 Mich. 51, seems to be at variance with the foregoing, though none of them is cited in the judgment.

<sup>2</sup> Rev. Code 1880, sec. 1204; *Bowman v. Roberts*, 58 Mich. 126; *Buck v. Payne*, 52 Miss. 271; *Elson v. Barrier*, 56 Miss. 394.

<sup>3</sup> *Sheble v. Curdt*, 56 Mo. 437; *Barnett v. Timberlake*, 57 Mo. 499. In Dakota and New Mexico there are statutory provisions vesting the right of possession in the mortgagor.

<sup>4</sup> *Gaar v. Hurd*, 92 Ill. 315; *Pierce*

*v. Hasbrouck*, 49 Ill. 23; *Heyland v. Badger*, 35 Cal. 404; *Ball v. Liney*, 48 N. Y. 6; 8 Am. Rep. 511; *Ford v. Ransom*, 39 How. Pr. 429; *Street v. Sinclair*, 71 Ala. 110; *Blodgett v. Blodgett*, 48 Vt. 32; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670.

<sup>5</sup> *Copp v. Williams*, 135 Mass. 401; *Tallman v. Jones*, 13 Kan. 438; *Dahill v. Booker*, 140 Mass. 308; 54 Am. Rep. 465.

<sup>6</sup> *Boswell v. Carlisle*, 70 Ala. 244; *Hotchkiss v. Hunt*, 40 Me. 213; *Jordan v. Farnsworth*, 15 Gray, 517; *Egert v. White*, 59 Iowa, 464; *Chadwick v. Lamb*, 29 Barb. 518; *Shinners v. Brill*, 38 Wis. 648; *Ashley v. Wright*, 19 Ohio St. 291.

to account therefor,<sup>1</sup> though, of course, where the mortgagor has contracted to apply the profits in liquidation of the debt, he and his representatives are bound to do so, and are liable to account accordingly.<sup>2</sup> If the mortgagor carelessly mixes other goods of his own with the mortgaged property, so that they cannot be identified, all the goods, at least *prima facie*, become subject to the mortgage.<sup>3</sup> And if the mortgagor adds new goods to those mortgaged, it is his duty, when the mortgagee takes possession, to identify such additional goods, and if he refuses to do so, he cannot complain if the mortgagee takes possession of them all. And attachments and executions levied thereon affect only the surplus of the goods after payment of the mortgage.<sup>4</sup> But if the mortgagee negligently permits the mortgagor to affect the intermingling, and the mortgagee does not point out the added goods to an officer having an execution against them, such officer may sell the whole as the property of the mortgagor.<sup>5</sup>

After breach of condition, the absolute legal title vests in the mortgagee, but the mortgagor has still, in equity, the right to redeem, and of which right he may avail himself, notwithstanding the mortgagee may have taken possession, at any time before foreclosure or sale, or other proper proceedings may have been had to bar it.<sup>6</sup> And this right is of such a nature that the mortgagor cannot deprive himself of it by an agreement in the mortgage deed to give up all claim to the mortgaged property upon

<sup>1</sup> *Graves v. Sayre*, 5 B. Mon. 390; *Stewart v. Fry*, 3 Ala. 573; *Tenney v. State Bank*, 20 Wis. 152; *North v. Drayton*, 1 Harp. Ch. 34.

<sup>2</sup> *Stewart v. Fry*, 3 Ala. 573.

<sup>3</sup> *Kreutzer v. Cooney*, 45 Md. 582; *Burns v. Campbell*, 71 Ala. 271; *Merchants' Nat. Bank v. McLaughlin*, 1 McCrary, 258; *Fuller v. Paige*, 26 Ill. 358; *Adams v. Wiles*, 107 Mass. 123; *Harding v. Coburn*, 12 Met. 133; 46 Am. Dec. 680; *Howe v. Wadsworth*,

59 N. H. 397, 402; *Willard v. Rice*, 11 Met. 493; 45 Am. Dec. 226; *Pulcifer v. Page*, 54 Am. Dec. 595, and note.

<sup>4</sup> *People v. Bristol*, 35 Mich. 28.

<sup>5</sup> *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233; *Mowry v. White*, 21 Wis. 417; *Hubbell v. Allen*, 90 Mo. 574.

<sup>6</sup> *Burtis v. Bradford*, 122 Mass. 129; *Davis v. Hubbard*, 38 Ala. 185; *Broadhead v. McKay*, 46 Ind. 595; *Lauders v. George*, 49 Ind. 309.

breach of the condition;<sup>1</sup> but after possession has been taken by the mortgagee, with the mortgagor's consent, the latter may release his equity of redemption either by sale or gift.<sup>2</sup> The general rule is, that the only right of the mortgagor after condition broken is his equitable right of redemption.<sup>3</sup> In some of the states a period of time is prescribed by statute within which, after forfeiture, the right of redemption may be exercised.<sup>4</sup> But in the absence of statutory limitation, the right must be exercised within a reasonable time after condition broken, what is a reasonable time being determined by analogy to the statute of limitations applicable to actions at law for the recovery of personal property, or, as has been said, by the circumstances of each particular case.<sup>5</sup> As soon as the mortgagee's possession becomes adverse to the mortgagor, then the period of limitation begins to run;<sup>6</sup> but part payment after forfeiture is a waiver of the forfeiture, and the time for redemption begins to run from the date of such payment.<sup>7</sup> In order that the mortgagor may recover costs, payment or tender before suit brought is a necessary preliminary to the enforcement of the right to redeem, as the mortgagor in seeking equity must do equity.<sup>8</sup>

ILLUSTRATIONS.—A mortgagor conveyed his personal property, exceeding five hundred dollars in value, with a clause in the deed reserving his "personal property, exemption allowed by law, and to be selected by him." *Held*, that the title to the whole of it passed to the mortgagee, and remained in him until

<sup>1</sup> *Lavigne v. Naramore*, 52 Vt. 267.

<sup>2</sup> *Stone v. Jenks*, 142 Mass. 519.

<sup>3</sup> *Boyd v. Beaudin*, 54 Wis. 193.

<sup>4</sup> *Trask v. Pennell*, 59 Me. 419; *Daniels v. Henderson*, 5 Fla. 452; R. I. Pub. Stats. 1882, c. 176, secs. 11, 12; S. C. Gen. Stats. 1882, sec. 2347; *Bushnell v. Avery*, 121 Mass. 148; Mass. Gen. Stats., c. 151, secs. 4-8; Mass. Pub. Stats. 1882, c. 192, secs. 5-9; N. H. Gen. Stats. 1878, c. 123, secs. 18-21; Vt. Laws, 1878, p. 59, secs. 13-16; Vt. Rev. Laws 1880, secs. 1976-1979.

<sup>5</sup> *Flanders v. Chamberlain*, 24 Mich. 305; *Stoddard v. Denison*, 38 How. Pr. 296; *Patchin v. Pierce*, 12 Wend. 61; *Bragelman v. Dane*, 69 N. Y. 69; *Wylder v. Crane*, 53 Ill. 490; *Hammers v. Cole*, 61 Ill. 307.

<sup>6</sup> *Harrison v. Harrison*, 1 Call, 419; *Bartlett v. Thynes*, 2 Hill Ch. 171.

<sup>7</sup> *Winchester v. Ball*, 54 Me. 558.

<sup>8</sup> *Hall v. Ditson*, 55 How. Pr. 19; *Flanders v. Chamberlain*, 24 Mich. 305; *Lambert v. Miller*, 38 N. J. Eq. 117.

the exempted articles were legally set apart; and that the simple act of executing a second mortgage, conveying a part of said property, was not a selection of such part, nor a separation of the same from the bulk: *Norman v. Craft*, 90 N. C. 211. H. bought a stock of goods from A., gave him a mortgage thereon for the purchase-money, and afterwards formed a copartnership with S., who furnished goods of equal value. *Held*, that the purchases made by S. and H., to supply the deficiency made by sales from the stock bought from A., were not subject to the execution issuing upon the foreclosure: *Anderson v. Howard*, 49 Ga. 313.

§ 3085. **The Mortgagee.**—At law the mortgagee is considered to have the absolute legal title in the property mortgaged, subject to its being defeated by performance of the condition of the mortgage.<sup>1</sup> He has also, in the absence of any stipulation to the contrary, the right to the immediate possession of the property, even before condition broken;<sup>2</sup> and equity will restrain the mortgagor from depriving him of the right to such possession, and enjoin the mortgagor from disposing of any of the mortgaged property;<sup>3</sup> and the mortgagee may have his action for damages to his reversionary interest, even though he has not a right to immediate possession.<sup>4</sup> Where the mortgagee has just ground for apprehending loss or injury to the property, a receiver may be appointed before breach of the condition;<sup>5</sup> and equity will protect the interest of the mortgagee in after-acquired property, especially if the security is threatened with irreparable injury, and the remedy at law would be inadequate.<sup>6</sup>

<sup>1</sup> *Stewart v. Hanson*, 35 Me. 506; *Hart*, 42 Ohio St. 41; 51 Am. Rep. 801; *Porter v. Parmly*, 43 How. Pr. 445; *Lewis v. Love*, 2 B. Mon. 345; 38 Am. Dec. 161; *Bryant v. Carson River Lum. Co.*, 3 Nev. 313; 93 Am. Dec. 403.

<sup>2</sup> See previous section, p. 5010; *Landon v. Emmons*, 97 Mass. 37; *Lee v. Fox*, 113 Ind. 98; *Case v. Winship*, 4 Blackf. 425; 30 Am. Dec. 664; *Roy v. Goings*, 96 Ill. 361; 36 Am. Rep. 151; *Werner v. Bergman*, 28 Kan. 60; 42 Am. Rep. 152; *Cline v. Libby*, 46 Wis. 123; 32 Am. Rep. 700; *Barret v.*

<sup>3</sup> *McCormick v. Hartley*, 107 Ind. 248; *Arnett v. Trimmer*, 43 N. J. Eq. 488.

<sup>4</sup> *Googins v. Gilmore*, 47 Me. 9; 74 Am. Dec. 472; *Manning v. Monaghan*, 23 N. Y. 539.

<sup>5</sup> *Maish v. Baird*, 59 Iowa, 307; *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93; 431; *Hall v. Sampson*, 35 N. Y. 274; 91 Am. Dec. 56.

<sup>6</sup> *McCormick v. Hartley*, 107 Ind. 248; *La Mothe v. Fink*, 8 Biss. 493.

But the mortgagee is not authorized, without cause, to seize and sell the mortgaged property before the debt becomes due, under a provision in the mortgage that he may seize and sell the property if he shall at any time "feel unsafe or insecure," as such a clause does not mean that he may arbitrarily and without cause declare that he feels unsafe or insecure, but the mortgagor must be about to commit, or have committed, some act tending to impair the security.<sup>1</sup> After the mortgagee has taken possession, he has the same rights of defending the property as any absolute owner.<sup>2</sup> The mortgagee has the undoubted right to purchase the equity of redemption from the mortgagor, but the transaction is jealously regarded in equity, and conclusive evidence of good faith is required.<sup>3</sup> Where the mortgagee buys the property at an execution sale, subject to his own mortgage, he cannot afterwards maintain an action on the debt, as the purchase extinguishes the mortgage, and his title as mortgagee is merged in his title as owner.<sup>4</sup> After breach of condition, a mortgagee of chattels has similar remedies for compelling its enforcement as a mortgagee of real estate, and he may, in like manner, pursue all such remedies concurrently;<sup>5</sup> and notwithstanding that the security of the mortgage be defeated by a paramount title, or prove fraudulent as against creditors, the personal liability of the mortgagor may be enforced against him.<sup>6</sup> The mortgagee is not bound to first exhaust the mortgage security, and acknowledgment of the indebtedness in the mortgage is sufficient to support an action for the debt.<sup>7</sup>

<sup>1</sup> *Newlean v. Olson*, 22 Neb. 717; 3 Am. St. Rep. 286.

<sup>2</sup> *Moore v. Murdock*, 26 Cal. 514; *Pike v. Colvin*, 67 Ill. 227; *Troy v. Smith*, 33 Ala. 469; *Volney Stamps v. Gilman*, 43 Miss. 456.

<sup>3</sup> *Hackleman v. Goodman*, 15 Ind. 202; *Phillips v. Hunter*, 22 Mo. 485; *Locke v. Palmer*, 26 Ala. 114.

<sup>4</sup> *Merritt v. Niles*, 25 Ill. 282.

<sup>5</sup> *Juchter v. Boehm*, 63 Ga. 71; *Bur-*

*tis v. Bradford*, 122 Mass. 129; *Tyson v. Weber*, 81 Ala. 470; *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57; *Charter v. Stephens*, 3 Denio, 33; 45 Am. Dec. 444.

<sup>6</sup> *Whitney v. Willard*, 13 Gray, 203.

<sup>7</sup> *Elder v. Rouse*, 15 Wend. 218; *Sterling v. Rogers*, 25 Wend. 658; *Larmon v. Carpenter*, 70 Ill. 549; *Wood v. Weimar*, 104 U. S. 786.

The usual remedy pursued by the mortgagee is that of foreclosure, the right to resort to which arises upon breach of condition.<sup>1</sup> But where the debt is made payable by installments, and default is made in one installment, opinions differ as to the right of the mortgagee to foreclose and sell the entire property. Different rules obtain in different states. In some states there are statutory provisions that only so much of the property as may be sufficient to pay the overdue installment shall be sold, and some courts enforce a similar rule, though the power of sale in the mortgage generally provides for a sale of all the property on default in any installment.<sup>2</sup> The general rule, however, is, that all the property may be sold on default in the first installment, whether the mortgage contains a provision to that effect, or not.<sup>3</sup> But in Michigan it is different, and there the mortgagee can sell only so much of the property as will pay the overdue installment.<sup>4</sup> As to when the right of foreclosure must be exercised, though statutes of limitation do not apply to equitable proceedings, yet they are adopted in equity by analogy to proceedings at law, and the right to foreclose is presumed to be barred after the lapse of time within which an action at law might be brought for possession of the property.<sup>5</sup> Where the mortgage contains a power of sale, the mortgagee's rights thereunder are cumulative, and do not in any way prejudice his right to take possession of the property, either before or after default, or to avail himself of any other of his remedies.<sup>6</sup> But the mortgagee has no right, except in New York, Indiana, South Carolina, and Tennessee, to become the pur-

<sup>1</sup> *Cassel v. Cassel*, 26 Ind. 90; *Le-land v. Collier*, 34 Mich. 418; *Clark v. Baker*, 6 Mont. 153.

<sup>2</sup> *Murray v. Erskine*, 109 Mass. 597.

<sup>3</sup> *McConnell v. Scott*, 67 Ill. 274; *Bragelman v. Dane*, 69 N. Y. 69; *Chapin v. Whitsell*, 3 Col. 315; *Flanders v. Barstow*, 18 Me. 357; *Cleaves v. Herbert*, 61 Ill. 126.

<sup>4</sup> *Brink v. Freoff*, 44 Mich. 69.

<sup>5</sup> *Ewell v. Tidwell*, 20 Ark. 136; *Prewitt v. Wortham*, 79 Ky. 287; *Byrd v. McDaniel*, 33 Ala. 18; *Blake v. Lane*, 5 Jones Eq. 412.

<sup>6</sup> *Lee v. Fox*, 113 Ind. 98; *Rich v. Milk*, 20 Barb. 616.

chaser at such sale, either directly or indirectly, except by express agreement with the mortgagor, and if the mortgagee does so purchase, the sale may be set aside at the option of the mortgagor, though it is valid as against third persons.<sup>1</sup> The mortgagee is not bound to give notice of the sale, and he may recover any deficiency from the mortgagor,<sup>2</sup> and the equity of redemption may be effectually foreclosed by a private sale.<sup>3</sup> The mortgagee is not entitled to sell more property than is sufficient to satisfy the debt, and when that amount has been realized, the sale should stop.<sup>4</sup> Where a sale is made under a power of sale in the mortgage, there is no implication of any warranty of title.<sup>5</sup> The liability to account for income or profits is always one of the obligations which attach to a mortgagee when in possession;<sup>6</sup> and he is liable for ordinary neglect, and is responsible for ordinary diligence, in the management and preservation of the property.<sup>7</sup>

ILLUSTRATIONS. — A gave a mortgage to B, which contained a condition that if, at any time, B should feel himself "unsafe" or "insecure," he might take immediate possession of the property wherever it could be found. A, without B's knowledge, sold the property to an innocent vendee. B then brought suit against such vendee to recover the property. *Held*, that the suit was maintainable: *Bailey v. Godfrey*, 54 Ill. 507; 5 Am. Rep. 157. A chattel mortgage for one hundred dollars on a growing crop, and a mare worth fifty dollars, provided that if the mortgagee at any time should deem himself unsafe, he might take

<sup>1</sup> *Imboden v. Hunter*, 23 Ark. 622; *Harris v. Lynn*, 25 Kan. 281; 37 Am. Rep. 253; *McConnell v. People*, 84 Ill. 583.

<sup>2</sup> *Mathews v. Fisk*, 64 Me. 101; *Griswold v. Morse*, 59 N. H. 211; *Charter v. Stevens*, 3 Denio, 33; 45 Am. Dec. 444.

<sup>3</sup> *Sheppard v. Earles*, 13 Hun, 651; *Harris v. Lynn*, 25 Kan. 281; 37 Am. Rep. 253.

<sup>4</sup> *Davis v. Hubbard*, 38 Ala. 185; *Osgood v. Pollard*, 17 N. H. 217; *Overton v. Bigelow*, 10 Yerg. 48; *Craft v. Bullard*, *Smedes & M. Ch.* 366.

<sup>5</sup> *Wan v. Coe*, 31 Fed. Rep. 369; <sup>6</sup> *Weathersbee v. Farrer*, 97 N. C. 106.

<sup>7</sup> *Wylder v. Crane*, 53 Ill. 490;

*Imboden v. Hunter*, 23 Ark. 622; 79 Am. Dec. 116; *Waite v. Dennison*, 51 Ill. 319; *Cushing v. Seymour*, 30 Minn. 301; *Hall v. Ditson*, 53 How. Pr. 19; *Goodell v. Dewey*, 100 Ill. 308; *Korns v. Shaffer*, 27 Md. 8; *Massey v. Hardin*, 83 Ill. 330; *Broughton v. Atchison*, 52 Ala. 62; *McConnell v. People*, 71 Ill. 481; *Davenport v. McChesney*, 86 N. Y. 242; *Lee v. Fox*, 113 Ind. 98; *Mills v. Williams*, 16 S. C. 593; *Lyon v. Jones*, 6 Humph. 533. And see *Edmiston v. Brucker*, 40 Hun, 256.

possession and sell. *Held*, that the failure of the crop justified the taking possession of the mare: *Allen v. Vose*, 34 Hun. 57. A chattel mortgage, providing for the sale of the goods in A county, was, by agreement between mortgagor and mortgagee, so changed as to permit of sale in B county. *Held*, that creditors of the mortgagor who garnisheed the mortgagee subsequent to such agreement could not, in the absence of fraud, have the sale set aside as illegal on account of the change and absence of notice in A county: *Tottle v. Taylor*, 64 Iowa, 629. A mortgagee sold sufficient of the property to pay debt and costs. He then went on and sold more of the property. *Held*, a conversion for which trover would lie: *Griswold v. Morae*, 59 N. H. 211. A statute avoids all mortgages of personal property unaccompanied by a transfer of possession, or unrecorded as to "subsequent purchasers and mortgagees in good faith." *Held*, that a mortgagee whose mortgage recited the fact of such a prior mortgage was not a mortgagee "in good faith": *Tolbert v. Horton*, 31 Minn. 518. H. hired a house of A, containing machinery, which he bought, paying part cash, and giving notes for the rest. It was agreed that if the notes were not paid, A should own the property. H. then mortgaged it to secure an existing debt. He afterwards absconded, and the mortgagees took possession of the machinery, but were induced by A to leave it there, under the impression that he would not claim it on his own or on H.'s account. A seized the machinery under a distress, and it was sold to him as H.'s property. In an action of replevin, *held*, that the mortgagees were entitled to the machinery: *Butler v. Gannon*, 53 Md. 333. A chattel mortgage provided that the mortgagee might take possession "in case default shall be made in payment of said notes, or either of them." *Held*, to give him his option as to any one, or to await the maturity of the note last falling due: *Chapin v. Whitsett*, 3 Col. 315.

**§ 3086. The Mortgagor's Assignee.**—A purchaser of the property from the mortgagor subject to the mortgage takes all the rights and interest which the mortgagor had in the property, and no greater.<sup>1</sup> And before default such purchaser may resell the property with like effect, and the mortgagee's remedy is to follow it into the hands of the last purchaser, and no such purchaser buying before default is chargeable with conversion of the property by

<sup>1</sup> *McLaughlin v. Smith*, 45 Mich. *Hammond v. Plimpton*, 30 Vt. 333; 277; *Black v. Robinson*, 61 Miss. 54; *Arnold v. Stock*, 81 Ill. 407.

the mortgagee.<sup>1</sup> But where the purchaser has notice of a stipulation by the mortgagor not to sell or dispose of the property, he is liable to the mortgagee as for a wrongful conversion of the property.<sup>2</sup> Though where a statute prohibits the sale except with the written consent of the mortgagee, and he consents only verbally, the sale is good as against him, and he cannot bring trover for the property.<sup>3</sup> But where the purchaser takes an absolute deed without reference to the mortgage, it is a conversion for which an action will lie.<sup>4</sup>

§ 3087. **The Assignee of the Mortgage.**—A purchaser of the mortgage stands in the shoes of the mortgagee. He has the same rights and remedies, and is subject to the same duties and liabilities. He obtains the entire legal and equitable interest of the mortgagee, whether the assignment be made before or after breach of condition;<sup>5</sup> and a purchaser of a part of the indebtedness secured by the mortgage acquires by his purchase an interest *pro tanto* in the mortgage.<sup>6</sup> But an assignment of the mortgage without the indebtedness amounts merely to a transfer in trust of the legal title, or is a mere nullity.<sup>7</sup> It is immaterial whether the assignment be made by the mortgagee before or after taking possession; the effect is the same.<sup>8</sup> An assignment of a paid mortgage does not revive it, even though made with the mortgagor's assent, and for a valuable consideration.<sup>9</sup> Where the mortgage secures negotiable paper not overdue, the as-

<sup>1</sup> *Hathaway v. Brayman*, 42 N. Y. 322; 1 Am. Rep. 524; *Heflin v. Slay*, 78 Ala. 180.

<sup>2</sup> *Fisher v. Friedman*, 47 Iowa, 443.

<sup>3</sup> *Gage v. Whittier*, 17 N. H. 312.

<sup>4</sup> *Lowe v. Wing*, 56 Wis. 31; *Whitney v. Lowell*, 33 Me. 318; *Ashmead v. Kellogg*, 23 Conn. 70; *Heflin v. Slay*, 78 Ala. 180.

<sup>5</sup> *Mayer v. Soulier*, 48 Mich. 411; *Pierce v. Faunce*, 47 Me. 507; *Robinson v. Fitch*, 26 Ohio St. 659; *Russell*

*v. Walker*, 73 Ala. 315; *Prout v. Root*, 116 Mass. 410; *Ramsdell v. Tewksbury*, 73 Me. 197; *Harman v. Barhydt*, 20 Neb. 625; *Batchelder v. Jenness*, 59 Vt. 104.

<sup>6</sup> *Studebaker Mfg. Co. v. McCargur*, 20 Neb. 500.

<sup>7</sup> *Earl v. Stumpf*, 56 Wis. 50; *Polhemus v. Trainer*, 30 Cal. 685; *Lucas v. Harris*, 20 Ill. 165.

<sup>8</sup> *Robinson v. Fitch*, 26 Ohio St. 659; *Cotton v. Watkins*, 6 Wis. 629.

<sup>9</sup> *Brooks v. Ruff*, 37 Ala. 371.

signee takes it free from all equities in favor of the mortgagor, though in Illinois and Minnesota the rule is different;<sup>1</sup> but if the mortgage secures a non-negotiable debt, the assignee takes it subject to all such equities.<sup>2</sup> It is not necessary that the assignment should be under seal, unless there is a statutory provision requiring the mortgage itself to be so.<sup>3</sup> The laws relating to the filing or recording of mortgages do not apply to assignments; the mortgage itself having been duly filed or recorded, the assignee is entitled to the benefit thereof.<sup>4</sup> An assignment of a mortgage does not carry with it any implied warranty of title.<sup>5</sup>

ILLUSTRATIONS. — A mortgagor, in ignorance that the mortgage had been assigned, delivered to the mortgagee certain bales of cotton in part payment, which the mortgagee sold, and purchased goods, paying therefor by an order on the purchasers of the cotton, which on presentation was paid to defendants, the mortgagee's vendors. *Held*, that the assignees of the mortgage could not recover the proceeds of the cotton in the hands of the innocent third parties: *Rice v. Jones*, 71 Ala. 551. A crop of corn was mortgaged by the owner to A, and another mortgage was afterwards given thereon to B. A, having received possession of the corn from the mortgagor, sold the same, and the purchasers in turn sold it to third parties. After this B assigned his mortgage to C, who brought trover against the purchasers from A. *Held*, that even if B's mortgage was, as C claimed, valid as against A's mortgage, the assignment to C could not convey with it the right to sue all persons through whose hands it had passed for injuries to the property before assignment: *Bowers v. Bodley*, 4 Ill. App. 279.

<sup>1</sup> *Gould v. Marsh*, 2 Hun, 500; *Judge v. Vogel*, 38 Mich. 563; *Bryant v. Vix*, 83 Ill. 11; *Oster v. Mickley*, 35 Minn. 245.

<sup>2</sup> *Decker v. Boice*, 83 N. Y. 215; *Judge v. Vogel*, 38 Mich. 568.

<sup>3</sup> *Gilchrist v. Patterson*, 18 Ark. 575.

<sup>4</sup> *Hall v. Redding*, 13 Cal. 214; *Baxter v. Gilbert*, 12 Abb. Pr. 97; *Bigelow v. Smith*, 2 Allen, 264.

<sup>5</sup> *Jones v. Huggeford*, 3 Met. 515.

## CHAPTER CLI.

## FRAUDULENT MORTGAGES.

- § 3088. General principles.
- § 3089. Mortgagor remaining in possession.
- § 3090. Under the statute of Elizabeth.
- § 3091. Preferences under insolvent laws.
- § 3092. Power of sale in mortgage.

§ 3088. **General Principles.**—A chattel mortgage is no exception to the general rule that fraud will vitiate any instrument.<sup>1</sup> Where fraud attaches to any part of the property, it affects the entire security, and the mortgage is void *in toto*, except where it is shown that there was no fraudulent intention in the making of the mortgage;<sup>2</sup> and the parties cannot by any parol agreement render valid a mortgage which is fraudulent and void in law.<sup>3</sup> Where part of the debt to secure which the mortgage was given is valid, and the other part consists of money advanced upon an illegal contract, the mortgage is void as to the latter, but may be enforced in respect of the valid portion of the debt.<sup>4</sup> But where the execution of the mortgage is procured under circumstances of duress, fraud, or misrepresentation, it is wholly void.<sup>5</sup> The circumstance that the mortgage is given to secure payment of a larger amount than that actually due is not conclusive of fraud; for the intention may have been to cover future advances, or may have been a mistake.<sup>6</sup> And the fact that the

<sup>1</sup> Eicks v. Copeland, 53 Tex. 581; 37 Am. Rep. 760; Crawford v. Kirksey, 55 Ala. 282; 28 Am. Rep. 704; Kinnard v. Gray, 58 N. H. 51; Grove v. Hodges, 55 Pa. St. 504. See *ante*, Title Contracts.

<sup>2</sup> Horton v. Williams, 21 Minn. 187, 192; Donnell v. Byern, 69 Mo. 468; Wallach v. Wylie, 28 Kan. 133; Russell v. Winne, 37 N. Y. 591; 97 Am. Dec. 755.

<sup>3</sup> Robinson v. Elliott, 22 Wall. 513; Wood v. Lowry, 17 Wend. 492.

<sup>4</sup> Lund v. Fletcher, 39 Ark. 325; 43

Am. Rep. 270; Rathbone v. Boyd, 30 Kan. 485; Langdon v. Gray, 52 How. Pr. 387.

<sup>5</sup> Davis v. Snider, 70 Ala. 315; Bane v. Detrick, 52 Ill. 19; Foster v. Johnson, 70 Ala. 249; Lightfoot v. Wallis, 12 Bush, 498.

<sup>6</sup> Berry v. O'Connor, 33 Minn. 29; Wood v. Franks, 67 Cal. 32; Willison v. Desenberg, 41 Mich. 156; Upon v. Craig, 57 Ill. 257; Hoey v. Pierron, 67 Wis. 262; Van Patten v. Thompson, 73 Iowa, 103.

mortgage is fraudulent as against the mortgagor's creditors does not necessarily invalidate it as between the parties.<sup>1</sup>

§ 3089. **Mortgagor Remaining in Possession.** — At the present day the generally accepted doctrine is, that the retention of possession by the mortgagor is not more than *prima facie* evidence of fraud, and any presumption arising therefrom may be rebutted by evidence showing the *bona fides* of the transaction.<sup>2</sup> Where the deed expressly authorizes the mortgagor to remain in possession, it is generally sufficient, to rebut any presumption of fraud.<sup>3</sup> In Pennsylvania and Illinois, however, the rule is different, and in the former state an actual change of possession is essential to the validity of a chattel mortgage, notwithstanding an agreement that the possession may be retained by the mortgagee;<sup>4</sup> while in Illinois the mortgage is void if the mortgagor keep possession, unless the deed expressly authorizes him to do so.<sup>5</sup> The foregoing, of course, applies only to the retention of posses-

<sup>1</sup> Gooding v. Riley, 50 N. H. 400; Brown v. Webb, 20 Ohio, 389; Andrews v. Marshall, 48 Me. 28.

<sup>2</sup> Crawford v. Kirksey, 55 Ala. 282; 28 Am. Rep. 704; Kane v. Drake, 27 Ind. 29; George v. Norris, 23 Ark. 121; Denny v. Faulkner, 22 Kan. 89; Goodwyn v. Goodwyn, 20 Ga. 600; Keller v. Blanchard, 19 La. Ann. 53; Ingalls v. Herrick, 108 Mass. 351; 11 Am. Rep. 360; Fairfield Bridge Co. v. Nye, 60 Me. 372; Ketchum v. Brennan, 53 Miss. 596; Cutting v. Jackson, 56 N. H. 253; Hudson v. Warner, 2 Har. & G. 415; Parr v. Brady, 37 N. J. L. 201; Tilson v. Terwilliger, 58 N. Y. 273; Sarle v. Arnold, 7 R. I. 582; Hornbeck v. Vanmetre, 9 Ohio, 153; Thornton v. Tandy, 39 Tex. 544; Barrow v. Paxton, 5 Johns. 258; 4 Am. Dec. 354; Clayborn v. Hill, 1 Wash. 177; 1 Am. Dec. 452; Glasscock v. Battow, 6 Rand. 78; 18 Am. Dec. 703; Divver v. McLaughlin, 2 Wend. 596; 20 Am. Dec. 655; Hundley v. Webb, 3 J. J. Marsh. 644; 20 Am. Dec. 189; Haven v. Low, 2 N. H. 13; 9 Am. Dec.

25; Patten v. Smith, 4 Conn. 450; 10 Am. Dec. 166; Watson v. Williams, 4 Blackf. 26; 28 Am. Dec. 36; Holbrook v. Baker, 5 Greenl. 309; 17 Am. Dec. 236.

<sup>3</sup> Stix v. Saddler, 109 Ind. 254; D'Wolf v. Harris, 4 Mason, 515; Bissell v. Hopkins, 3 Cow. 166; 15 Am. Dec. 259; Thornton v. Davenport, 1 Scam. 296; 29 Am. Dec. 358; Conkling v. Shelley, 28 N. Y. 360; 84 Am. Dec. 348; Ford v. Williams, 13 N. Y. 577; 67 Am. Dec. 83; Googins v. Gilmore, 47 Me. 9; 74 Am. Dec. 472; Barnet v. Fergus, 51 Ill. 352; 99 Am. Dec. 547; Frankhouser v. Ellett, 22 Kan. 127; 31 Am. Rep. 171.

<sup>4</sup> Clow v. Woods, 5 Serg. & R. 275; 9 Am. Dec. 346; Fry v. Miller, 45 Pa. St. 441; Luckenbach v. Brickenstein, 5 Watts & S. 145.

<sup>5</sup> Burnham v. Muller, 61 Ill. 453; Thornton v. Davenport, 1 Scam. 296; Babcock v. McFarland, 43 Ill. 381; Read v. Wilson, 22 Ill. 377; 74 Am. Dec. 159.

sion by the mortgagor, where the mortgage is not filed or recorded. When that has been done, the creditors of the mortgagor are notified of the transaction, and cannot claim that they are injured by it. The secret nature of the transaction is done away with, and the creditors cannot claim that they give credit to the mortgagor on the faith of his having the unencumbered ownership of the property.<sup>1</sup> Exceptions to the rule, however, occur in Nebraska,<sup>2</sup> New York,<sup>3</sup> and Minnesota,<sup>4</sup> where it is held that, notwithstanding the mortgage is duly recorded, a presumption of fraud arises when the property remains in the possession of the mortgagor.<sup>5</sup> Where the property is of such a description as that its use necessarily causes its consumption, and it is permitted to remain in the possession of the mortgagor, and to be used and consumed by him, the mortgage, notwithstanding that it is duly recorded, is *prima facie* fraudulent.<sup>6</sup> The presumption of fraud, however, in such a case is only *prima facie*, and may be rebutted by evidence showing the absence of any fraudulent intention or effect.<sup>7</sup> If the goods are only partly perishable or consumable, the mortgage is not rendered void thereby as of course; but the matter is one for the jury to decide, after taking into consideration the character and condition of the goods.<sup>8</sup> Where the mortgagor is permitted to retain possession of and sell the property, it will be presumed, until the contrary appears, that he does so under an agreement to account as the agent of the mortgagee, and the proceeds will be regarded as applied to the liqui-

<sup>1</sup> Smith v. Fields, 79 Ala. 335; State v. Cooper, 79 Mo. 464; Berson v. Numan, 63 Cal. 550; Forbes v. Parker, 16 Pick. 462; Harrington v. Brittan, 23 Wis. 541; Robinson v. Elliot, 22 Wall. 513; Cahoon v. Miers, 67 Md. 573.

<sup>2</sup> Severance v. Leavitt, 16 Neb. 439.

<sup>3</sup> Smith v. Acker, 23 Wend. 653.

<sup>4</sup> Bannon v. Bowler, 34 Minn. 416.

<sup>5</sup> Wood v. Lowry, 17 Wend. 492; Smith v. Acker, 23 Wend. 653.

<sup>6</sup> Shurtleff v. Willard, 19 Pick. 202; Sommerville v. Horton, 4 Yerg. 541; 26 Am. Rep. 242; Robbins v. Parker, 3 Met. 117.

<sup>7</sup> Miller v. Jones, 15 Nat. Bank. Reg. 150.

<sup>8</sup> Brockenbrough v. Brockenbrough, 31 Gratt. 580; Googins v. Gilmore, 47 Me. 9; 74 Am. Dec. 472; Simpson v. Mitchell, 8 Yerg. 417; Ewing v. Cargill, 21 Miss. 79; Sipe v. Earman, 26 Gratt. 563.

dation of the mortgage debt, whether they have been actually paid over or not. If, however, it appears that there was an understanding that the mortgagor was not to account, but that he might deal with the property to all intents and purposes as if it was his own, an inference of fraud arises which renders the mortgage void.<sup>1</sup>

ILLUSTRATIONS. — A mortgaged to B his stock of merchandise, worth six thousand dollars, some of it perishable, constituting all his property, to secure a debt of three thousand dollars. B knew that A was embarrassed, but not that he was insolvent. A was not expressly authorized to sell, but the property was left in his possession, and it appeared to be the intention that he should retain possession until the mortgage was due. *Held*, that the power to sell was implied, and that the mortgage was void as to creditors: *Benedict v. Renfro*, 75 Ala. 121; 51 Am. Rep. 429. P., to secure payment of three thousand five hundred dollars due in 1884, mortgaged to a bank his stock of goods and what might be added thereto, reserving the right to sell in course of trade. The mortgage was not recorded until 1885. In 1884, L., in ignorance of the mortgage, sold to P. goods which were added to the stock. A deposit of two thousand dollars made by P. from the proceeds was applied by the bank to the debt. *Held*, that, as against L., the mortgage was void, being fraudulent in fact: *Lyon v. Council Bluffs Savings Bank*, 29 Fed. Rep. 566. A mortgagor of goods who had been left in possession, and whose mortgage was not filed, made a general assignment for the benefit of his creditors. The assignee took possession, and proceeded to sell the goods in execution of his trust. The mortgagee filed a bill in equity to foreclose. *Held*, that, as the statute declared his mortgage void as against the very parties for whom the assignee was trustee, he had no standing whatever in equity: *Putnam v. Reynolds*, 44 Mich. 113.

§ 3090. Under the Statute of Elizabeth. — When the mortgagee takes the mortgage with knowledge that the mortgagor in giving it is attempting to hinder or defeat his creditors he thereby becomes a party to the attempted fraud; and although he pays an adequate consideration, and takes possession, the mortgage is tainted with the fraud, and is void as against the creditors of the mort-

<sup>1</sup> *New v. Sailors*, 114 Ind. 407; 5 Am. St. Rep. 632.

gagor.<sup>1</sup> The foundation of this rule of law lies in the guilty knowledge of the mortgagee; for there is no objection to a debtor giving a mortgage to his creditor, the effect of which may be to hinder or defeat other creditors, and unless the mortgagor has the design of so doing, and the mortgagee the knowledge of that design, the security is valid. The mere fact that the effect of the mortgage is to hinder or delay creditors does not necessarily render it fraudulent; it must appear that such was the mortgagor's intention, and that the mortgagee was aware of it.<sup>2</sup> Where there are two mortgagees to whom the mortgage is made to secure separate and distinct debts, and one of them is a party to the fraudulent designs of the mortgagor, but the other is innocent thereof, the rights of the latter are unaffected by the fraud, and he occupies the same position as he would have done had the mortgage been given to him alone.<sup>3</sup> The withholding a mortgage from record until just before the mortgagor makes a general assignment for the benefit of creditors is a circumstance strongly indicative of fraud;<sup>4</sup> but the mortgagor cannot impeach the mortgage so as to render it invalid against his creditors by any subsequent admissions that it was made with a fraudulent intent, unless the mortgagee's knowledge of such intent is also shown.<sup>5</sup> The mortgage can be assailed only by creditors of the mortgagor and purchasers in good faith, and they must first have established their right to occupy such

<sup>1</sup> David v. Burchard, 53 Wis. 492; Robinson v. Holt, 39 N. H. 557; 75 Am. Dec. 233.

<sup>2</sup> Rencher v. Wynne, 86 N. C. 268; Winstead v. Hulme, 32 Kan. 568; Nasse v. Algermissen, 25 Mo. App. 186; Strohm v. Hayes, 70 Ill. 41; Galpin v. Galpin, 74 Iowa, 454; Murphy v. Moore, 23 Hun, 95; Price v. Master-son, 35 Ala. 493; Frost v. Rosecrans, 66 Iowa, 405; Holmes v. Braidwood, 83 Mo. 610; Francis v. Rankin, 84 Ill. 169. See *ante*, Title Trusts.

<sup>3</sup> Smith v. Post, 1 Hun, 516. But see Adams v. Niemann, 46 Mich. 135.

<sup>4</sup> Magovern v. Richard, 27 S. C. 272; Jaffrey v. Brown, 29 Fed. Rep. 476; Standard Paper Co. v. Guenther, 67 Wis. 101; Simon v. Oppenheimer, 20 Fed. Rep. 553; Lyon v. Council Bluffs Sav. Bank, 29 Fed. Rep. 566; Johnson v. Stellwagen, 67 Mich. 10.

<sup>5</sup> Walker v. Henry, 85 N. Y. 130; Perkins v. Barnes, 118 Mass. 484; Herkelrath v. Stookey, 63 Ill. 486; Bushnell v. Wood, 85 Ill. 83.

positions;<sup>1</sup> but the mortgage cannot be impeached by evidence that, after executing it, the mortgagor gave other mortgages on the same property to other persons, which were fraudulent towards his creditors.<sup>2</sup>

ILLUSTRATIONS.—T. executed to F. a mortgage of personal property, fraudulent and void as to creditors. Afterwards T. made in good faith an assignment of all his property for the benefit of his creditors to C., who took possession of the mortgaged property. F. brought an action against C. to recover the property, and in that action the court caused the property to be sold, and the proceeds brought into court to abide the event of the action. After this, and more than six months after the assignment to C., T. filed his petition in bankruptcy, was adjudged a bankrupt, and an assignee in bankruptcy was appointed. *Held*, 1. That, as the mortgage was valid between the parties to it, the legal title to the property passed to the mortgagee, leaving only a right of redemption in the mortgagor, which was all that passed to the voluntary assignee, such an assignee not being a purchaser for valuable consideration so as to be able to avoid the fraudulent mortgage; 2. That, upon the appointment of the assignee in bankruptcy, the title attempted to be passed by the mortgage vested at once in him, and he was entitled to the possession: *Mann v. Flower*, 25 Minn. 500.

§ 3091. Preferences under Insolvent Laws.—In the absence of any statutory prohibition, a debtor may prefer a creditor by mortgage or otherwise, and the mortgage is equally binding, even though the consideration consist entirely of a pre-existing debt.<sup>3</sup> Where the parties to such a mortgage are related to each other, it is a circumstance sufficient to raise a suspicion of the *bona fides* of the transaction.<sup>4</sup> Where a debtor in failing circum-

<sup>1</sup> *Ellingboe v. Brakken*, 36 Minn. 156; *Bynum v. Miller*, 86 N. C. 559; 41 Am. Rep. 467; *Overstreet v. Manning*, 67 Tex. 657; *Fearey v. Cummings*, 41 Mich. 376; *Ransom v. Schmela*, 13 Neb. 73; *People's Sav. Bank v. Bates*, 120 U. S. 556; *Harmon v. Harmon*, 63 Ill. 512; *Southard v. Benner*, 72 N. Y. 424; *Keller v. Smalley*, 63 Tex. 512. <sup>2</sup> *Ford v. Williams*, 13 N. Y. 577; 67 Am. Dec. 83.

<sup>3</sup> *Smith v. Skeary*, 47 Conn. 47; *McConnell v. Scott*, 67 Ill. 274; *Wietz v. Potter*, 32 Fed. Rep. 888; *Gilbert v.*

*McCorkle*, 110 Ind. 215; *Andrews v. Fillmore*, 46 Mich. 315; *Davis v. Scott*, 22 Neb. 154; *Williams v. Lord*, 75 Va. 390; *Bannon v. Bowler*, 34 Minn. 416; *Eureka etc. Works v. Bresnahan*, 66 Mich. 489; *Carson v. Byers*, 67 Iowa, 606; *Carter v. Rewey*, 62 Wis. 552; *National Bank v. Sprague*, 20 N. J. Eq. 13. See *ante*, Title Trusts.

<sup>4</sup> *Troy v. Smith*, 33 Ala. 469; *Norris v. McCanna*, 29 Fed. Rep. 757; *Mansseau v. Mueller*, 45 Wis. 430; *Sparks v. Mack*, 31 Ark. 666; *Surget v. Boyd*, 57 Miss. 485; *Dice v. Irvin*, 110 Ind. 561.

stances gives a mortgage to one creditor while others are pressing him for payment, though not conclusive, it is a circumstance to be submitted to the jury on the question of fraudulent intent, and in the absence of any such intention the mortgage is valid.<sup>1</sup> Whether the mortgage was made in the usual and ordinary course of business under the statute is a question for the jury, and the objection is not tenable if the mortgage were given to secure an honest debt wholly or partially incurred at the time.<sup>2</sup> Under these laws the postponement of the recording of the mortgage until shortly before the mortgagor's insolvency under an arrangement to that effect does not necessarily render the mortgage void, but it is a circumstance to be considered by the jury in determining whether it is fraudulent at common law.<sup>3</sup> The contention that the security is released by proving the debt against the insolvent's estate can be raised only by the assignee in insolvency. As between prior and subsequent mortgagees, the latter cannot acquire any advantage by reason of the former having proved on the estate without disclosing his mortgage.<sup>4</sup> Jurisdiction to entertain actions brought by assignees to set aside such mortgages is vested in the courts of the different states, such actions not being proceedings in bankruptcy within the meaning of the bankrupt act.<sup>5</sup>

**ILLUSTRATIONS.**—A gave B a mortgage on his household furniture, and afterwards filed his petition for discharge in bankruptcy. B and the creditors agreed that the portion of the furniture exempt by law from the operation of the bankrupt laws should be set off to A by the assignee, which was done. The mortgage was declared fraudulent as against creditors,

<sup>1</sup> Gage v. Chesebro, 49 Wis. 486; Allen v. Kennedy, 49 Wis. 549; Williams v. Lord, 75 Va. 390; Van Patten v. Burr, 55 Iowa, 224.

<sup>2</sup> Buffum v. Jones, 144 Mass. 29; Moore v. Young, 4 Biss. 128.

<sup>3</sup> Jaffrey v. Brown, 29 Fed. Rep. 476; Folsom v. Clemence, 111 Mass. 273; Baldwin v. Flash, 58 Miss. 593;

Chase v. Denny, 130 Mass. 566; Gilbert v. Vail, 60 Vt. 261; Bingham v. Jordan, 1 Allen, 373; 79 Am. Dec. 748.

<sup>4</sup> Cook v. Farrington, 104 Mass. 212.

<sup>5</sup> Claflin v. Houseman, 93 U. S. 130; Ansley v. Patterson, 77 N. Y. 156; Frost v. Citizens' National Bank, 68 Wis. 234.

and the furniture not exempt was sold by the assignee. B never proved his debt in bankruptcy, and A was discharged. *Held*, that B's right to hold the property thus set off was not affected, and that he might replevy it: *Tuesley v. Robinson*, 103 Mass. 558; 4 Am. Rep. 575. In September, A gave to B a chattel mortgage. In December, A filed his petition in bankruptcy. When the mortgage became due, B took possession. In an action of replevin brought against B by the assignee in bankruptcy, *held*, that he took only the equity of redemption, and that B had a right to possession of the property, and that, notwithstanding he knew at the date of the mortgage that A was insolvent: *Bentley v. Wells*, 61 Ill. 59; 14 Am. Rep. 53.

§ 3092. **Power of Sale in Mortgage.**—Whether the permission to the mortgagor to sell the property in the usual course of his business renders the mortgage fraudulent and void is a question on which the authorities are conflicting. The prevailing doctrine is, that where the mortgagor is permitted to retain possession of the property and sell it as his own, it is at most only *prima facie* evidence of fraud, and does not conclusively render the transaction void.<sup>1</sup> In many cases the nature of the security is such that it is to the mutual interest of both mortgagee and mortgagor that the latter should be allowed to continue in possession and carry on his business without interruption, as it may be presumed that he would be able to do it to better advantage than any one else, and the law will not presume fraud in that because the mortgagor receives the purchase-money he will therefore misapply it. The mortgagee is the person most vitally interested, and if he considers it for his best interests to place confidence in the mortgagor, there would seem to be no reason why the law should assume that the mortgagor will abuse that confidence.<sup>2</sup> Those states where it is held that such possession and permission to sell amount only to *prima facie* evidence of fraud are Arkansas, Dakota, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Mary-

<sup>1</sup> *Clark v. Hyman*, 55 Iowa, 14; 39 Langworthy, 13 Wis. 629; 80 Am. Rep. 160; *Shurtleff v. Willard*, Dec. 758.  
<sup>2</sup> 19 Pick. 202; *Briggs v. Parkman*, 2 Met. 258; 37 Am. Dec. 89; *Place v.*

<sup>1</sup> *Hughes v. Cory*, 20 Iowa, 399.

land, Massachusetts, Michigan, Nebraska, New Jersey, North Carolina, Rhode Island, South Carolina, and Wyoming Territory;<sup>1</sup> but in Alabama, Colorado, Illinois, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New York, Ohio, Oregon, Tennessee, Texas, Virginia, Washington, and Wisconsin, the rule is, that the retention of the mortgaged property by the mortgagor coupled with the power to sell for his own benefit renders the mortgage absolutely void, and it is to be so declared as a matter of law by the court;<sup>2</sup> though it seems that where the sales are to be made for the benefit of the mortgagee, and the proceeds, as they arise, paid over to him, the doctrine is not applicable, and the mortgage is valid, and such sales may be on credit, or the proceeds applied in the purchase of other goods to be substituted for those originally included in the mortgage.<sup>3</sup> But where the mortgage contains a privilege of selling the property and purchasing other property, the property so purchased would not be within the mortgage by substitution.<sup>4</sup>

<sup>1</sup> *Ganss v. Doyle*, 46 Ark. 122; *Anderson v. Howard*, 49 Ga. 313; *Fisher v. Syfers*, 109 Ind. 514; *Meyer v. Evans*, 66 Iowa, 179; *Frankhouser v. Ellett*, 22 Kan. 127; 31 Am. Rep. 171; *Vanmeter v. Estill*, 78 Ky. 456; *Deering v. Cobb*, 74 Me. 332; 43 Am. Rep. 596; *Butler v. Rahm*, 46 Md. 541; *Blanchard v. Cooke*, 144 Mass. 207; *People's Savings Bank v. Bates*, 120 U. S. 556; *Chicago Lumber Co. v. Fisher*, 18 Neb. 334; *Lister v. Simpson*, 38 N. J. Eq. 438; *Cheatham v. Hawkins*, 80 N. C. 161; *Bynum v. Miller*, 89 N. C. 393; *Williams v. Winsor*, 12 R. I. 9; *Hirschkind v. Israel*, 18 S. C. 157.

<sup>2</sup> *Owens v. Hobbie*, 82 Ala. 466; *Brasher v. Christophe*, 10 Cal. 284; *Dunning v. Mead*, 90 Ill. 376; *Greenebaum v. Wheeler*, 90 Ill. 296; *Mann v. Flower*, 25 Minn. 500; *Britton v. Criswell*, 63 Miss. 394; *Hubbell v. Allen*, 90 Mo. 574; *Nicholson v. Golden*, 27 Mo. App. 132; *Leopold v. Silverman*, 7 Mont. 266; *Wilson v. Sullivan*, 58 N. H. 260; *Reynolds v. Ellis*, 103 N. Y. 115; 57 Am. Rep. 701;

*Brackett v. Harvey*, 91 N. Y. 214; *Kleine v. Katzenberger*, 20 Ohio St. 110; 5 Am. Rep. 630; *Orton v. Orton*, 7 Or. 478; 33 Am. Rep. 717; *Tennessee Nat. Bank v. Ebbert*, 9 Heisk. 153; *Peiser v. Peticolas*, 50 Tex. 638; 32 Am. Rep. 621; *Cook v. Halsell*, 65 Tex. 1; *Williams v. Lord*, 75 Va. 390; *Byrd v. Forbes*, 3 Wash. Ter. 318; *Knapp etc. Co. v. Deitz*, 64 Wis. 31; *Anderson v. Patterson*, 64 Wis. 557. And see *Roundy v. Converse*, 71 Wis. 524; 5 Am. St. Rep. 240.

<sup>3</sup> *Goodheart v. Johnson*, 88 Ill. 58; *Miller v. Lockwood*, 32 N. Y. 293; *Crow v. Red River Co. Bank*, 52 Tex. 362; *Ellsworth v. Phelps*, 30 Hun, 646; *Wilson v. Sullivan*, 58 N. H. 260; *Hewson v. Tootle*, 72 Mo. 632; *Fiske v. Harshaw*, 45 Wis. 666; *Miller v. Shreve*, 29 N. J. L. 250. See note to *Pulcifer v. Page*, 54 Am. Dec. 595; *Kleine v. Katzenberger*, 20 Ohio St. 110; 5 Am. Rep. 630.

<sup>4</sup> *Ranlett v. Blodgett*, 17 N. H. 298; 43 Am. Dec. 603; *Rose v. Bevan*, 10 Md. 466; 69 Am. Dec. 170.

ILLUSTRATIONS.—A executed to B a mortgage on all his stock in trade. The mortgage gave A permission to remain in possession, and to sell and apply the proceeds of the goods to his own use. *Held*, fraudulent and void in law as against creditors: *Blakeslee v. Rossman*, 43 Wis. 116. A trading firm in a city in Indiana, owing money, made a mortgage of their stock of goods, the mortgage containing this clause: And it is hereby expressly agreed that until default shall be made in the payment of some one of said notes, the parties of the first part may remain in possession of said goods, and may sell the same as heretofore, and supply their places with other goods, and such substituted goods shall be subjected to the lien of this mortgage. *Held*, that the mortgage was void as matter of law, notwithstanding recording: *Robinson v. Elliott*, 22 Wall. 513.

**TITLE XXXIII.**

**LIENS.**



## TITLE XXXIII.

# LIENS.

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## CHAPTER CLII.

### LIENS.

- § 3093. Common-law liens.
- § 3094. Equitable liens.
- § 3095. Liens by express agreement.
- § 3096. Statutory liens.
- § 3097. Lien of artisan or workman.
- § 3098. Lien of attorney.
- § 3099. Lien of auctioneer.
- § 3100. Lien of banker.
- § 3101. Lien of carrier.
- § 3102. Lien of factor.
- § 3103. Lien of innkeeper.
- § 3104. Lien of warehouseman.
- § 3105. Vendor's lien—Realty.
- § 3106. Vendor's lien—Personalty.
- § 3107. Vendee's lien.

§ 3093. **Common-law Liens.**—A common-law lien is a right to retain possession of property belonging to another until a claim of the party in possession against the owner is satisfied. Such liens arise by operation of law, and without any agreement of the parties.<sup>1</sup> The princi-

<sup>1</sup> Chambers v. Davidson, L. R. 1 P. C. 296; Andrews v. Doe, 6 How. (Miss.) 554; 38 Am. Dec. 450. All liens depend upon contracts express or implied, and none can be implied where the defendant acts adversely to the rights of the person for whom he has paid the money: Allen v. Ogden, 1 Wash. 174. In Donald v. Hewitt, 33 Ala. 534, 73 Am. Dec. 431, the court say: "It is contended for appellants that the well-ascertained technical

meaning of the word 'lien' is a right to retain possession of property until a demand is satisfied, and that it must be so understood where it occurs in the written contract above named. It is true that common-law liens—for example, liens of carriers, innkeepers, factors, and artificers—are mere rights to retain until the specific debt is satisfied, and cannot continue without possession. But whatever may be the import of the word when applied

pal examples of the common-law liens are the liens of workmen on property upon which they have performed service; of pawnors upon their pawns; of innkeepers upon goods of their guests; and of carriers upon property conveyed by them. A mere creditor happening to have in his possession specific articles belonging to his debtor has no lien upon them.<sup>1</sup> A person who has advanced money to another to carry on business has no lien upon the proceeds of such business.<sup>2</sup> The policy of the law is against upholding secret liens and charges, to the injury of innocent purchasers and encumbrancers for value.<sup>3</sup> The common law establishes liens in the order of priority of their acquisition, the first in order of time standing first in order of rank.<sup>4</sup>

A lien is either general or particular. A particular lien on goods is confined to the very goods; but a general lien on goods extends not only to the particular account, but also to the general balance of the accounts. A right to retain property for a claim in respect to it alone is a particular lien. A right to retain all the property of the debtor which is in or may come into the hands of the creditor is a general lien.<sup>5</sup> There can be no lien on chattels at common law separate from the possession.<sup>6</sup> A common-law lien is lost if possession is surrendered;<sup>7</sup> but

to that class of cases, or whatever may have been its original meaning, it has acquired in our law a much more extended signification. It is used to designate all the various charges of debts upon land or personalty which are created by statute, or recognized in chancery or maritime law, although neither connected with nor dependent upon possession: Willard's Eq. Jur. 123. Thus we have the lien of a judgment, the lien of an execution, the lien of a partner, the lien of a legal or equitable mortgage, the lien of a vendor, and various other charges which are denominated liens; and in courts of equity the term 'lien' is used to denote a charge or encumbrance on a thing, where there

is neither *jus in re* nor *jus ad rem*, nor possession of the thing; Peck v. Jenness, 7 How. 612, 619; Brig Nestor, 1 Sum. 73."

<sup>1</sup> Allen v. Megguire, 15 Mass. 490.

<sup>2</sup> Miller v. Price, 20 Wis. 117.

<sup>3</sup> Palmer v. Howard, 72 Cal. 293; 1 Am. St. Rep. 60.

<sup>4</sup> Voorhis v. Westervelt, 43 N. J. Eq. 642; 3 Am. St. Rep. 315.

<sup>5</sup> Myer v. Jacobs, 1 Daly, 32.

<sup>6</sup> Jenkins v. Eichelberger, 4 Watts, 121; 28 Am. Dec. 691; Jordan v. James, 5 Ohio, 88.

<sup>7</sup> Oakes v. Moore, 24 Me. 214; 41 Am. Dec. 379; Miller v. Marston, 35 Me. 153; 56 Am. Dec. 694.

in the maritime law and in equity liens exist independently of possession.<sup>1</sup> A lien will be destroyed not only by parting with possession, but by attempting to retain it otherwise than as security.<sup>2</sup> So where a party refuses, upon demand made, to deliver up property without setting up any lien thereon, he thereby waives the right to set up a lien afterwards.<sup>3</sup> The remedy of one from whose custody is wrongfully taken property on which he has a lien is by an action against the wrong-doer, either to recover possession or for a wrongful conversion.<sup>4</sup> A creditor who has a lien on two funds will be compelled, as against a subsequent lienor having a claim on only one, to satisfy his debt from the other fund.<sup>5</sup> One cannot waive a lien of which he has no knowledge.<sup>6</sup>

**§ 3094. Equitable Liens.**—An equitable lien is a right not recognized at law to have a fund or specific property, or its proceeds, applied, in whole or in part, to the payment of a particular debt or class of debts.<sup>7</sup> Every express executory agreement whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein identified, a security for a debt or other obligation, or whereby the party promises to convey, assign, or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property.<sup>8</sup> Therefore an equitable lien will be decreed wherever a debtor has, in good faith, contracted with a creditor that the latter shall have a lien upon specified property as security for a debt, if the agreement does not operate to

<sup>1</sup> *Ex parte Foster*, 2 Story, 131.

<sup>2</sup> *Bean v. Bolton*, 3 Phila. 87; *Picquet v. McKay*, 2 Blackf. 465.

<sup>3</sup> *Dows v. Morewood*, 10 Barb. 183; *Thatcher v. Harlan*, 2 Houst. 178; *Hanna v. Phelps*, 7 Ind. 21; 63 Am. Dec. 410. *Contra*, *Everett v. Coffin*, 6 Wend. 603; 22 Am. Dec. 551.

<sup>4</sup> *Wingard v. Banning*, 39 Cal. 543.

<sup>5</sup> *Cheesebrough v. Millard*, 1 Johns. Ch. 409; 7 Am. Dec. 494; *Ramsey's Appeal*, 2 Watts, 228; 27 Am. Dec. 301.

<sup>6</sup> *Boynton v. Braley*, 54 Vt. 92.

<sup>7</sup> 2 Story's Eq. Jur., sec. 1215.

<sup>8</sup> *Knott v. Mfg Co.*, 30 W. Va. 790.

create a lien at law.<sup>1</sup> When one joint owner of a business and stock in trade sells out his interest to the other, for valuable consideration, and takes a lien on the stock in trade, and the increase thereof in the line of the business, to secure the payment of the purchase-money, such lien is a continuing security, enforceable in equity, between the parties and their privies.<sup>2</sup> But where chattels upon which there is a registered lien are destroyed, the lien does not attach to new chattels substituted in their place.<sup>3</sup> The expectation of a person performing services or furnishing materials that funds of his employer derived from specific resources will be devoted to paying for his services or materials, even when founded upon an express promise by the employer that those funds shall be so devoted, does not create a lien in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished. There must be a relinquishment by the employer of the right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to his payment when his contract is completed.<sup>4</sup> Thus the fact that a decedent in his lifetime had frequently declared his intention to pay certain indebtedness to plaintiffs from the proceeds of a number of cattle owned by him, is insufficient to create a lien in favor of plaintiffs upon the fund arising from the sale of the cattle by his executors.<sup>5</sup>

<sup>1</sup> A valid equitable lien, as against subsequent encumbrancers or their agents, is created by an agreement that the so-called preferred stock of a railroad company shall be a lien of a certain class, provided the agreement is

brought to their knowledge: *Skiddy v. R. R. Co.*, 3 Hughes, 320.

<sup>2</sup> *McClure v. McDearmon*, 26 Ark. 66.

<sup>3</sup> *Cowart v. Cowart*, 3 Lea, 57.

<sup>4</sup> *Dillon v. Barnard*, 21 Wall. 430.

<sup>5</sup> *Cook v. Black*, 54 Iowa, 693.

Examples of equitable liens are found in the lien of a partner on the partnership assets;<sup>1</sup> the lien of the creditors of a partnership;<sup>2</sup> the lien of the creditors of a corporation upon its assets;<sup>3</sup> the lien of a *cestui que trust* upon trust funds.<sup>4</sup> Equity will enforce a lien for permanent and valuable improvements made by one in possession of land, in good faith, without notice of the title of the legal owner, who stands by and suffers the same to be made.<sup>5</sup> One who, under an honest but mistaken belief of ownership, pays taxes on another's land, may have a lien on the land for repayment of the amount, with interest from the time he made payment.<sup>6</sup> Where land is devised to one who is required to pay to other devisees a sum sufficient to make the devisees equal, an equitable lien is created.<sup>7</sup> An equitable lien passes to the assignee of the debt of which such lien is an incident, although not named in the instrument of assignment.<sup>8</sup> There must be a valuable and adequate consideration for an equitable lien, but what will be a sufficient consideration must depend upon the circumstances of each case.<sup>9</sup>

ILLUSTRATIONS.—A knows that B claims goods, and stands by and permits B to pay customs duties without disclosing his claim, and with the intention of replevying the goods after the duties are paid. *Held*, that B acquires an equitable lien, which he is entitled to have discharged before A can obtain possession: *Fowler v. Parsons*, 143 Mass. 401. A entered into a written contract with B, whereby, in consideration of money advanced by the latter for the purchase of skins, he agreed that he would tan, finish, and deliver them to B, who was to sell them on commission and put the proceeds at the disposal of A. It was also agreed that the skins should be considered as security for the money advanced. *Held*, that the legal title to the skins was in A, subject to a claim by B in the nature of an equitable lien: *Hauselt v. Harrison*, 105 U. S. 401. A, having a claim against a county for services, agreed with B and C, to

<sup>1</sup> See Title Partnership.

<sup>2</sup> *Id.*

<sup>3</sup> See Title Corporations.

<sup>4</sup> See Title Trustees.

<sup>5</sup> *Preston v. Brown*, 35 Ohio St. 18.

<sup>6</sup> *Goodnow v. Litchfield*, 63 Iowa,

275; *Goodnow v. Stryker*, 63 Iowa, 569.

<sup>7</sup> *Dudgeon v. Dudgeon*, 87 Mo. 218.

<sup>8</sup> *Payne v. Wilson*, 74 N. Y. 343.

<sup>9</sup> *Eaton v. Patterson*, 2 Stew. & P. 9.

whom he was indebted, to give them county orders for the amounts severally due them. *Held*, that this agreement created a valid lien upon the fund in favor of B and C: *Richardson v. Rust*, 9 Paige, 243. A having negotiated a loan, by letter, and promised to secure it by a bill of sale of specified property, died soon afterwards without giving the security. *Held*, that the lender had a lien upon the specified property: *Read v. Gailard*, 2 Desaus. 552; 2 Am. Dec. 696.

**§ 3095. Liens by Express Agreement.** — Liens may be created by contract of the parties where none would exist by operation of law.<sup>1</sup> Where the owner of a canal-boat sunk in the Hudson River, after trying to raise it himself, and hiring men for that purpose, requested the persons about there to continue the search, and promised to see them paid, and afterwards promised to pay the expense, it was held that the party raising the boat had a lien on it and the cargo for his expenses.<sup>2</sup> So by contract it may be agreed that the vendor of property shall retain a lien upon the property in the hands of the vendee until the purchase-money shall be paid.<sup>3</sup> A vendor's lien on real estate for unpaid purchase-money may be created by the express contract of the parties at the time of the sale and conveyance of such real estate.<sup>4</sup> A lien created by contract, and reserved on the face of the conveyance, is regarded as a specific lien forming an original substantive charge upon the estate thus conveyed, and as affecting all persons who may subsequently come into possession of the estate with notice, either actual or constructive, of its existence.<sup>5</sup> But the security is an incident that follows the legal obligation to pay, and whenever that obligation ceases, the security must cease with it. A lien upon land given to secure payment of a promissory note cannot be enforced after the note is barred by the statute of limita-

<sup>1</sup> Overton on Liens, 233; McCaffrey v. Wooden, 62 Barb. 316; Milliman v. Neher, 20 Barb. 40; Ostertag v. Galbraith, 23 Neb. 730.

<sup>2</sup> Baker v. Hoag, 7 Barb. 113.

<sup>3</sup> Sawyer v. Fisher, 32 Me. 28.

<sup>4</sup> Smith v. Rowland, 13 Kan. 245.

<sup>5</sup> Lincoln v. Purcell, 2 Head, 143; 73 Am. Dec. 197.

tions.<sup>1</sup> An express contract that the lien shall be retained to a specified extent is equivalent to a waiver of that lien to any greater extent.<sup>2</sup>

ILLUSTRATIONS.—A lease of a hotel in process of erection stipulated that all furniture and fixtures should be bound for the rent. It was to take effect at a future day. When signed, the hotel was unfurnished, but before it took effect there were furniture and fixtures in the hotel. The rent was payable monthly. *Held*, that a lien attached upon the furniture and fixtures for the full amount of rent reserved, and had priority over a mortgage given after the lease took effect, but before rent was in arrears, to one knowing of the stipulation: *Wright v. Bircher's Executor*, 72 Mo. 179; 37 Am. Rep. 433. Advances were made by a bank to a contractor to enable him to furnish certain manufactured articles to the government; and it was agreed that such advances should be a lien on the drafts to be drawn on the government for the proceeds of the articles manufactured. *Held*, that this did not give the bank a lien on a judgment against the government for damages for violation of the contract: *Bank of Washington v. Nock*, 9 Wall. 373. It was stipulated by a brick-maker that the lessees of a brick-yard should retain the bricks to be made, as securities for advances to him. *Held*, that the bricks became pledged as fast as they were made, and that such a lien, with the consent of the brick-maker, was assignable: *Macomber v. Parker*, 14 Pick. 497. A borrowed money of B, who executed an obligation promising to pay the amount, to insure his buildings, and not to give any voluntary lien of any character on his buildings or land so long as the debt should remain unpaid. *Held*, that this obligation created no lien in A's favor in B's property: *Knott v. Shepherds-town Mfg. Co.*, 30 W. Va. 790.

§ 3096. **Statutory Liens.**—By statutes in most of the states, any person furnishing labor or materials for the erection or repair of a building has a lien on the building erected, and on the interest of the owner of the building in the land on which it stands.<sup>3</sup> In some states the lien attaches to the building and the land, by whomsoever owned, and in some, not only the lot on which the building stands is liable, but also the lot or curtilage imme-

<sup>1</sup> *Yeates v. Weeden*, 6 Bush, 438.

<sup>2</sup> *Brown v. Gilman*, 4 Wheat. 255.

<sup>3</sup> See 1 Stimson's *American Statute Law*, 1960 et seq.

diately about it, and necessary for its use.<sup>1</sup> The statutes prescribe the modes both for enforcing the lien and for limiting the liability of the owner. In many states, by statute, the landlord has a lien for his rent on the crops grown on the land during the term; or on the furniture in the house, the farm implements, or any personal property on the premises.<sup>2</sup> In several states a person making advances to a farmer may, by agreement, have a lien on the crops of that year to the preference of all previous or subsequent liens.<sup>3</sup> In Kansas one furnishing water for irrigating purposes has a lien on the crop for the contract price.<sup>4</sup> The legislature has the power to authorize hogs and cattle taken damage-feasant to be impounded by the owner of the premises, and detained until the damages and costs are paid, and to give such owner a lien on the animals to secure such damages and costs.<sup>5</sup> In a number of states, by statute, liens are given to laborers, to artisans, to workmen, to agisters, graziers, and livery-stable keepers, to the owners of stud-horses, and other persons.<sup>6</sup> A lien fixed under one statute becomes a vested right not affected by a repeal of the statute.<sup>7</sup>

**§ 3097. Lien of Artisan or Workman.**—A person doing work or labor on an article has a lien on such thing for his charges.<sup>8</sup> As a general rule, every bailee for hire who by his labor and skill has imparted an additional value to the goods of another has a lien, at his election, upon the property for his reasonable charges in relation to it so long as he retains the same in his custody.<sup>9</sup> One with whom materials are left for manufacture has a lien on

<sup>1</sup> See 1 Stimson's American Statute Law, 1960 et seq.

<sup>2</sup> 1 Stimson's American Statute Law, sec. 2034; *aliter* in the absence of statute: *Deaver v. Rice*, 4 Dev. & B. 431; 34 Am. Dec. 388.

<sup>3</sup> Alabama, Florida, North Carolina, Virginia, Georgia: See 1 Stimson's American Statute Law, 1954.

<sup>4</sup> Kansas Laws 1885, sec. 133.

<sup>5</sup> *Rood v. McCarger*, 49 Cal. 117.

<sup>6</sup> 1 Stimson's American Statute Law, secs. 4640 et seq.

<sup>7</sup> *Handel v. Elliott*, 60 Tex. 145.

<sup>8</sup> *Hutchins v. Olcott*, 4 Vt. 549; 24 Am. Dec. 635; *White v. Smith*, 44 N. J. L. 105; 43 Am. Rep. 347.

<sup>9</sup> *Wilson v. Martin*, 40 N. H. 88; *Hanna v. Phelps*, 7 Ind. 21; 63 Am. Dec. 410.

them for his work.<sup>1</sup> Thus the following liens have been sustained: Of a mill-owner, on lumber sawed at his mill;<sup>2</sup> of one engaged in the business of rendering lard from hogs, on the lard so made;<sup>3</sup> of a pork-packer, on pork packed by him;<sup>4</sup> of a driver of logs, for his services on the logs which he is employed to drive.<sup>5</sup> The lien attaches at common law only where the property has been improved in value by the labor or attention of the party.<sup>6</sup> Thus an agister has no lien on the cattle of others,<sup>7</sup> nor has a livery-stable keeper to whom a horse has been delivered to be stabled, kept, and fed.<sup>8</sup> But a livery-stable keeper has a lien for the keep and exercise of a horse sent to him to be trained,<sup>9</sup> and so has a farrier with whom a horse is left to be kept and cured.<sup>10</sup> And possession being essential to the lien, a mere employee or workman of a contractor has no lien on the property, though enhanced by his labor.<sup>11</sup> So one who contracts to haul lumber at an agreed price, to be paid for when the lumber is sold, has no lien on it.<sup>12</sup> A manufacturer of brick made and burnt on the land of another, but of which the manufacturer has no lease, and

<sup>1</sup> *Mathias v. Sellers*, 86 Pa. St. 486; 27 Am. Rep. 723; *Townsend v. Newell*, 14 Pick. 332; *Moore v. Hitchcock*, 4 Wend. 392.

<sup>2</sup> *Hutchins v. Olcott*, 4 Vt. 549; 24 Am. Dec. 634; *Arians v. Brickley*, 65 Wis. 26; 56 Am. Rep. 611; *Pierce v. Sweet*, 33 Pa. St. 151.

<sup>3</sup> *Hanna v. Phelps*, 7 Ind. 21; 63 Am. Dec. 410.

<sup>4</sup> *East v. Ferguson*, 59 Ind. 172; *Shaw v. Ferguson*, 78 Ind. 554.

<sup>5</sup> *Hamilton v. Buck*, 36 Me. 536.

<sup>6</sup> *White v. Smith*, 44 N. J. L. 105; 43 Am. Rep. 347.

<sup>7</sup> *Jackson v. Cummins*, 5 Mees. & W. 342; *Cummings v. Harris*, 3 Vt. 244; 23 Am. Dec. 206; *Grinnell v. Cook*, 3 Hill, 485; 38 Am. Dec. 663.

<sup>8</sup> *Judson v. Etheridge*, 1 Crompt. & M. 742; *Miller v. Marston*, 35 Me. 153; 56 Am. Dec. 694. As to a livery-stable keeper who is also an innkeeper, see *Wall v. Garrison*, 11 Col. 515. A stable-keeper's lien cannot be asserted

where the person who leaves the horse in the stable is not the owner nor the owner's agent, who has no authority in the premises, and whose possession is but a naked wrongful possession: *Stott v. Scott*, 68 Tex. 302.

<sup>9</sup> *Bevan v. Waters*, 3 Car. & P. 520; *Forth v. Simpson*, 13 Q. B. 680. One who keeps and trains another's horse at the owner's request has a statutory lien for the keep, and a common-law lien for the training: *Towle v. Raymond*, 58 N. H. 64. One to whom a horse has been delivered to be trained for running races for bets and wagers has a lien for the expense and skill therein bestowed: *Harris v. Woodruff*, 124 Mass. 205; 26 Am. Rep. 658.

<sup>10</sup> *Lord v. Jones*, 24 Me. 439; 41 Am. Dec. 391.

<sup>11</sup> *McIntyre v. Carver*, 2 Watts & S. 392; 37 Am. Dec. 519; *Hollingsworth v. Dow*, 19 Pick. 228; *Wright v. Ferry*, 23 Fla. 160.

<sup>12</sup> *Stillings v. Gibson*, 63 N. H. 1.

no other interest than a right to enter and make the brick, has no such possession of the brick as to give him a lien thereon for his labor.<sup>1</sup> But where a person has a lien on certain articles for work done upon them, a delivery of the articles without his consent does not affect his rights.<sup>2</sup> The lien for work and labor on an article is waived by taking a note for the amount of the charges;<sup>3</sup> or by the voluntary and unconditional delivery of the property to the owner;<sup>4</sup> or by an unqualified refusal to deliver the chattel to the bailor without placing the refusal on the ground of the lien.<sup>5</sup> But the lien for work and labor is not affected or waived by a special agreement for the amount to be paid for the work.<sup>6</sup> And a manufacturer of goods is entitled to a lien on the same for the price of manufacturing, notwithstanding they were manufactured under a special agreement providing for the payment of such price in advance.<sup>7</sup> Under a contract for repairing several articles for a gross sum, the person repairing has a lien on all the articles for the repairs on any.<sup>8</sup> But generally the lien is only a specific lien on the identical property upon which the labor and materials are bestowed. Thus one tendered payment for repairs upon a carriage cannot hold the carriage for repairs unpaid for upon other carriages of the same owner, the whole not being as of an entire lot.<sup>9</sup> A laborer's statutory lien is assignable,<sup>10</sup> though the common-law lien for work and labor is not.<sup>11</sup>

ILLUSTRATIONS.—A wife allowed her husband to use her wagon, and he took it to a wheelwright for necessary repairs. The wheelwright made the repairs, and charged them to the

<sup>1</sup> *King v. Indian Orchard Canal Co.*, 11 Cush. 231.

<sup>2</sup> *Partridge v. Dartmouth College*, 5 N. H. 286.

<sup>3</sup> *Hutchins v. Olcott*, 4 Vt. 549; 24 Am. Dec. 634.

<sup>4</sup> *Sensenbrenner v. Matthews*, 48 Wis. 250; 33 Am. Rep. 809; *Smith v. Greenop*, 60 Mich. 61.

<sup>5</sup> *Hanna v. Phelps*, 7 Ind. 21; 63 Am. Dec. 410. See *Hamilton v. McLaughlin*, 145 Mass. 20.

<sup>6</sup> *Mathias v. Sellers*, 86 Pa. St. 486; 27 Am. Rep. 723; *Hanna v. Phelps*, 7 Ind. 21; 63 Am. Dec. 410.

<sup>7</sup> *Ruggles v. Walker*, 34 Vt. 468.

<sup>8</sup> *Hensel v. Noble*, 95 Pa. St. 343; 40 Am. Rep. 659.

<sup>9</sup> *Moulton v. Greene*, 10 R. I. 110.

<sup>10</sup> *Murphy v. Adams*, 71 Me. 113; 36 Am. Rep. 299.

<sup>11</sup> *Bradley v. Spofford*, 23 N. H. 444; 55 Am. Dec. 205.

husband, supposing the wagon to be his. *Held*, that he had a lien therefor as against the wife: *White v. Smith*, 44 N. J. L. 105; 43 Am. Rep. 347. P. contracted with H. to launder all the cuffs and collars manufactured by the latter, at a price specified. P. was to return the goods as fast as laundered, and to render a bill and receive payment in cash on the first of each month for all goods laundered and returned during the preceding month. In an action brought against a sheriff who had levied on the goods in plaintiff's hands under an execution against H., *held*, that P. had no right of lien either for the balance due him or for the work done on the goods so levied on: *Wiles Laundering Co. v. Hahlo*, 105 N. Y. 234; 59 Am. Rep. 496. An association borrowed money for constructing a park, giving its note, which its officers, who were guarantors, paid in good faith with the money borrowed. *Held*, that persons furnishing labor and materials for the park had no lien on the borrowed money, although the association had no other property, and had become insolvent: *Myers v. Jacques*, 53 Conn. 517. A livery-stable keeper refused to deliver up a horse on the owner's demand unless paid for a time preceding as well as succeeding the date of notice to the owner, the horse having been left there without the owner's knowledge or authority. *Held*, that the lien was waived: *Hamilton v. McLaughlin*, 145 Mass. 20. A had a lien on horses for their keep. He instituted proceedings to enforce the lien, and the officer, after a sale, paid the excess over the amount of the lien into court, as required by statute. *Held*, that A could not by a suit in equity reach this money to satisfy his claim for keeping the horses from the time of the institution of the lien proceedings to the time of sale: *Lord v. Collins*, 79 Me. 227.

§ 3098. **Lien of Attorney.**—An attorney has a lien upon any judgment or recovery obtained by him for his fees and compensation in obtaining it;<sup>1</sup> though in some

<sup>1</sup> *Walker v. Sergeant*, 14 Vt. 247; *Pendar v. Morris*, 3 Caines, 165; *McDonald v. Napier*, 14 Ga. 89; *Carter v. Davis*, 8 Fla. 183; *Hanger v. Fowler*, 20 Ark. 667; *Sexton v. Pike*, 13 Ark. 193; *Andrews v. Morse*, 12 Conn. 444; 31 Am. Dec. 752; *Warfield v. Campbell*, 38 Ala. 527; 82 Am. Dec. 725; *Rooney v. R. R. Co.*, 18 N. Y. 368; *Twiggs v. Chalmers*, 56 Ga. 282; *In re Paschall*, 10 Wall. 483; *Central R. R. Co. v. Pettus*, 113 U. S. 116; *Young v. Dearborn*, 27 N. H. 324; *Currier v. R. R. Co.*, 37 N. H. 223; *Ten Broeck v. De Witt*, 10 Wend. 617; *Martin v. Hawks*, 15 Johns. 405; *Power v. Kent*, 1 Cow. 172; *Heartt v. Chipman*, 2 Aiken, 162. The attorney's lien is governed by the law of the state where the judgment was recovered and the lien attached, and not by that of the state where the judgment is sought to be collected: *Citizens' National Bank v. Culver*, 54 N. H. 327; 20 Am. Rep. 134. "The general proposition," says *Danforth, J.*, in *In re Knapp*, 85 N. Y. 284, "that an attorney has a lien for his costs and charges upon deeds or

states it is held that where his fees are not taxable by law, or where the client has agreed to pay him a sum as compensation beyond the amount taxable as fees, such sums are not a lien on the judgment.<sup>1</sup> So the attorney has a lien upon the papers of his client in his possession;<sup>2</sup> as a note in his hands for collection;<sup>3</sup> or a bond or mortgage for foreclosure;<sup>4</sup> in short, upon all the client's property in his possession, as papers and writings (including deeds, leases, etc.), money and securities deposited for

papers, or upon moneys received by him in his client's behalf in the course of his employment, is not doubted, nor does it stand upon questionable foundations. It comes to us *super antiquas vias*. As early as the year 1734 it was held by Lord Chancellor Talbot to arise upon a contract implied by law, and as effectual as if it resulted from an express agreement: *Ex parte Bush*, 7 Vin. Abr. 74. And 1779, in *Wilkins v. Carmichael*, 1 Doug. 101, Lord Mansfield declared that the practice which protected it 'was established on general principles of justice, and that courts of both law and equity had carried it so far that an attorney or solicitor may obtain an order to stop his client from receiving money in a suit in which he has been employed for him until his bill is paid'; and in *Welsh v. Hole*, 1 Doug. 238, the same judge held that 'an attorney has a lien on the money recovered by his client for his bill of costs. If the money came to his hands he may retain the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court they will prevent its being paid over till his demand is satisfied.' Indeed, he was inclined to go still further, and to hold that if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which had been assigned after notice. *Parke, B.*, in *Barker v. St. Quintin*, 12 Mees. & W. 451, refers to this decision as establishing the attorney's claim to the equitable interference of the court to have the judgment held as security for the debt

due to the attorney, or after notice to compel the defendant to pay its proceeds over again. In our own state this was so settled that Kent, in his *Commentaries*, vol. 2, p. 641, puts it down as an established principle that the attorney has two liens for his costs,—one on the papers in his hands, and the other on the funds recovered. No new rule therefore was enunciated in *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, where it was said that the 'lien of the attorney . . . attaches to the money recovered or collected upon the judgment.' It is plain, then, that the right of lien exists. Its origin should not be lost sight of."

<sup>1</sup> *Humphrey v. Browning*, 46 Ill. 476; 95 Am. Dec. 446; *Forsythe v. Beveridge*, 52 Ill. 268; 4 Am. Rep. 612; *Frissell v. Halle*, 8 Mo. 18; *Hill v. Brinkley*, 10 Ind. 102; *Ex parte Kyle*, 1 Cal. 331; *Mansfield v. Dorland*, 2 Cal. 507; *Wright v. Cobleigh*, 21 N. H. 339; *Wells v. Hatch*, 43 N. H. 246; *Currier v. R. R. Co.*, 37 N. H. 223; *Heartt v. Chipman*, 2 Aiken, 162; *Phillips v. Stagg*, 2 Edw. Ch. 108.

<sup>2</sup> *St. John v. Diefendorf*, 12 Wend. 261; *Dubois's Appeal*, 38 Pa. St. 231; 80 Am. Dec. 478. The Nebraska statute giving an attorney a lien on papers and money for his fees is but a reenactment of the rule of the common law: *Sayre v. Thompson*, 18 Neb. 33.

<sup>3</sup> *Stewart v. Flowers*, 44 Miss. 513; 7 Am. Rep. 707; *Dennett v. Cutts*, 11 N. H. 163; *Howard v. Osceola*, 22 Wis. 453.

<sup>4</sup> *Bowling Green Bank v. Todd*, 52 N. Y. 489.

collection.<sup>1</sup> The lien does not arise until judgment,<sup>2</sup> and until the lien attaches, the parties can settle the suit regardless of the attorney's claim for costs.<sup>3</sup> Where the judgment is for costs only, the debtor is bound to take notice of the lien of the attorney of the judgment creditor thereon, and cannot satisfy the judgment by payment to any one but the attorney. But it is otherwise where the judgment is for damages and costs. If the attorney claims compensation beyond the taxed costs, under an agreement with his client, express or implied, his lien for such compensation can be protected against a payment to the client only by notice to the judgment debtor.<sup>4</sup>

The lien on books and papers is a general lien;<sup>5</sup> but a lien on a judgment recovered or on money collected is restricted to his fees and charges in the particular case; he has no lien in such case for his general balance.<sup>6</sup> Though it is essential that the attorney's claim shall have arisen from professional employment,<sup>7</sup> it is not required that the funds upon which it is sought to establish a lien for compensation and disbursements came into his hands in consequence of other efforts than the prosecution of an action.<sup>8</sup> An attorney has a lien on a judgment in favor of his client for all services which he has rendered in

<sup>1</sup> *Stewart v. Flowers*, 44 Miss. 513; 7 Am. Rep. 707.

<sup>2</sup> *Foot v. Tewksbury*, 2 Vt. 97; *Potter v. Mayo*, 3 Me. 34; 14 Am. Dec. 211; *Simmons v. Almy*, 103 Mass. 33; *Hooper v. Welch*, 43 Vt. 169; 5 Am. Rep. 267; *Newbert v. Cunningham*, 50 Me. 231; 79 Am. Dec. 612; *Casey v. March*, 30 Tex. 180. There can be no attorney's lien before judgment in an action of tort which does not survive: *Abbott v. Abbott*, 18 Neb. 503.

<sup>3</sup> *Cases supra*; *Weakly v. Hall*, 13 Ohio, 167; 42 Am. Dec. 194; *Heisler v. Den*, 17 N. J. L. 438; *Hawkins v. Loyless*, 39 Ga. 5. *Contra*, *Stockton Sav. Soc. v. Donnelly*, 60 Cal. 431.

<sup>4</sup> *Marshall v. Meech*, 51 N. Y. 140; 10 Am. Rep. 572.

<sup>5</sup> *Overton on Liens*, sec. 56; *Stewart*

*v. Flowers*, 44 Miss. 513; 7 Am. Rep. 707.

<sup>6</sup> *Overton on Liens*, sec. 56. An attorney's lien on a judgment does not authorize him to bring a suit thereon in his client's name without his authority: *Horton v. Champlin*, 12 R. I. 550; 34 Am. Rep. 722.

<sup>7</sup> *Warnal v. Jackson*, 2 Jacob & W. 14; *Ex parte Nesbitt*, 2 Schoales & L. 279. A broker employed to sell real estate has no lien for fees on the title papers: *Arthur v. Sylvester*, 105 Pa. St. 233. But an agent employed to obtain a loan on commission has a lien on the fund for his fees: *Vinton v. Baldwin*, 95 Ind. 433. See *Richards v. Gaskill*, 39 Kan. 423.

<sup>8</sup> *In re Knapp*, 85 N. Y. 284; *Armstrong v. Tate*, 1 East, 464; *In re H.*, 87 N. Y. 521; *Ward v. Craig*, 87 N. Y. 560.

obtaining such judgment.<sup>1</sup> His lien for services is limited to the judgment recovered in the case in which the services were rendered, and does not extend to his client's property which was the subject of litigation.<sup>2</sup> An attorney has no lien upon his client's land for services rendered in defending against an effort to charge them with the payment of the debt of another;<sup>3</sup> nor for services in prosecuting a suit in equity to establish the title.<sup>4</sup> And an attorney who has recovered land for his client has no lien thereon to secure his fee.<sup>5</sup> An attorney has a lien for his costs upon a fund recovered by his aid, paramount to that of the persons interested in the fund or those claiming as their creditors. His lien for services rendered under a contract with his client in contesting a will and partitioning the estate is prior to the judgment obtained subsequent to the contract.<sup>6</sup> An attorney in a partition suit has a lien for his fees only on his client's share of the fund realized by a sale of the land, not on the whole fund.<sup>7</sup> The lien of an attorney is superior to an attachment by trustee process.<sup>8</sup> An assignment by the judgment creditor of the judgment to the attorney merges any statute lien for costs which the attorney may have had thereon.<sup>9</sup> An attorney's lien on a judgment does not authorize him to bring a suit on the judgment without the client's consent.<sup>10</sup> Where an action for breach of promise of marriage has abated by the marriage of the parties thereto, the counsel for the plaintiff cannot prosecute it under a statute giving him a lien for fees.<sup>11</sup> Posses-

<sup>1</sup> *Renick v. Ludington*, 16 W. Va. 378.

<sup>2</sup> *McWilliams v. Jenkins*, 72 Ala. 480.

<sup>3</sup> *Shaw v. Neale*, 6 H. L. Cas. 581; *McWilliams v. Jenkins*, 72 Ala. 480.

<sup>4</sup> *McCollough v. Flourney*, 69 Ala. 189; *Hauger v. Fowler*, 20 Ark. 667; *Small v. Clark*, 22 Vt. 598; *Cozzens v. Whitney*, 3 R. I. 79; *Humphrey v. Browning*, 46 Ill. 476; 95 Am. Dec. 446; *Martin v. Harrington*, 57 Wis. 208; *Heisky v. Du Val*, 47 Ark. 86.

<sup>5</sup> *Martin v. Harrington*, 57 Miss. 208. *Contra*, *Filmore v. Wells*, 10 Col. 228.

<sup>6</sup> *Justice v. Justice*, 115 Ind. 201.

<sup>7</sup> *Keith v. Fitzhugh*, 15 Lea, 49.

<sup>8</sup> *Weed v. Boutelle*, 56 Vt. 570; 43 Am. Rep. 821.

<sup>9</sup> *Dodd v. Brott*, 1 Minn. 270; 66 Am. Dec. 541.

<sup>10</sup> *Horton v. Champlin*, 12 R. I. 550; 34 Am. Rep. 722.

<sup>11</sup> *Harris v. Tyson*, 63 Ga. 629; 36 Am. Rep. 126.

sion of papers placed in the hands of an attorney is necessary to his lien thereon for his fees, and if he voluntarily surrenders them, his lien is gone.<sup>1</sup> His lien upon a judgment is waived by his procuring satisfaction of the judgment and perfecting the client's title to land attached in the action.<sup>2</sup> An attorney's lien is not divested by the fact that the judgment obtained by him became dormant, and was afterwards revived by other attorneys.<sup>3</sup>

**ILLUSTRATIONS.**—A solicitor undertook the prosecution of a suit in chancery, without a stipulated price or time of payment, but, during the progress of the suit, withdrew in consequence of being refused an advance of money in part compensation for services rendered in the suit. The suit was prosecuted to a successful termination by another solicitor, and the land which was the subject-matter in suit was sold by the complainants therein to a third person. *Held*, that the first solicitor was not entitled to be decreed the payment of a reasonable sum out of the purchase-money as a compensation for his services, the lien as solicitor not having attached: *Stewart v. Flowers*, 44 Miss. 513; 7 Am. Rep. 707.

**§ 3099. Lien of Auctioneer.**—An auctioneer has a lien on the property on his hands and its proceeds for his charges and commissions.<sup>4</sup> The lien may be lost by delivery of the goods before the price is paid.<sup>5</sup>

**§ 3100. Lien of Banker.**—A bank has a general lien on all money and securities of a depositor in its possession for the amount of the general balance due from such customer.<sup>6</sup> But there is no lien on securities delivered to it under a special agreement;<sup>7</sup> and if funds are deposited in a bank for a special purpose, known to the bank, it cannot refuse to apply them to such purpose on the ground that a debt is due to it by the depositor.<sup>8</sup> A banker has no

<sup>1</sup> *Nichols v. Pool*, 89 Ill. 491.

<sup>2</sup> *Cowen v. Boone*, 48 Iowa, 350.

<sup>3</sup> *Jenkins v. Stephens*, 60 Ga. 216.

<sup>4</sup> *Hulse v. Young*, 16 Johns. 1.

<sup>5</sup> *Blum v. Towe*, Riley, 153.

<sup>6</sup> *Com. Bank v. Hughes*, 17 Wend. 94; *State Bank v. Armstrong*, 4 Dev.

519; *Bank of Metropolis v. N. E. Bank*, 1 How. 234; 17 Pet. 174; *Kelly v. Phelan*, 5 Dill. 225.

<sup>7</sup> *Bank of Metropolis v. N. E. Bank*, 1 How. 234; 17 Pet. 174.

<sup>8</sup> *Bank of United States v. Macalister*, 9 Pa. St. 475.

lien on securities left with him by mistake;<sup>1</sup> nor upon property subject to a trust, and improperly left with him by the trustee, without notice of the trust;<sup>2</sup> provided the *cestui que trust* has been guilty of no misconduct or negligence depriving him of his rights.<sup>3</sup> No lien will attach on funds standing to the credit of a depositor, unless there is an indebtedness actually existing and matured;<sup>4</sup> thus if a bank holds a note of the depositor, which it discounted for him, the bank will have no lien until the note matures.<sup>5</sup> And where a valid lien has been established, the bank will lose it by taking security for the debt, payable at some distant day.<sup>6</sup>

§ 3101. **Lien of Carrier.** — The carrier has, at common law, as security for compensation for his labor, and for any advances which he may have made for the benefit of the goods in his charge, a lien upon such goods. This lien, however, extends only to charges and advances upon the particular goods upon which it is claimed, i. e., a particular lien.<sup>7</sup> He cannot obtain a general lien by notice that he will carry only on this condition.<sup>8</sup> But he may by usage.<sup>9</sup> One who carries property for the convenience and at the request of the bailee thereof has no lien thereon for services as against the owner.<sup>10</sup> Where a common car-

<sup>1</sup> *Lucas v. Dorrien*, 7 Taunt. 279. And see *Petrie v. Myers*, 54 How. Pr. 513.

<sup>2</sup> *Locke v. Prescott*, 32 Beav. 261; *Manningford v. Toleman*, 1 Call, 670.

<sup>3</sup> *Manningford v. Toleman*, 1 Call, 670; *Murray v. Pinkett*, 12 Clark & F. 764.

<sup>4</sup> *Beckwith v. Union Bank*, 4 Sand. 604; 9 N. Y. 211; *Jordon v. Shoe and Leather Nat. Bank*, 12 Hun, 512; 74 N. Y. 467; 30 Am. Rep. 319.

<sup>5</sup> *Giles v. Perkins*, 9 East, 12.

<sup>6</sup> *Hewison v. Guthrie*, 2 Bing. N. C. 755.

<sup>7</sup> *Rushforth v. Hadfield*, 6 East, 522; *Hartshorne v. Johnson*, 7 N. J. L. 108; *Ames v. Palmer*, 42 Me. 197; 66 Am. Dec. 271; *Galena etc. R. R. Co. v. Rae*, 18 Ill. 488; 68 Am. Dec. 574;

*Wilson v. R. R. Co.*, 56 Me. 60; 96 Am. Dec. 435; *Langworthy v. R. R. Co.*, 2 E. D. Smith, 195. This lien is prior to the rights of the vendor, and the carrier may insist upon retaining possession until those charges are paid. An officer holding process against the vendee may lawfully advance these charges to the carrier, on taking possession of the goods, and having so advanced them, is substituted to all the carrier's rights of possession as security therefor: *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84.

<sup>8</sup> *McFarland v. Wheeler*, 26 Wend. 467; *Wright v. Snell*, 5 Barn. & Ald. 350.

<sup>9</sup> *Hutchinson on Carriers*, sec. 477.

<sup>10</sup> *Gilson v. Gwinn*, 107 Mass. 126; 9 Am. Rep. 13.

rier by water, after landing goods at the wharf in the city to which they are consigned, voluntarily assumes the delivery of them to the consignee at his place of business, no lien for cartage arises.<sup>1</sup> A common carrier who innocently receives goods from a wrong-doer, without the consent of the owner, express or implied, has no lien upon them for their carriage against such owner.<sup>2</sup> A common carrier who has received goods from a wharfinger, with whom they have been deposited by their owner without authority to forward them, has no lien on them for freight against the owner.<sup>3</sup> A carrier cannot acquire a lien on the property of the United States government for his services in transporting such property.<sup>4</sup> Where carriers have, by delay in transporting and delivering goods, injured the consignee to an amount equal to their charge for freight, their lien ceases, and the consignee may maintain replevin for the goods without paying or tendering the freight.<sup>5</sup> The lien does not exist on the goods of one for freight and charges on the goods of another, shipped by the same bill of lading to the same consignee.<sup>6</sup> A common carrier, having received goods for transportation, and given a bill of lading, cannot detain them for a debt due to himself not connected with the carriage.<sup>7</sup> A lien for freight does not attach unless the property is delivered at the specific place agreed upon.<sup>8</sup> Where several independent carriers receive goods in succession, each is entitled to payment in advance, or to a lien on the goods for his own charges, and also for the back charges paid by him;<sup>9</sup> but a carrier receiving goods from another carrier,

<sup>1</sup> Richardson v. Rich, 104 Mass. 156; 6 Am. Rep. 210.

<sup>2</sup> Robinson v. Baker, 5 Cush. 137; 51 Am. Dec. 54; Stevens v. R. R. Co., 8 Gray, 262.

<sup>3</sup> Clark v. R. R. Co., 9 Gray, 231.

<sup>4</sup> Dufolt v. Gorman, 1 Minn. 301; 66 Am. Dec. 543.

<sup>5</sup> Dyer v. R. R. Co., 42 Vt. 441; 1 Am. Rep. 350.

<sup>6</sup> Hale v. Barrett, 26 Ill. 195; 79 Am. Dec. 367.

<sup>7</sup> Pharr v. Collins, 35 La. Ann. 939; 48 Am. Rep. 251.

<sup>8</sup> Johnston v. Davis, 60 Mich. 56.

<sup>9</sup> Western T. Co. v. Hoyt, 69 N. Y. 230; Knight v. R. R. Co., 13 R. I. 572; 43 Am. Rep. 46; Vaughan v. R. Co., 13 R. I. 578.

with knowledge that a through-contract has been made and the charges paid in advance, has no lien thereon for carrying them over his own line.<sup>1</sup> A carrier has no right to sell goods to enforce his lien thereon for the freight earned by him in their transportation, and for freight earned by preceding carriers of the goods and paid by him.<sup>2</sup>

The carrier's lien is waived by delivering the possession of the goods to the owner.<sup>3</sup> But he may release his lien upon part of the cargo, retaining the balance for the charges upon the whole.<sup>4</sup> A carrier having delivered part of a quantity of goods consigned to one person, without collecting the freight, has a lien therefor upon the part undelivered, even as against the consignor's right of stoppage in transit.<sup>5</sup> So credit given by the carrier beyond the time of delivery is a waiver of the lien.<sup>6</sup> The lien for freight and charges is lost if goods are delivered to the consignee upon his note therefor, and is not revived if the carrier or his agent afterwards accidentally obtains possession of them.<sup>7</sup> Where goods were landed upon a wharf in October, and by usage the wharfage was not paid until Christmas, it was held that there could be no lien.<sup>8</sup> A frequent and general, but not universal, practice, in a particular port, on the part of ship-owners to allow goods brought on their vessels to be transported to the warehouse of the consignee, and there inspected before freight is paid, is not such a custom as will displace the right of the carrier to demand freight on the delivery of goods on the wharf.<sup>9</sup>

<sup>1</sup> Marsh v. R. R. Co., 3 McCrary, 236.

<sup>2</sup> Briggs v. R. R. Co., 6 Allen, 246; 83 Am. Dec. 628.

<sup>3</sup> Ames v. Palmer, 42 Me. 197; 66 Am. Dec. 271; Reineman v. R. R. Co., 51 Iowa, 338.

<sup>4</sup> Chicago etc. R. R. Co. v. N. U. P. Co., 38 Iowa, 377.

<sup>5</sup> Potts v. R. R. Co., 131 Mass. 455; 41 Am. Rep. 247; N. H. etc. Co. v. Campbell, 128 Mass. 104; 35 Am. Rep. 360.

<sup>6</sup> Pinney v. Wells, 10 Conn. 104; Corvell v. Simpson, 16 Ves. 275; Raitt v. Mitchell, 4 Camp. 145; Chandler v. Belden, 18 Johns. 157; 9 Am. Dec. 193; Lucas v. Pockolls, 4 Bing. 729.

<sup>7</sup> Hale v. Barrett, 26 Ill. 195; 79 Am. Dec. 367.

<sup>8</sup> Crawshaw v. Homfray, 4 Barn. & Ald. 50.

<sup>9</sup> The Eddy, 5 Wall. 481.

If a carrier retains goods by virtue of a lien for the freight, he is bound to take all reasonable measures to prevent injury to them while they are detained.<sup>1</sup>

ILLUSTRATIONS. — A lot of cotton was sent from Louisiana to Providence, Rhode Island. By the mistake of some intermediate carrier it was conveyed to Chicopee, Massachusetts. By the owner's direction it was brought to Providence by a railroad company, which paid all charges to Chicopee. *Held*, that the latter company could maintain a lien for these charges: *Vaughan v. R. R. Co.*, 13 R. I. 578.

§ 3102. **Lien of Factor.** — A factor has a common-law lien on his principal's goods in his possession for a general balance due him.<sup>2</sup> A factor's lien is personal, and cannot be set up by a third person in an action by the principal,<sup>3</sup> nor can it be assigned or transferred.<sup>4</sup> A factor has an equitable lien upon goods which the owner has agreed to consign to him, if he has made advances upon the credit of the consignment, though the agreement is broken, and the goods never come into his hands.<sup>5</sup> Where goods are consigned to a factor for sale, the owner has an equitable lien upon the proceeds, subject to the factor's lien for charges and advances.<sup>6</sup>

§ 3103. **Lien of Innkeeper.** — An innkeeper has a lien on all property in his possession belonging to the guest,<sup>7</sup> and the lien extends to goods of which the guest is not the owner, provided they are put by him into the possession of the innkeeper, and the latter does not know that

<sup>1</sup> *St. Louis etc. R. R. Co. v. Flanagan*, 23 Ill. App. 489.

<sup>2</sup> *Patterson v. McGahey*, 8 Mart. 486; 13 Am. Dec. 298; *Holbrook v. Wight*, 24 Wend. 169; 35 Am. Dec. 607; *Martin v. Pope*, 6 Ala. 532; 41 Am. Dec. 66; *Desha v. Pope*, 6 Ala. 690; 41 Am. Dec. 76; *Strahorn v. Union Stock Co.*, 43 Ill. 424; 92 Am. Dec. 142.

<sup>3</sup> *Holly v. Huggeford*, 8 Pick. 73; 19 Am. Dec. 303.

<sup>4</sup> *Ames v. Palmer*, 42 Me. 197; 66 Am. Dec. 271.

<sup>5</sup> *Cotesworth v. Stephens*, 4 Hare, 185.

<sup>6</sup> *Ex parte Alston*, L. R. 4 Ch. App. 168; *Broadbent v. Barlow*, 3 De Gex, F. & J. 570.

<sup>7</sup> *Overton on Liens*, 149; *Dunlap v. Thorne*, 1 Rich. 213; *Nichols v. Holliday*, 27 Wis. 406. He has a lien on the baggage of his guest, though an infant, for the price of his entertainment, if furnished in good faith, without the knowledge that the infant was acting improperly, and contrary to the wishes of his guardian; and has also a lien for money furnished the infant and expended by him for necessities: *Watson v. Cross*, 2 Duvall, 147.

they are not the property of the guest.<sup>1</sup> It extends to property exempt from execution.<sup>2</sup> Though the law was formerly otherwise,<sup>3</sup> the modern cases have extended the innkeeper's lien to the horses and carriage of the guest, both for specific charges against the same, and for the guest's personal entertainment,<sup>4</sup> and to all goods and chattels actually received by one as innkeeper, though he may not have been bound to receive them.<sup>5</sup> But the lien will not extend to the property of a third person, though he is traveling with the guest;<sup>6</sup> nor where the party is not a traveler, but is a boarder under a special contract.<sup>7</sup> He has no right to enforce his lien by sale without process of law.<sup>8</sup> The lien of an innkeeper is waived by permitting the guest to remove the property from the inn, or take it into his exclusive control.<sup>9</sup> But where he is induced to part with his possession by fraudulent representations of the guest,—as that a draft given by the latter for the amount of his bill is good, and will be paid, when he is not, in fact, authorized to draw such a draft,—

<sup>1</sup> *Cook v. Kane*, 13 Or. 482; 57 Am. Rep. 28; *Threefall v. Borwick*, L. R. 7 Q. B. 711; L. R. 10 Q. B. 210; *Manning v. Hollenbeck*, 27 Wis. 202; *Grinnell v. Cook*, 3 Hill, 485; 38 Am. Dec. 663. But he has no lien where he knows the ownership is not in the guest: *Covington v. Newberger*, 99 N. C. 523; *Broadwood v. Granara*, 10 Ex. 417. Where a guest of a hotel left without paying his bill, leaving behind a type-writer, which had been loaned to him, it was held that while the property was not the subject of a lien, a reasonable charge could be collected for its storage: *Wyckhoff v. Southern Hotel Co.*, 24 Mo. App. 352. A boarding-house keeper has no lien upon the personal property of a married woman for her board, where the contract was made, not with her, but with her husband: *McIlvaine v. Hilton*, 14 N. Y. Sup. Ct. 594.

<sup>2</sup> *Swan v. Bournes*, 47 Iowa, 501; 29 Am. Rep. 492.

<sup>3</sup> *Ross v. Bramsted*, 2 Rolle, 438;

*Moss v. Townsend*, 1 Bulst. 207; *Stirt v. Drungold*, 3 Bulst. 289.

<sup>4</sup> *Fox v. McGregor*, 11 Barb. 41; *Pollock v. Landis*, 36 Iowa, 651; *Mason v. Thompson*, 9 Pick. 280; 20 Am. Dec. 471; *McDaniels v. Robinson*, 26 Vt. 316; 62 Am. Dec. 574; *Peet v. McGraw*, 25 Wend. 683.

<sup>5</sup> *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Threefall v. Borwick*, L. R. 7 Q. B. 711; L. R. 10 Q. B. 210.

<sup>6</sup> *Clayton v. Butterfield*, 10 Rich. 300. Where a parent stops at an inn with his two children, the innkeeper has no lien on the baggage of one for what may be due from the others: *Id.*

<sup>7</sup> *Hursh v. Byers*, 29 Mo. 469; *Ewart v. Stark*, 8 Rich. 423; *Pollock v. Landis*, 36 Iowa, 651. The lien is extended by statute to boarding-house keepers, in some states: See *Brooks v. Harrison*, 41 Conn. 184; *Smith v. Colcord*, 115 Mass. 70; *Jaquith v. American Ex. Co.*, 60 N. H. 61.

<sup>8</sup> *Case v. Fogg*, 46 Mo. 44.

<sup>9</sup> *Overton on Liens*, 152.

there is no waiver of the lien upon the baggage of the guest for his charges.<sup>1</sup>

**ILLUSTRATIONS.**—A father and his two daughters put up at an inn. The board was all charged to the father. *Held*, that the landlord had no lien on the trunk of one of the daughters, and its contents, for the whole board due to him: *Clayton v. Butterfield*, 10 Rich. 300.

**§ 3104. Warehouseman's Lien.**—A warehouseman has a lien upon the property in his hands for his charges; he has a lien upon what he has not delivered for the storage charges of the whole;<sup>2</sup> provided the whole was received under one bailment.<sup>3</sup> In New York, no lien exists on goods for the storage thereof in favor of a private person not in the business of storage, and not a warehouseman.<sup>4</sup>

**§ 3105. Vendor's Lien—Realty.**—Where by agreement the purchaser is to have immediate possession of the land, but the title is to remain in the vendor until the purchase-money is paid, the latter has an express lien on the land.<sup>5</sup> So parties, by their contract, may create a lien which will bind the land for the payment of the purchase-money, although a lien thus created is not a vendor's lien in the technical sense of the term.<sup>6</sup> An express reservation of a vendor's lien in a deed amounts to an equitable mortgage; and the rights of the vendor and vendee depend on their contract, and not on implication of law.<sup>7</sup> A specific lien, or one created by contract, will be operative against creditors, *bona fide* purchasers, and all other persons, without regard to actual notice, where the conveyance reserving the lien has been properly recorded.<sup>8</sup> "Where

<sup>1</sup> *Manning v. Hollenbeck*, 27 Wis. 202.

<sup>2</sup> *Schmidt v. Blood*, 9 Wend. 268; 24 Am. Dec. 143.

<sup>3</sup> *Steinman v. Wilkins*, 7 Watts & S. 486; 42 Am. Dec. 254, and note 257-260.

<sup>4</sup> *In re Kelly*, 18 Fed. Rep. 528; *Alt v. Weidenberg*, 6 Bosw. 176.

<sup>5</sup> *Lagow v. Badollet*, 1 Blackf. 416;

12 Am. Dec. 258. The general debts of a party who conveys land without consideration are not a lien upon the land: *Hays v. Montgomery*, 118 Ind. 91.

<sup>6</sup> *Helm v. Weaver*, 69 Tex. 143.

<sup>7</sup> *Harvey v. Kelly*, 41 Miss. 490; 93 Am. Dec. 267.

<sup>8</sup> *Lincoln v. Purcell*, 2 Head, 143; 73 Am. Dec. 197.

the vendor conveys, without more, though the consideration is upon the face of the instrument, and by a receipt indorsed upon it, expressed to be paid, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and vendee, and persons claiming as volunteers, upon the doctrine of this court, . . . though, perhaps, no actual contract has taken place, a lien shall prevail, in the one case, for the whole consideration; in the other, for that part of the money which was not paid."<sup>1</sup> And this is so, although the price was to be paid in specific articles or in services, and not in money.<sup>2</sup> But a lien will not exist where no purchase-money is agreed to be paid for the land, the only consideration being the vendee's agreement to support the vendor during the latter's life.<sup>3</sup> *Prima facie* such lien exists without a special agreement for that purpose; and it devolves upon the purchaser to show that the lien was not intended to be resumed.<sup>4</sup> Equity will enforce a vendor's lien, notwithstanding an adequate remedy at law.<sup>5</sup>

The doctrine is fully settled in most of the states. In Pennsylvania, North Carolina, South Carolina, Nebraska, Massachusetts, Maine, and Kansas (and perhaps Connecticut, Delaware, Oregon, and New Hampshire), the principle is not accepted.<sup>6</sup> In Kansas, the vendor of real estate

<sup>1</sup> Mackreth v. Symons, 1 Leqd. Cas. Eq. 330; Chilton v. Brandon, 2 Black, 458; Manly v. Slason, 21 Vt. 271; 52 Am. Dec. 60; 2 Washburn on Real Property, 505, 508; Tiernan v. Beam, 2 Ohio, 383; 15 Am. Dec. 557; Boos v. Ewing, 17 Ohio, 500; 49 Am. Dec. 478; Moore v. Holcomb, 3 Leigh, 597; 24 Am. Dec. 683; Kent v. Gerhard, 12 R. I. 92; 34 Am. Rep. 612; Flinn v. Barber, 61 Ala. 107; Findley v. Armstrong, 23 W. Va. 113; Bankhead v. Owen, 60 Ala. 457; Brown v. Ferrell, 83 Ky. 417.

<sup>2</sup> Harvey v. Kelly, 41 Miss. 490; 93 Am. Dec. 267; Winters v. Farn, 47 Ark. 493.

<sup>3</sup> Arlin v. Brown, 44 N. H. 102.

<sup>4</sup> Ellis v. Temple, 4 Cold. 315; 94 Am. Dec. 200.

<sup>5</sup> Pratt v. Clark, 57 Mo. 189.

<sup>6</sup> Kauffelt v. Bower, 7 Serg. & R. 64; 10 Am. Dec. 428; Strauss's Appeal, 49 Pa. St. 358; Heister v. Green, 48 Pa. St. 96; 86 Am. Dec. 569; Johnson v. Cawthorn, 1 Dev. & B. 32; 27 Am. Dec. 250; Wornall v. Battle, 3 Ired. Eq. 182; White v. Jones, 92 N. C. 388; Wright v. Dame, 5 Met. 503; Ahrend v. Odiorne, 118 Mass. 261; 19 Am. Rep. 449; Philbrook v. Delano, 29 Me. 410; Simpson v. Mindel, 3 Kan. 185; Greeno v. Barnard, 18 Kan. 518; Edminster v. Higgins, 6 Neb. 265; Anabley v. Pasharo, 22 Neb. 662; Kelly v. Ruble, 11 Or. 75.

who has executed only a bond to convey has a lien for the unpaid purchase-money.<sup>1</sup> The lien is abolished by statute in Georgia, Iowa, Vermont, Virginia, and West Virginia.<sup>2</sup>

A vendor's lien can exist only as collateral to a debt created simultaneously with the sale, and a part of it.<sup>3</sup> A stranger, by paying the debt to the vendor, does not become subrogated to the vendor's lien.<sup>4</sup> A person cannot acquire a lien upon land purchased by another by the voluntary and unauthorized payment of the purchase-money therefor.<sup>5</sup> So a third party who advances money to a purchaser to enable him to buy lands cannot claim the benefit of the vendor's lien.<sup>6</sup> So where A, without authority from B, purchases lands, and takes the title in the name of B, no vendor's lien exists.<sup>7</sup> But where the vendor stipulates that part of the purchase-money be paid to a third person, the latter is entitled to a lien therefor.<sup>8</sup> The existence of the technical relation of vendor and vendee is not the test of the former's right to a vendor's lien. It may accompany the assignment of a certificate of purchase at a foreclosure.<sup>9</sup> And where the owner of land made a parol gift of it to his daughter, and she sold the land to another, taking his notes for the price, and the grantor executed the conveyance to the vendee, the price not having been paid, the vendee (the daughter) was permitted to enforce her lien therefor.<sup>10</sup> To create a vendor's lien, there must be a debt for unpaid purchase-money in a fixed amount due directly to the vendor. If the vendee's obligation consists of a collateral covenant, or is for the

<sup>1</sup> *Stevens v. Chadwick*, 10 Kan. 406; 15 Am. Rep. 348.

<sup>2</sup> 1 *Stimson's American Statute Law*, sec. 1950.

<sup>3</sup> *Palmer v. Sterling*, 41 Mich. 218.

<sup>4</sup> *Nicol v. Dunn*, 25 Ark. 129.

<sup>5</sup> *Truesdell v. Callaway*, 6 Mo. 605.

<sup>6</sup> *Stansell v. Roberts*, 13 Ohio, 148; 42 Am. Dec. 193; *Skaggs v. Nelson*,

25 Miss. 88; *Marquat v. Marquat*, 7 How. Pr. 417.

<sup>7</sup> *Weare v. Linnell*, 29 Mich. 224.

<sup>8</sup> *Gault v. Trumbo*, 17 B. Mon. 682; *Lee v. Newman*, 55 Miss. 365; *Turkes v. Reis*, 14 Abb. N. C. 26; *Latham v. Staples*, 46 Ala. 462; *Hamilton v. Gilbert*, 2 Heisk. 680.

<sup>9</sup> *Barrett v. Lewis*, 106 Ind. 120.

<sup>10</sup> *Russell v. Watt*, 41 Miss. 602; 93 Am. Dec. 270.

discharge of the liability of a third person, and the conveyance is absolute, no lien is retained.<sup>1</sup> A vendor's lien upon land for the purchase-money does not extend to land received in exchange by the vendee for the land bought.<sup>2</sup> A vendor has no lien thereon for indebtedness of the purchaser arising from other transactions;<sup>3</sup> nor can he enforce his lien for the price after he has transferred the demand to another person.<sup>4</sup> A lien upon the land sold gives no lien upon the profits of the land.<sup>5</sup> A lease for a term of years is personal property, and the vendor of such property has no general lien upon it for unpaid purchase-money after he has parted with the possession.<sup>6</sup> But it has been held that a vendor's lien may be enforced against a lease for ninety-nine years, renewable forever.<sup>7</sup> And a vendor's lien may exist upon a right of way sold to a railroad company.<sup>8</sup> The owner of land who sells wood standing thereon, with authority to the vendee to cut it within a certain time, has no lien on the wood for the price, in case of the vendee's insolvency after the wood is cut, and before it is removed.<sup>9</sup>

When the vendor has a lien against the vendee for unpaid purchase-money, it binds the estate in the hands of the following individuals, viz.: The purchaser himself and his heirs, his unsecured or general creditors; all persons taking under him or them as volunteers; and subsequent purchasers for valuable consideration who bought with notice of the purchase-money remaining unpaid.<sup>10</sup>

<sup>1</sup> *Harvey v. Kelly*, 41 Miss. 490; 93 Am. Dec. 267.

<sup>2</sup> *Bishop v. Snell*, 37 Ala. 90.

<sup>3</sup> *Redfield v. Ferrell*, 30 Ark. 465.

<sup>4</sup> *Scott v. Mann*, 36 Tex. 157.

<sup>5</sup> *Little v. Brown*, 2 Leigh, 353.

<sup>6</sup> *Cade v. Brownlee*, 15 Ind. 369; 77 Am. Dec. 95.

<sup>7</sup> *Bratt v. Bratt*, 21 Md. 578.

<sup>8</sup> *Hempfield R. R. Co. v. Thornburg*, 1 W. Va. 261.

<sup>9</sup> *Douglas v. Shumway*, 13 Gray; 498.

<sup>10</sup> *Mackreth v. Symons*, 1 Lead. Cas.

Eq. 357; *Garson v. Green*, 1 Johns. Ch. 308; *Clower v. Rawlings*, 9 Smedes & M. 122; 47 Am. Dec. 108; *Ellis v. Temple*, 4 Cold. 315; 94 Am. Dec. 200; *Walton v. Hargroves*, 42 Miss. 18; 98 Am. Dec. 429; *Poe v. Paxton*, 26 W. Va. 607; *Walker v. Prosswick*, 2 Ves. Sr. 622; *Morris v. Chambers*, 29 Beav. 246; *Eakridge v. McClure*, 2 Yerg. 84; *Parker v. Foy*, 43 Miss. 260; 55 Am. Rep. 484; *Lincoln v. Purcell*, 2 Head, 143; 73 Am. Dec. 196; *Graves v. Coutant*, 31 N. J. Eq. 763.

A vendor's lien will not prevail against a *bona fide* purchaser or a mortgagee without notice;<sup>1</sup> nor against a creditor who may have acquired a judgment or execution lien upon the property before a bill has been filed by the vendor to enforce his lien.<sup>2</sup> The lien, though it relates to the date of the conveyance, does not acquire the character or effect of a specific lien until the filing of a bill to enforce it.<sup>3</sup> Where part of a tract of land subject to a lien is conveyed, the residue is primarily liable for the whole debt; and where there are successive conveyances, the land is liable in the inverse order of the conveyances, that is, each grantee must take the land with all its equitable burdens.<sup>4</sup> A vendor's lien goes to the administrator or executor, not to the heir,<sup>5</sup> and may be foreclosed by him.<sup>6</sup>

A vendor's lien may be waived or surrendered by the voluntary act of the vendor, as well as extinguished by payment.<sup>7</sup> As to what amounts to a waiver or abandonment of the lien, the general rule is that the abandonment by the vendor of his lien "is to depend, not upon the circumstance of taking a security, but upon the nature of the security as amounting to evidence, as it is sometimes called, or to a declaration, or a plain or manifest intention, . . . of a purpose not to rely any longer upon the estate, but upon the personal credit, of the individual."<sup>8</sup> The lien is not affected by making a conveyance of the property, and taking a note or bond with personal security for the

<sup>1</sup> Washburn on Real Property, 89; McCardlish v. Keen, 13 Gratt. 621; Duval v. Bibb, 4 Har. & M. 113; 4 Am. Dec. 506; Blight v. Banks, 6 T. B. Mon. 192; 17 Am. Dec. 136; Fain v. Inman, 6 Heisk. 5; 19 Am. Rep. 577; Collier v. Harkness, 26 Ga. 362; 71 Am. Dec. 216; Bankhead v. Owen, 60 Ala. 457. See Gillespie v. Bradford, 7 Yerg. 168; 27 Am. Dec. 494.

<sup>2</sup> Lincoln v. Purcell, 2 Head, 143; 73 Am. Dec. 197.

<sup>3</sup> Ellis v. Temple, 4 Cold. 315; 94 Am. Dec. 200.

<sup>4</sup> Miller v. Holland, 84 Va. 652.

<sup>5</sup> Evans v. Enloe, 70 Wis. 345; Robinson v. Appleton, 22 Ill. App. 351.

<sup>6</sup> Robinson v. Appleton, 22 Ill. App. 351.

<sup>7</sup> Frazier v. Hendren, 80 Va. 265.

<sup>8</sup> Mackreth v. Symons, 1 Lead. Cas. Eq. 334; 2 Washburn on Real Property, 507; Woodall v. Kelly, 85 Ala. 363; 7 Am. St. Rep. 57.

balance due,' unless it was intended to be substituted for the purchase-money, or was in fact the thing bargained for;<sup>2</sup> nor because the obligation taken for its payment includes the price of personal property sold at the same time, when the amount to be paid for the land can be ascertained by proof;<sup>3</sup> nor by a renewal of the note given for the purchase price, though the renewed note includes other considerations;<sup>4</sup> nor by the acceptance of a mortgage for the purchase price, which turns out to be forged;<sup>5</sup> nor by the acceptance of securities which have no legal validity;<sup>6</sup> nor by substituting for his vendee's note that of a subvendee.<sup>7</sup>

But the lien is waived by taking a mortgage on the property for the debt;<sup>8</sup> or by taking a mortgage on other property;<sup>9</sup> or a note of the purchaser, with a third person as surety thereon;<sup>10</sup> or by the neglect to enforce the lien for a considerable time, though short of the time prescribed by the statute of limitations;<sup>11</sup> or by securing judgment for the unpaid purchase-money.<sup>12</sup> It is gener-

<sup>1</sup> *Tiernan v. Beam*, 2 Ohio, 383; 15 Am. Dec. 557; *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153; *Coulee v. Coulee*, 87 Ind. 249; *Dowdy v. Blake*, 50 Ark. 205; 7 Am. St. Rep. 88. *Contra*, *Blight v. Banks*, 6 T. B. Mon. 192; 17 Am. Dec. 136; *Richards v. Leaming*, 27 Ill. 431; 81 Am. Dec. 238.

<sup>2</sup> *Snell's Equity*, 128; *Taylor v. Hunter*, 5 Humph. 569; *White v. Williams*, 1 Paige, 502. As by taking a note, not as security, but by way of payment for the land: *Jobe v. Chedister*, 5 Lea, 346.

<sup>3</sup> *Russell v. McCormick*, 45 Ala. 587; 6 Am. Rep. 707.

<sup>4</sup> *Mims v. Lockett*, 23 Ga. 237; 68 Am. Dec. 521.

<sup>5</sup> *Fouch v. Wilson*, 60 Ind. 64; 28 Am. Rep. 651.

<sup>6</sup> *Gilbert v. Bakes*, 106 Ind. 558.

<sup>7</sup> *Cummings v. Mocre*, 61 Miss. 184.

<sup>8</sup> *Sharp v. Collins*, 74 Mo. 266; *Stuart v. Harrison*, 52 Iowa, 511; *Neil v. Speigle*, 33 Ark. 63; *Richards v. McPherson*, 74 Ind. 158; *Chicago etc. R. R. Co. v. Peck*, 112 Ill. 408; *Orrich v.*

*Durham*, 79 Mo. 174. *Contra*, *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115. In Missouri, where a vendor takes a mortgage or deed of trust on the land for a part of the unpaid purchase-money, the vendor's lien for the rest is waived, unless the contrary is stated in the trust deed or mortgage: *Briscoe v. Callahan*, 77 Mo. 134.

<sup>9</sup> *White v. Dougherty*, 1 Mart. & Y. 309; 17 Am. Dec. 802.

<sup>10</sup> *Fonda v. Jones*, 42 Miss. 792; 2 Am. Rep. 669; *Dibblee v. Mitchell*, 15 Ind. 435; 77 Am. Dec. 99; *Akers v. Lane*, 56 Iowa, 346. Although the surety is worthless: *Kendrick v. Eggleston*, 56 Iowa, 128; 41 Am. Rep. 90. Although, *prima facie*, the acceptance of the notes of a third party waives the vendor's lien, it may be agreed that it shall not do so: *Lord v. Wilcox*, 99 Ind. 491.

<sup>11</sup> *Richards v. Leaming*, 27 Ill. 431; 81 Am. Dec. 239.

<sup>12</sup> *Crans v. Hamilton County Commissioners*, 87 Ind. 162.

ally held that although taking security for the payment of the purchase price of land raises a presumption that the vendor has waived his lien therefor, yet this presumption may be rebutted by circumstances showing an intention to preserve the lien.<sup>1</sup> The lien is upon the whole and every part of land. If a part be lost by paramount title so as to entitle the vendee to an abatement, the residue of the land is liable for the balance.<sup>2</sup> Part payment does not extinguish a vendor's lien. It still remains a security for the balance unpaid;<sup>3</sup> nor is it extinguished by a judgment of a county court allowing and ordering the payment of a claim against an estate.<sup>4</sup> A discharge in bankruptcy of the vendee or his purchaser with notice will not discharge the land.<sup>5</sup> The vendor's lien descends to the heir in the same condition as the ancestor held it.<sup>6</sup>

The vendor's lien is held assignable by the assignment of the security in some states,<sup>7</sup> while in others it is considered personal, and not assignable.<sup>8</sup> But the transfer of the notes given for the purchase price by delivery or by indorsement without recourse does not transfer the lien.<sup>9</sup> And a vendor's lien does not pass by the assign-

<sup>1</sup> *Willis v. Gay*, 48 Tex. 463; 26 Am. Rep. 328; *Hunt v. Marsh*, 80 Mo. 378.

<sup>2</sup> *Mims v. Lockett*, 23 Ga. 237; 68 Am. Dec. 521.

<sup>3</sup> *Hays v. Horine*, 12 Iowa, 61; 79 Am. Dec. 518.

<sup>4</sup> *Hays v. Horine*, 12 Iowa, 61; 79 Am. Dec. 518.

<sup>5</sup> *Graves v. Outant*, 31 N. J. Eq. 763.

<sup>6</sup> *Lavender v. Abbott*, 30 Ark. 172.

<sup>7</sup> *Lagow v. Badollet*, 1 Blackf. 416; 12 Am. Dec. 258; *Edwards v. Bohannan*, 2 Dana, 98; *Roper v. McCook*, 7 Ala. 318; *Johnston v. Gwathmey*, 4 Litt. 317; 14 Am. Dec. 135; *Stevens v. Chadwick*, 10 Kan. 406; 15 Am. Rep. 348; *McClintic v. Wise*, 25 Gratt. 448; 18 Am. Rep. 694; *Sloan v. Campbell*, 71 Mo. 387; 36 Am. Rep. 473; *Murray v. Able*, 19 Tex. 213; 70 Am. Dec. 330; *Kern v. Hazlerigg*, 11 Ind. 443; 71 Am. Dec. 360; *Griffin v. Camack*,

36 Ala. 695; 76 Am. Dec. 344; *Perry v. Roberts*, 30 Ind. 244; 95 Am. Dec. 689; *Robinson v. Barbour*, 42 Miss. 795; 97 Am. Dec. 501.

<sup>8</sup> *Baum v. Grigaby*, 21 Cal. 172; 81 Am. Dec. 153; *Williams v. Young*, 21 Cal. 228; *Brush v. Kinsley*, 14 Ohio, 20; *Shall v. Biscoe*, 18 Ark. 142; *Simpson v. Montgomery*, 25 Ark. 365; 99 Am. Dec. 228; *Green v. Demoss*, 10 Humph. 374; *Wellborn v. Williams*, 9 Ga. 89; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Jackman v. Hallock*, 1 Ohio, 318; 13 Am. Dec. 627; *Schnebley v. Ragan*, 7 Gill & J. 120; 28 Am. Dec. 195; *Hecht v. Spears*, 27 Ark. 229; 11 Am. Dec. 784; *Richards v. Leaming*, 27 Ill. 431; 81 Am. Dec. 239; *Massey v. Gordon*, 12 Minn. 145; 90 Am. Dec. 287; *Bowlen v. Peterson*, 6 Bart. 342.

<sup>9</sup> *Hightower v. Rigsby*, 56 Ala. 126; *Lang v. Wilkinson*, 57 Ala. 259; *Bankhead v. Owen*, 60 Ala. 457.

ment of a judgment for the purchase-money.<sup>1</sup> A suit to enforce a vendor's lien is not barred by a judgment obtained on the note.<sup>2</sup>

ILLUSTRATIONS. — Plaintiff's land was sold by the sheriff, at auction, under an execution, and bought by defendant, who bid more than enough to satisfy the execution. *Held*, that plaintiff had a lien on the land for the excess of the purchase-money: *Yarborough v. Wood*, 42 Tex. 91; 19 Am. Rep. 44. T., the owner of land, being indebted to G., to secure the debt gave the latter the sale of the land. He sold to B., to whom T. executed a deed of conveyance, B. giving his note to G. for the purchase-money, and it was agreed that the vendor's lien for the purchase-money should exist. *Held*, that the vendor's lien existed in favor of G. against a vendee from B. of the land, with notice: *Perkins v. Gibson*, 51 Miss. 699; 24 Am. Rep. 644. One conveys land to a married woman, and takes a deed of other lands from her husband, with covenants of warranty, in part payment, and the husband's promissory note for the balance. *Held*, a waiver of his lien as vendor: *Andrus v. Coleman*, 82 Ill. 26; 25 Am. Rep. 289. On a purchase of land the vendee gave his bank check for the amount of a cash payment. The check was not presented until four weeks afterwards, and there were no funds to pay it, the vendee having withdrawn them two weeks previously. *Held*, that the vendor's lien was not lost: *Madden v. Barnes*, 45 Wis. 135; 30 Am. Rep. 703. Complainant conveyed certain real estate to the defendant by a deed containing an express reservation of a vendor's lien. A note was given for the purchase-money, with an agreement annexed that it should be paid in lumber. *Held*, that the vendor's lien existed: *Harvey v. Kelly*, 41 Miss. 490; 93 Am. Dec. 267.

§ 3106. **Vendor's Lien — Personalty.** — The vendor of personal property has no implied or equitable lien on the property for the purchase-money.<sup>3</sup> But a vendor of goods has a lien upon them for the price, so long as they remain in his possession, and the purchaser neglects to pay the price according to the terms of sale.<sup>4</sup> The vendor's lien

<sup>1</sup> *Turner v. Horner*, 29 Ark. 440. .

<sup>2</sup> *Waldron v. Zacharie*, 54 Tex. 503.

<sup>3</sup> *Williams v. Gillispie*, 30 W. Va. 586.

<sup>4</sup> *Parks v. Hall*, 2 Pick. 206; *Clark v. Draper*, 19 N. H. 419; *Milliken v. Warren*, 57 Me. 46; *White v. Welsh*,

38 Pa. St. 396; *Wanamaker v. Yerkes*, 70 Pa. St. 443; *Barr v. Logan*, 5 Harr. (Del.) 52; *Carlisle v. Kinney*, 66 Barb. 363; *Morse v. Sherman*, 106 Mass. 430; *Haskins v. Warren*, 115 Mass. 514; *Ware River R. R. Co. v. Hibbard*, 114 Mass. 447; *Southwestern Freight*

depends upon possession, and is lost if he has parted with their actual or constructive possession.<sup>1</sup> But there may be a constructive delivery of the goods sold which will pass the title, but which will not destroy the vendor's lien,<sup>2</sup> as by counting out the goods, marking them, and setting them aside for the purchaser,<sup>3</sup> or delivering them to the buyer to allow him to examine them.<sup>4</sup> Where goods are sold to be paid for on delivery, but after delivery the vendee refuses to pay for them, the vendor has a lien on them for the price, and may resume possession of them.<sup>5</sup> The lien is gone if there is a term of credit expressed or implied in the dealing.<sup>6</sup> The taking of a promissory note or bill of exchange payable at a future day for the price of the goods sold operates as a bar to the vendor's right of lien, and the lien is waived wherever the parties make any agreement inconsistent with its existence, or from which a waiver may be inferred.<sup>7</sup>

*Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255; *Bradley v. Michael*, 1 Ind. 551; *Owens v. Weedman*, 82 Ill. 409; *Welsh v. Bell*, 32 Pa. St. 12.

<sup>1</sup> *Lupin v. Marie*, 6 Wend. 77; 21 Am. Dec. 256; *Parks v. Hall*, 2 Pick. 206; *Pickett v. Bullock*, 52 N. H. 354; *Welsh v. Bell*, 32 Pa. St. 12; *Bowen v. Burke*, 13 Pa. St. 146; *Boyd v. Mosely*, 2 Swan, 661; *Obermeyer v. Cole*, 25 Ark. 562; *Gay v. Hardeman*, 31 Tex. 245; *McNail v. Ziegler*, 68 Ill. 224; *Thompson v. Wedge*, 50 Wis. 642.

<sup>2</sup> *Siegerson v. Kahmann*, 39 Mo. 206; *Southwestern Freight Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255; *Owens v. Weldman*, 82 Ill. 409; *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754; *Thompson v. R. R. Co.*, 28 Md. 407; the court saying: "So long as the vendor does not surrender actual possession, his lien remains, although he may have performed acts which amount to a constructive delivery, so as to pass the title or avoid the statute. In all cases of symbolical delivery, which is the only species of constructive delivery sufficient to give

a final possession to the vendee, it is only because of the manifest intention of the vendor utterly to abandon all claim and right of possession, taken in connection with the difficulty or impossibility of making an actual and manual transfer, that such a delivery is considered as sufficient to annul the lien of the vendor."

<sup>3</sup> *Southwestern Freight Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255; *Owens v. Weldman*, 82 Ill. 409; *Thompson v. Gray*, 1 Wheat. 75.

<sup>4</sup> *Haskins v. Warren*, 115 Mass. 514.

<sup>5</sup> *Palmer v. Hand*, 13 Johns. 434; 7 Am. Dec. 393; *Russell v. Miner*, 22 Wend. 662; *Ford v. Sproule*, 2 A. K. Marsh. 528; 12 Am. Dec. 439; *Hobson v. Davidson*, 8 Mart. (La.) 422; 13 Am. Dec. 294; *Emerson v. Fisk*, 6 Me. 200; 19 Am. Dec. 206.

<sup>6</sup> *Morris v. Rexford*, 18 N. Y. 555; *Leonard v. Davis*, 1 Black, 476; *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754; *Stoddard Mfg. Co. v. Huntley*, 8 N. H. 441; 31 Am. Dec. 198.

<sup>7</sup> *Pickett v. Bullock*, 52 N. H. 354; *Hewlett v. Flint*, 7 Cal. 284.

A part payment does not divest the seller of his lien so long as he retains possession.<sup>1</sup> But payments in full for a severed portion of the goods divests the vendor of his lien in respect of that portion actually paid for.<sup>2</sup> If the vendee becomes insolvent before the term of credit expires, and the goods still remain in the vendor's possession, his lien is restored, and he may hold the goods as security for the price.<sup>3</sup> Taking a note or bill of exchange for the purchase-money does not defeat the vendor's lien upon the subsequent insolvency of the purchaser before he has taken actual possession of the goods, provided the note remains in the hands of the vendor not negotiated, but ready to be delivered up on the discharge of the lien.<sup>4</sup> The vendor's lien is superior to the claim of a *bona fide* purchaser or pledgee.<sup>5</sup>

§ 3107. **Vendee's Lien.**—The vendee who has paid the purchase-money in whole or in part before receiving his conveyance has a lien upon the property similar to that of the vendor for unpaid purchase-money.<sup>6</sup> The vendee has a lien for the purchase price where the contract of sale is not enforceable because of the statute of

<sup>1</sup> *Welsh v. Bell*, 32 Pa. St. 12; *Buckle v. Furmin*, 17 Wend. 504; *Williams v. Moore*, 5 N. H. 235; *Hamburger v. Rodman*, 9 Daly, 93.

<sup>2</sup> *Merchants' etc. Bank v. Phoenix Steel Co.*, L. R. 5 Ch. Div. 205.

<sup>3</sup> *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754; *Hamburger v. Rodman*, 9 Daly, 93; *Milliken v. Warren*, 57 Me. 46; *Bloxam v. Sanders*, 4 Barn. & C. 941; the court saying: "If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession."

<sup>4</sup> *Gunn v. Bolckow*, L. R. 10 Ch. 491;

*Arnold v. Delano*, 4 Cush. 33, 41; 50 Am. Dec. 754; *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700; *Milliken v. Warren*, 57 Me. 46; *Miles v. Gorton*, 2 Crompt. & M. 504.

<sup>5</sup> *Palmer v. Hand*, 13 Johns. 434; 7 Am. Dec. 392.

<sup>6</sup> *Snell's Equity*, 133; *Bibb v. Prather*, 1 Bibb, 313; *Griffith v. Depew*, 3 A. K. Marsh. 177; 13 Am. Dec. 141; *Funk v. McKeown*, 4 J. J. Marsh. 162; *Vaughan v. Myers*, 2 Dana, 113; *Money v. Dorsey*, 7 Smedes & M. 15; *Davis v. Heard*, 44 Miss. 50; *Allen v. Bratton*, 47 Miss. 119; *Shirley v. Shirley*, 7 Blackf. 452; *Stewart v. Wood*, 63 Mo. 252; *Clark v. Jacobs*, 56 How. Pr. 519; *Hilton v. Duncan*, 1 Cold. 313; *Conner v. Banks*, 18 Ala. 42; 52 Am. Dec. 209; *Manly v. Slason*, 21 Vt. 271; 52 Am. Dec. 60; *Taft v. Kessel*, 16 Wis. 273.

frauds,<sup>1</sup> or is rescinded for cause.<sup>2</sup> The vendee is entitled to a judgment for the sale of the land to make the amount due to him, his lien being in the nature of a mortgage. And where the contract is recorded, the lien will be enforced against the land in the hands of a subsequent purchaser.<sup>3</sup>

<sup>1</sup> *McC Campbell v. McC Campbell*, 5 Litt. 92; 15 Am. Dec. 48.

<sup>2</sup> *Flint v. Cuny*, 7 La. 379; 26 Am. Dec. 505.

<sup>3</sup> *Wickman v. Robinson*, 14 Wis. 493; 80 Am. Dec. 789.



TITLE XXXIV.

DESCENT AND DISTRIBUTION.



## TITLE XXXIV.

# DESCENT AND DISTRIBUTION.

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### CHAPTER CLIII.

#### DESCENT AND DISTRIBUTION.

- § 3108. Definition of "descent" and "descendants."
- § 3109. The kinds of descent.
- § 3110. Difference between English and American law.
- § 3111. State has power to regulate descent and distribution.
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**§ 3108. Definition of "Descent" and "Descendants."**—

Descent is the hereditary succession of property whereby one person by the death of another, and by right of representation as his heir at law, acquires title to his land,<sup>1</sup> and is one of the two principal means of acquiring property;<sup>2</sup> title by descent being directly opposed to that by purchase;<sup>3</sup> an estate acquired by inheritance being one that descends upon the heir, and is cast upon him by the single operation of the law.<sup>4</sup> "Succession," which is synonymous with "descent," is defined as the coming in of another to take the property of one who dies without disposing of it by will.<sup>5</sup>

Strictly defined, the "descendants" of a person are his children and grandchildren, and their children to the remotest degree;<sup>6</sup> although the word "descendants" is not synonymous with "child" and "children," as used in the Texas statutes;<sup>7</sup> nor has the word "descendants" the same precise technical signification as the words "heirs of the body," but in Massachusetts it may be used as synonymous with "children."<sup>8</sup>

Under the several statutes and rules of descent, property may, in the several states of the United States, ascend as well as descend, so that the meaning of the words "de-

<sup>1</sup> 2 Bla. Com., Cooley's ed., 201; Lely's Wharton's Law Lexicon (Lond. 1889), tit. Descent; Bouvier's Law Dict., tit. Descent. "Descent" applies to the heir: Estate of Donahue, 36 Cal. 329.

<sup>2</sup> Lely's Wharton's Law Lexicon (Lond. 1889), tit. Descent.

<sup>3</sup> 3 Washburn on Real Property, 4; 2 Bla. Com. 201, 241; Co. Lit. 18 b; Bac. Abr., tit. Descent; Burrill's Law Dict., tit. Purchaser. "Title by descent was considered the worthier title, and where the will gave to the devisee the same estate in quantity and quality which he would have taken as heir at law, he was adjudged to take, not under the will, but by descent or operation of law": Donnelly v. Turner, 60 Md. 81, 84; Gilpin v. Hollingsworth, 3 Md. 190; 56 Am. Dec. 737.

<sup>4</sup> Estate of Donahue, 36 Cal. 329.

<sup>5</sup> Deering's Annotated Civ. Code of Cal., sec. 1383.

<sup>6</sup> Jewell v. Jewell, 28 Cal. 232; Bryan v. Walton, 20 Ga. 480; Crossley v. Clare, Amb. 397; Legard v. Haworth, 1 East, 120.

<sup>7</sup> Burgess v. Hargrove, 64 Tex. 110.

<sup>8</sup> Schmauns v. Göss, 132 Mass. 141, 144. The word "descendant," as used in New York Revised Statutes, part 2, chapter 6, title 1, article 3, section 52, is limited to issue in any degree of the person referred to, and does not embrace collateral relations: Van Beuren v. Daah, 30 N. Y. 393, 417. For a further discussion of the word "descendants," see Huston v. Read, 32 N. J. Eq. 591, 599; Barstow v. Goodwin, 2 Bradf. 413, 416.

scend" and "descendants" does not now apply with the literal and exact force that those words had under the canons of descent. This is illustrated by a Pennsylvania case, where it is held that the word "descend," in a statute, should not be so construed as to exclude a lineal ancestor, and that it is used in respect to next of kin so as to include them in the ascending line.<sup>1</sup>

§ 3109. **The Kinds of Descent.** — Descents are of two kinds,—lineal and collateral; as, in the first instance, from father or grandfather to son or grandson; and in the second case, from brother to brother, or cousin to cousin. They are also distinguished as mediate and immediate descents. Much learned and technical discussion was formerly had as to the exact meaning of these latter terms. The supreme court of the United States, in 1832, in discussing the terms "mediate" and "immediate," in this connection, declared that "descent is often said to be immediate when the ancestor from whom the party derives his blood is immediate and without any intervening links or degrees, and mediate when the kindred is derived from him *mediante altero*, another ancestor intervening between them. Thus a descent in lineals from father to son is in this sense immediate, but a descent from grandfather to grandson, the father being dead, or from uncle to nephew, the brother being dead, is deemed mediate, the father and the brother being in these latter cases the *medium deferens*, as it is called, of the descent or consanguinity."<sup>2</sup>

§ 3110. **Difference between English and American Law.** —The rules of descent in the several states of the Union differ radically from the English canons of descent, most of the essential features governing in the English law

<sup>1</sup> *McDowell v. Addams*, 45 Pa. St. 430, 434. Although "descent" may not include the father of the intestate, the rules of descent do not prevent property from ascending: *Hardenbergh v. Bacon*, 33 Cal. 356, 380.

<sup>2</sup> *Levy's Lessee v. McCartee*, 6 Pet. 102, 113.

having been rejected, and the American law being entirely—with some exceptions—regulated by statutes, which differ in their provisions in a greater or less degree in the different states of the United States. The English rule as to “shifting descents” differs essentially from the American rule; the estate descends to the heirs equally under the latter, without regard to primogeniture, and the descent, once cast, is not defeated, although nearer heirs are subsequently born.<sup>1</sup>

§ 3111. **State has Power to Regulate Descent and Distribution.**—There is no doubt that the several states of the United States possess the power to regulate the tenure of real property within their respective limits, and the rules of its descent. This right extends to the passage of laws relating to the distribution of personal property, and both rights are an established principle of the

<sup>1</sup> *Bates v. Brown*, 5 Wall. 710. “Before the Revolution some of the colonies had passed laws regulating the descent of real property upon principles essentially different from those of the common law. In most of them the common law subsisted until after the close of the Revolution and the return of peace. It prevailed in Virginia until the act of her legislature of 1785 took effect, and it was perhaps the law upon this subject in ‘the Northwestern Territory’ at the time of its cession, in 1784, by Virginia to the United States. With the close of the Revolution came a new state of things. There was no monarch and no privileged class. The equality, the legal rights of every citizen, was a maxim universally recognized and acted upon as fundamental. The spirit from which it proceeded has founded and shaped our institutions, state and national. . . . One of its most striking manifestations is to be found in the legislation of the states upon the subject under consideration. Of the results, an eminent writer thus speaks: ‘In the United States the English common law of descents in its most essential features has been universally rejected, and each state has established

a law of descents for itself’: 4 Kent’s Com. 412. Another writer, no less eminent, upon this topic, says: ‘In the law of descents there is an almost total change of the common law. It is radically new in each state, bearing no resemblance to the common law in most of the states, and having great and essential differences in all’: *Reeve on Descents*, 11. So far as British law was taken as the basis of this regulation in the different states, it was the statutes of Charles II. and James II. respecting the distribution of personal property, and not the canons of descent of the common law. The two systems are radically different in their principles”: *Bates v. Brown*, 5 Wall. 710; citing *Dunn v. Evans*, 7 Ohio, 169; *Cutlar v. Cutlar*, 2 Hawks, 324; *Caldwell v. Black*, 5 Ired. 463; *Drake v. Rogers*, 13 Ohio St. 21, as overruling *Dunn v. Evans*, 7 Ohio, 169; *Cox v. Matthews*, 17 Ind. 367. See also, on this point, *Bingham on Descents*, 315 et seq., where the laws of the several states as they existed at the time of the compilation of that treatise, in 1870, are compared with the seven canons of descent enumerated by Blackstone and given in note to section 3113 herein.

law which arises *ex necessitate*, and is fully recognized in the several state jurisdictions, as well as by the United States.<sup>1</sup> So that descent and distribution in America is, with few exceptions,<sup>2</sup> controlled by state statutes,<sup>3</sup> which may be curtailed or enlarged by the legislature from time to time.<sup>4</sup> These statutes apply to property not devised, or to intestate estates;<sup>5</sup> and where the intestate's title is free from controversy, the course of descents and the statutes relating thereto are not to be construed and administered upon equitable principles, but by the rules of law.<sup>6</sup> So that in case of a void will the statutes, and not the will, govern the descent.<sup>7</sup> These statutes are mere arbitrary rules by which the course which property shall take upon the owner's death is governed and regulated, and are designed and established for the protection of property, and to fix personal rights, and make the transmission of property fixed and certain, and are based upon the law of consanguinity.<sup>8</sup>

ILLUSTRATIONS.—A will by which life estates was given to the heirs at law was void, and the estate went to the heirs. *Held*, that the will could not be taken as a basis for the division of the estate: *Salmon v. Stuyvesant*, 16 Wend. 321.

§ 3112. **Legal Status and Title as Affecting Course of Descent.**—The right of descent flows from the legal *status* of the parties, as in case of a surviving husband or adoptive father; and where the *status* is fixed, the law supplies

<sup>1</sup> *United States v. Fox*, 94 U. S. 315; *McCormick v. Sullivan*, 10 Wheat. 202.

<sup>2</sup> Distribution may in some cases be made in accordance with the common-law rules: *Clark v. Clark*, 17 Nev. 124.

<sup>3</sup> *Pollock v. Speidel*, 27 Ohio St. 86; *Gilpin v. Williams*, 25 Ohio St. 283.

<sup>4</sup> *Emmert v. Hayes*, 89 Ill. 11.

<sup>5</sup> *Slaughter v. Garland*, 40 Miss. 172.

<sup>6</sup> *Patterson v. Lamson*, 45 Ohio St. 77.

<sup>7</sup> *Salmon v. Stuyvesant*, 16 Wend. 321.

<sup>8</sup> *Jones v. Barnett*, 30 Tex. 637, 639, 640. The constitutions of three states—New Hampshire, Vermont, and Pennsylvania—declare that the estates of suicides are not forfeited; and in nine, such estates descend as in cases of natural death; viz., New Hampshire, Vermont, Pennsylvania, Delaware, Kentucky, Tennessee, Missouri, Texas, Colorado: *Stims. Stat. L.*, sec. 144. And so the estates, real and personal, of suicides descend in New York, Maryland, Virginia, West Virginia, and Louisiana: *Id.*, sec. 1162.

the rules of descent.<sup>1</sup> So the course of descent of real estate is to be controlled by the legal title.<sup>2</sup>

§ 3113. **Who are Heirs, and Who may Take—In General.**—The term “heirs” denotes a class of persons who stand in such relation to the deceased that they would be entitled to the inheritance under the laws of descent and distribution,<sup>3</sup> the line of descent being directly from the intestate in the first instance.<sup>4</sup> In Texas, however, the only class of persons who primarily inherit from a deceased intestate every species of property of which he may die seised, whether the same be separate or community estate, are his children.<sup>5</sup> So the children of a testator will be presumed to take his land, as heirs, until it is shown that his will was executed so as to pass real estate, and that its contents were inconsistent with his children’s claim to the land as heirs.<sup>6</sup> So the lineal descendants of a devisee dying before a testator take through him.<sup>7</sup> So the title to personal estate vests in the heir although the right of possession is in the personal representative.<sup>8</sup> And upon the death of a residuary legatee before the testator, the real and personal estate given to him lapses for the benefit of the heirs and next of kin.<sup>9</sup> So in case of void bequests, the heir takes his distributive share.<sup>10</sup> In Louisiana all the legitimate children of an intestate participate to his succession by equal shares.<sup>11</sup> And lands which are the equitable separate estate of the wife descend to her heir at law.<sup>12</sup> And the real estate of a married woman descends to her heirs, subject to her husband’s curtesy.<sup>13</sup> So illegitimate and adopted children may be heirs to the

<sup>1</sup> *Humphries v. Davis*, 100 Ind. 274; *Moses v. Allen*, 81 Me. 268; *Nutter v. 50 Am. Rep. 788.*

<sup>2</sup> *Patterson v. Lamson*, 45 Ohio St. 77.

<sup>3</sup> *Warnell v. Finch*, 15 Tex. 163;

*Brooks v. Evetts*, 33 Tex. 732.

<sup>4</sup> *Lash v. Lash*, 57 Iowa, 88.

<sup>5</sup> *Eckford v. Knox*, 67 Tex. 200, 202.

<sup>6</sup> *Stephenson v. Doe*, 8 Blackf. 508;

*46 Am. Dec. 489.*

<sup>7</sup> *State v. Tiechman*, 13 Mo. App. 580;

<sup>8</sup> *Jahns v. Nolting*, 29 Cal. 507.

<sup>9</sup> *Robinson v. McIver*, 63 N. C. 645.

<sup>10</sup> *Moore v. McWilliams*, 3 Rich. Eq.

10.

<sup>11</sup> *McCollum v. Smith, Meigs*, 342; 33

*Am. Dec. 147.*

<sup>12</sup> *Grimball v. Patton*, 70 Ala. 628.

<sup>13</sup> *Kingsley v. Smith*, 14 Wis. 360.

extent of inheriting from both father and mother.<sup>1</sup> But the heir in whom one half the estate is already vested, the remainder to become so upon the death of a tenant by the curtesy, is not an heir expectant.<sup>2</sup> In 1859 free persons of color residing in Ohio, whose ancestors had been slaves, were not citizens of the United States, nor as to their relations with other states or the citizens of other states were they citizens of Ohio, and they could not acquire a residence in Alabama, and consequently could not inherit lands there.<sup>3</sup> As to coparceners and tenants in common, no substantial difference exists under the Mississippi statutes of descent and distribution.<sup>4</sup> A brief statement of the general rule as to descents may be thus formulated: No other persons can take by descent than such as are recognized as legitimate heirs by the laws of the country within which the real estate of the intestate is situate, and they must take in the order and proportion which those laws prescribe.<sup>5</sup>

<sup>1</sup> See *post*, §§ 3136, 3137.

<sup>2</sup> *Davidson v. Little*, 22 Pa. St. 245; 60 Am. Dec. 81.

<sup>3</sup> *Donovan v. Pitcher*, 53 Ala. 411; 25 Am. Rep. 634.

<sup>4</sup> *Root v. McFerrin*, 37 Miss. 17; 75 Am. Dec. 49.

<sup>5</sup> *Lingen v. Lingen*, 45 Ala. 410; *Grimball v. Patton*, 70 Ala. 626. Blackstone, in his Commentaries, lays down seven rules or canons of descent, which are as follows: "1. Inheritances shall descend to the issue of the person who last died actually seized *in infinitum*; but shall never lineally ascend; 2. The male issue shall be admitted before the female; 3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females all together; 4. The lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living; 5. On failure of lineal descendants or issue of the person last seized, the inheritance shall descend to his collateral relations being of the blood

of the first purchaser, subject to the three preceding rules; 6. The collateral heir of the person last seized must be his next collateral kinsman of the whole blood; 7. In collateral inheritances the male stock shall be preferred to the female; that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near, unless where the lands have in fact descended from a female": 2 Bla. Com., Cooley's ed., 207 et seq. Formerly, in California, the laws of Mexico governed in relation to descent: *McNeil v. San Francisco Congregational Soc.*, 66 Cal. 105; *Coppinger v. Rice*, 33 Cal. 408. Certain degrees of kindred are in Georgia determined by the rules of the canon law: *Lester, Rowell, and Hill's Code* 1882, sec. 2484, par. 9; 60 Ga. 199. The statutes of the several states in force at the present date in regard to descents and distribution should be referred to upon any question relating thereto.

ILLUSTRATIONS.—The code provided that “if a devisee die before the testator, his heirs shall inherit the amount so devised to him.” The devisee died before the testator, leaving as his nearest heir his brother. *Held*, that the brother was entitled to the devise: *Blackman v. Wadsworth*, 65 Iowa, 80. A testator made his will in 1825, leaving real estate to a son, who died in 1833; the testator died in 1840. *Held*, that the estate vested in the son’s children, not in the heirs at law of the testator: *Bishop v. Bishop*, 4 Hill, 138. One of the children died before the ancestor, leaving heirs. *Held*, that such heirs would take the portion which would have descended to such child if he had survived the ancestor: *Dodge v. Beeler*, 12 Kan. 525. A statute made null and void all devises and bequests to an attesting witness to a will disposing of real and personal property, and the property embraced in the void bequests distributable as intestate property. A devise was made to a witness who was an heir. *Held*, that he would take as an heir his share in such property: *Moore v. McWilliams*, 3 Rich. Eq. 10.

§ 3114. **Survivorship in Case of Death by Common Disaster.**—There is no presumption as to survivorship in the case of persons who perish by a common disaster.<sup>1</sup>

§ 3115. **Time when Estate Vests.**—When lands are claimed by descent, the capacity to take must have existed in the heir at the moment of the death of the ancestor.<sup>2</sup> And this capacity to take may come through another, as in the case of grandchildren taking their father’s share from the grandfather.<sup>3</sup> The right of the heir to the possession of real estate inherited by him vests immediately on the decease of the intestate,<sup>4</sup> and the heir may thereupon at once alien the same,<sup>5</sup> subject, however, to the rights of creditors to have their debts satisfied out of it in case there is not sufficient personal property therefor,<sup>6</sup> as the

<sup>1</sup> *Russell v. Hallett*, 23 Kan. 276; *Newell v. Nichols*, 75 N. Y. 78; 31 Am. Rep. 424; *Coye v. Leach*, 8 Met. 371; 41 Am. Dec. 518, and note 522. See Lawson on Presumptive Evidence, rule 54, p. 240.

<sup>2</sup> *Donovan v. Pitcher*, 53 Ala. 411; 25 Am. Rep. 634.

<sup>3</sup> *Cheas’s Appeal*, 87 Pa. St. 362; 30 Am. Rep. 361.

<sup>4</sup> *Marsh v. Waupaca Co.*, 38 Wis. 250; *Jones v. Billstein*, 28 Wis. 221;

*Hyde v. Barney*, 17 Vt. 280; 44 Am. Dec. 335; *Smith v. Thomas*, 14 Lea, 324; *Lavery v. Woodward*, 16 Iowa, 1; *Fisk v. Norvel*, 9 Tex. 13; 58 Am. Dec. 128; *Brenham v. Story*, 39 Cal. 17.

<sup>5</sup> *Lavery v. Woodward*, 16 Iowa, 1; *Hyde v. Barney*, 17 Vt. 280; 44 Am. Dec. 335.

<sup>6</sup> *Douglass v. Massie*, 16 Ohio, 271; 47 Am. Dec. 375; *Lavery v. Woodward*, 16 Ohio, 1.

land may be sold on execution in behalf of judgment creditors against the heirs.<sup>1</sup> For the above reasons, a certain qualified interest is subsequently vested in the executors and administrators, principally for the collection and payment of credits and debts; and at the completion of the trust the property remaining is restored to the heirs as rightful proprietors;<sup>2</sup> but the heirs, after succession has once been administered and closed, have full ownership of the decedent's property, with all the incidental rights of control, disposition, and actions for its recovery and possession.<sup>3</sup> If the capacity to take be enlarged by subsequent legislation, such laws cannot operate retrospectively to divest an estate in lands which had then vested.<sup>4</sup> And this rule applies to the case of lands inherited by reason of a void will attempted to be validated by special act of the legislature.<sup>5</sup> Although an estate in fee is, as we have shown, presumed to descend on the ancestor's death in pursuance of the laws of inheritance, yet this rule may be qualified to the extent that the descent may be shown to have been interrupted by a devise;<sup>6</sup> yet if the will be void there is no devise, and the heirs inherit at once as if there had never been any will.<sup>7</sup> So the estate vests in the heirs at once under a will void because of the unlawful suspension of the power of alienation.<sup>8</sup> As to distributive shares, they vest in the person entitled instantly upon the death of the intestate, and not from the time when the distribution is actually made;<sup>9</sup> this right is, however, subject to creditors' rights, which take precedence until satisfied.<sup>10</sup>

<sup>1</sup> *Douglass v. Massie*, 16 Ohio, 271; 47 Am. Dec. 375.

<sup>2</sup> *Fisk v. Norvel*, 9 Tex. 13; 58 Am. Dec. 128.

<sup>3</sup> *Fisk v. Norvel*, 9 Tex. 13; 58 Am. Dec. 128. See post, §§ 3117, 3118.

<sup>4</sup> *Donovan v. Fitcher*, 53 Ala. 411; 25 Am. Rep. 634.

<sup>5</sup> *Alter's Appeal*, 67 Pa. St. 341; 5 Am. Rep. 433.

<sup>6</sup> *Barter v. Bradbury*, 20 Me. 260; 37 Am. Dec. 49.

<sup>7</sup> *Alter's Appeal*, 67 Pa. St. 341; 5 Am. Rep. 433.

<sup>8</sup> *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117.

<sup>9</sup> *Moore v. Gordon*, 24 Iowa, 153.

<sup>10</sup> See cases ante.

ILLUSTRATIONS. — A husband and wife died; each had a will drawn in favor of the other; after the husband's death it was found that each by mistake had signed the will of the other, to remedy which error the legislature passed a special act authorizing the court to reform the will in case the mistake was proven. *Held*, that there was in law no will; that at the death of the husband his estate vested in his heirs, and that the subsequent legislation could not affect their right to have the estate vest: *Alter's Appeal*, 67 Pa. St. 341; 5 Am. Rep. 433. A testator devised real estate to his son, providing that if the son should die without legitimate issue, the land should be sold and the proceeds be equally divided among his grandchildren, born, or to be born. Some of the grandchildren died before the son. *Held*, that such grandchildren's representatives were entitled to take their share: *Chess's Appeal*, 87 Pa. St. 362; 30 Am. Rep. 361.

§ 3116. **What Estate or Interest Descends to Heir.** — The interest of a remainderman dying before the termination of a life estate descends to his heirs, where the remainder is vested.<sup>1</sup> And the unexhausted *residuum* of an estate goes to the heir like undisposed of real estate, where lands are devised upon trust for a particular purpose, and there is a balance left, or the trust fails.<sup>2</sup> So expectant estates are descendible in Michigan in the same manner as estates in possession.<sup>3</sup> But a claim having no foundation in law, and which depends on the generosity of the government, does not descend to the heir.<sup>4</sup> The proceeds of land sold under a decree of the probate court are governed by the same rules of descent and succession as the land itself.<sup>5</sup> But where one having an interest in lands dies intestate after the sale thereof, his interest in the money realized from the sale is personal estate, and goes to the administrator, and not to the heir at law;<sup>6</sup> though it is held in Texas that in that state personality descends to the heir, and is not vested in the

<sup>1</sup> *Bufford v. Holliman*, 10 Tex. 560; 60 Am. Dec. 223.

<sup>2</sup> *Mahorner v. Hooe*, 9 Smedes & M. 247; 48 Am. Dec. 706.

<sup>3</sup> *Curtis v. Fowler*, 66 Mich. 696.

<sup>4</sup> *Emerson v. Hall*, 13 Pet. 409.

<sup>5</sup> *Teague v. Corbitt*, 57 Ala. 529; *Nelson v. Murfee*, 69 Ala. 598. See *Denham v. Cornell*, 67 N. Y. 556, 562.

<sup>6</sup> *Denham v. Cornell*, 67 N. Y. 556. But see *Id.* p. 562.

administrator.<sup>1</sup> It is held in Pennsylvania that a sale on credit of land works an equitable conversion thereof into personalty for the purposes of succession. If it is recovered back by the widow and heirs of the owner after his decease, under a clause of forfeiture in the contract of sale, its *status* is not changed, and it is to be distributed to the heirs of the deceased owner as personal property in the proportion that personalty would be distributed to them.<sup>2</sup> So the interest of a vendee in a contract at a sheriff's sale, acquired after he has made his will, has been held to vest in the heir.<sup>3</sup> So the right of successorship to a chose in action is properly governed by the rules of descent.<sup>4</sup> And where a testator gives his wife a life estate in one third his property, and his sons equal shares of the balance, without devising the widow's portion, after her decease the sons take that portion.<sup>5</sup> Pre-emption rights may descend to the heir.<sup>6</sup> And estates-tail in Massachusetts, under the laws in force in 1854, descended, as at common law, to the eldest son and his eldest son.<sup>7</sup> And this was formerly the law in New Jersey.<sup>8</sup> But the act of descents in that state abolishes fee-tails in every form in which they might arise.<sup>9</sup> And in Maryland estates in fee-tail descend as fee-simple estates.<sup>10</sup> Primarily, the heir takes only such interest as remains after the payment of debts.<sup>11</sup> Nor has he any other or greater right in the intestate's property than the intestate himself could have maintained in his lifetime,<sup>12</sup> because the property is subject to the same encumbrances as it was in the ancestor's

<sup>1</sup> Bufford v. Holliman, 10 Tex. 560; 60 Am. Dec. 223.

<sup>2</sup> Leiper's Appeal, 35 Pa. St. 420; 78 Am. Dec. 347.

<sup>3</sup> Landrum v. Hatcher, 11 Rich. 54; 70 Am. Dec. 237.

<sup>4</sup> Brown v. Critchell, 110 Ind. 31.

<sup>5</sup> McCay v. Hugus, 6 Watts, 345.

<sup>6</sup> Lester v. White, 44 Ill. 464.

<sup>7</sup> Wight v. Wight, 1 Gray, 234; Corbin v. Healy, 20 Pick. 514.

<sup>8</sup> Den ex dem. Spachius v. Spachius, 16 N. J. L. 172.

<sup>9</sup> Redstrake v. Townsend, 39 N. J. L. 372.

<sup>10</sup> Mason v. Johnson, 47 Md. 347, 356. As to how far estates-tail exist in this country, see note to Outland v. Bowen, 115 Ind. 150; 7 Am. St. Rep. 420.

<sup>11</sup> Burns v. Berry, 42 Mich. 176; Brown v. Bell, 58 Mich. 58; Boisse v. Dickson, 31 La. Ann. 741.

<sup>12</sup> Peck v. Brummagim, 31 Cal. 440; 89 Am. Dec. 195; Whitcomb v. Reid, 31 Miss. 567; 66 Am. Dec. 579.

hands.<sup>1</sup> With the exceptions above noted, the heir is entitled to all the interest, lands, and property his ancestor had at his decease;<sup>2</sup> subject, however, to the rights of other heirs, if there are any; sometimes, also, to the rights of others who are devisees or legatees under a will;<sup>3</sup> and subject also to advancements or to debts owed by the heir to the intestate, in which last case the amount of the debt should be deducted from such heir's share in the distribution of the estate.<sup>4</sup> If other heirs have an interest, the heirs may take the land as tenants in common.<sup>5</sup>

ILLUSTRATIONS.—A tract of land was acquired by the intestate in his lifetime under a pre-emption clause incorporating a railroad company. *Held*, an interest in land, which descended to the heir at law: *Lester v. White*, 44 Ill. 464. The testator made a will, but did not therein dispose of his residuary estate. *Held*, that it descended under the intestate laws: *Hoffner v. Wynkoop*, 97 Pa. St. 130. Money was given by a will to be invested in real estate; the bequest failed. *Held*, that it went to the heirs at law: *Thorn v. Coles*, 3 Edw. Ch. 330. There was a sale under partition proceedings; the widow purchased, married again, conveyed the land through a third person to her husband; her children by her first husband survived her second husband, who died leaving heirs of his own. *Held*, that the land went to his heirs: *Spencer v. McGonagle*, 107 Ind. 410. Advancements were made by a father to his son; the son died before the father, leaving children. *Held*, that the grandchildren only took such estate as their father would have taken, and that the advancements made to the latter should be deducted: *Hughes's Appeal*, 57 Pa. St. 179.

§ 3117. **Rights and Duties of Heirs in Relation to Inherited Estate.**—One who takes property by descent does not occupy the position of a *bona fide* purchaser. The possession of real estate by the heir follows that of the ancestor, subject to the rights of third persons in or to the same, or any property therein.<sup>6</sup> So heirs coming into possession of real estate by descent are bound to pay taxes,

<sup>1</sup> *Burns v. Berry*, 42 Mich. 176. See *post*, §§ 3117, 3118.

<sup>2</sup> *Wheat v. Owens*, 15 Tex. 241; 65 Am. Dec. 164.

<sup>3</sup> See cases *ante*, § 3113.

<sup>4</sup> *Batton v. Allen*, 5 N. J. Eq. 99; 43 Am. Dec. 630.

<sup>5</sup> *Peters v. Jones*, 35 Iowa, 512.

<sup>6</sup> *Morgan v. Corbin*, 21 Iowa, 117.

and are entitled to its possession.<sup>1</sup> An heir apparent can sell or assign his estate in expectancy, and the purchaser takes it subject to advancements made by the ancestor, but not subject to the debts due from the heir to the ancestor.<sup>2</sup> Heirs succeed to their ancestors' rights of exemption, and where an exempted estate has been converted into funds, the heir may claim the value out of the funds.<sup>3</sup> But an heir has no right to control his ancestor's personal property until after administration closed;<sup>4</sup> nor can an heir claim lands descended to him by adverse possession against the debts of his ancestor.<sup>5</sup> It is held in New York that a right of entry in land by descent is within the statute of wills, though at the time of the devise, and of the deviser's death, the land be in the adverse possession of another.<sup>6</sup> Heirs have the right to, and may by agreement, divide the intestate's property among themselves, where there are no debts due from the estate,<sup>7</sup> and may transfer choses in action of the estate,<sup>8</sup> and may settle the estate by voluntary proceedings, both after and before an administrator is appointed.<sup>9</sup> So they may collect and make distribution of the personal estate without an administrator being appointed. The law favors such arrangements, and such an agreement will be binding on all parties.<sup>10</sup>

**ILLUSTRATIONS.**—The payee of a note died intestate; no administration was taken out on his estate; there were no creditors, and his distributees transferred the note. *Held*, that such transfer vested in the assignee the equitable title thereto: *Wood v. Weimar*, 104 U. S. 786.

**§ 3118. Liabilities of Heirs in Regard to Descended Estate and Ancestors' Debts—Actions by and against**

<sup>1</sup> *Piatt v. St. Clair's Heirs*, 6 Ohio, 228; *Lavery v. Woodward*, 16 Iowa, 1, 5.

<sup>2</sup> *Steele v. Frierson*, 85 Tenn. 430.

<sup>3</sup> *Carter v. Carter*, 20 Fla. 558; 51 Am. Rep. 618.

<sup>4</sup> *Tappan v. Tappan*, 30 N. H. 50.

<sup>5</sup> *Wheeler v. Floyd*, 24 S. C. 413.

<sup>6</sup> *Jackson v. Varick*, 7 Cow. 238.

<sup>7</sup> *Reed v. Reed*, 56 Vt. 492; *Arnis*

*v. Cameron*, 55 Ga. 449.

<sup>8</sup> *Wood v. Weimar*, 104 U. S. 786.

<sup>9</sup> *Brown v. Forscha*, 43 Mich. 492.

<sup>10</sup> *Foot v. Foot*, 61 Mich. 181.

**Heirs.** — The heir is liable for his ancestor's debts to the extent of the lands inherited; but if the land is in the heir's possession, it can only be reached by a direct action and judgment against the heir, and sale of the land;<sup>1</sup> though at the common law the heirs of a deceased debtor were only liable for the ancestor's bond debts to the extent of the real assets descended, but this liability has been extended by statute in Maryland to simple contract debts;<sup>2</sup> the reason of the above rules being that a creditor's interest is paramount to the title of the heirs.<sup>3</sup> But the heir is not personally liable for his ancestor's debts beyond the value of the estate descended to him;<sup>4</sup> nor is one who comes into possession of an estate by descent through his mother liable for an unpaid judgment obtained by the intestate against the mother.<sup>5</sup> And if lands of the intestate have actually passed into the exclusive possession of the heirs before the recovery of a judgment against the administrator, the lands cannot be made to respond to the judgment.<sup>6</sup> A proceeding against the heir to subject inherited assets to the payment of debts is a proceeding *in personam*.<sup>7</sup> An heir may, in Louisiana, make himself liable for the payment of the debts of the deceased, where he accepts a succession that has fallen to him with the benefit of inventory, and treats the property as his own, and offers it for sale and sells it.<sup>8</sup> So he may, by occupying a portion of the succession property, become liable for the rents thereof during such occupancy.<sup>9</sup> And a suit in equity may be maintained against heirs, where there has been no administration, to compel them to pay a debt due from their ancestor out of the assets received by them for him.<sup>10</sup> But in an action

<sup>1</sup> *Wheeler v. Floyd*, 24 S. C. 413.<sup>2</sup> *Campbell's Case*, 2 Bland, 209; 20 Am. Dec. 360.<sup>3</sup> *Bruch v. Lantz*, 2 Rawle, 392; 21 Am. Dec. 458.<sup>4</sup> *Williams v. Ewing*, 31 Ark. 229.<sup>5</sup> *Kendall v. Mondall*, 67 Md. 444, 447.<sup>6</sup> *Huggins v. Oliver*, 21 S. C. 147.<sup>7</sup> *Mayes v. Jones*, 62 Tex. 365.<sup>8</sup> *Benedict v. Bonnot*, 39 La. Ann. 972.<sup>9</sup> *Succession of Bauman*, 30 La. Ann. 1138.<sup>10</sup> *Adams v. Holcombe*, 1 Harp. Eq. 202; 14 Am. Dec. 719.

against an heir on his ancestor's covenant, plaintiff must not only show that the defendant had assets by descent, but that administration is closed.<sup>1</sup>

Where there is no administrator and no indebtedness, the heir may recover a debt due the estate, or property and assets of the estate;<sup>2</sup> but heirs cannot successfully maintain a suit on a note of the intestate until after the period for granting administration on the estate has expired.<sup>3</sup> So a pretermitted heir may maintain ejectment for a share of the land possessed by his father at his decease.<sup>4</sup> But on a contract personal to one deceased, and not running with his land, it is held in Missouri that the heirs cannot sue.<sup>5</sup> The purchase of a claim for unassigned dower is no defense in an action of ejectment brought by the heirs.<sup>6</sup>

ILLUSTRATIONS. — Assets of an estate were deposited with the state treasurer in default of known heirs. *Held*, that the heirs might maintain an action therefor: *State v. Wygall*, 51 Tex. 621. The payee of a note died intestate. No administrator was appointed, and the statutory period for taking out letters expired. *Held*, that the heirs could maintain an action in equity on the note: *Phinny v. Warren*, 52 Iowa, 332.

### § 3119. Descents Falling to Children and their Issue.

—Real estate descends under the several state statutes to the legitimate issue of the intestate who survive him, and is transmitted through such issue to the descendants of them,—that is, to the legitimate children and grandchildren to the remotest degree,—and if a child die before the ancestor, leaving issue, such issue may inherit through him from the ancestor.<sup>7</sup> This rule also applies to the

<sup>1</sup> *McAllister v. Williams*, 23 Mo. App. 286.

<sup>2</sup> *Salter v. Salter*, 98 Ind. 522; *Holsman v. Hibben*, 100 Ind. 338; *Williams v. Riley*, 88 Ind. 290. And see *Humphries v. Davies*, 100 Ind. 369, 50 Am. Rep. 788, as to the necessary averments in such case.

<sup>3</sup> *Baird v. Brooks*, 65 Iowa, 40.

<sup>4</sup> *McCracken v. McCracken*, 67 Mo. 641.

<sup>5</sup> *Huling v. Chester*, 19 Mo. App. 607.

<sup>6</sup> *Turnipseed v. Fitzpatrick*, 75 Ala. 297.

<sup>7</sup> See statutes of the several states, and note statutes of Indiana as to grandchildren and great-grandchildren; and see Statutes of New Jersey as to eldest grandson, etc.: *Towles v. Roundtree*, 10 Fla. 299.

distribution of personalty, with certain exceptions relative to the widow or surviving husband's share.<sup>1</sup>

ILLUSTRATIONS. — A died seised and possessed of real and personal estate, leaving surviving him grandchildren both by a son and daughter, who had deceased before the intestate. *Held*, that the grandchildren took the estate: *Crump v. Faucett*, 70 N. C. 345.

§ 3120. **Descents Falling to Surviving Husband.** — Under the statute in Illinois in force in 1866, if a married woman dies intestate, seised of land, and without children, or the issue or descendants of them, but leaves surviving her husband and her mother, and leaves no father, or brothers, or sisters, or descendants of them, the estate vests in fee by descent in the husband and mother of the intestate as heirs, who hold in equal parts as tenants in common.<sup>2</sup> So the husband may take, in Georgia and Tennessee, as heir at law of his wife.<sup>3</sup> So in Iowa, upon the death of the wife without issue,<sup>4</sup> and in the first-named state, where property is deeded by a husband to his wife, whereby a separate estate is vested in her, he becomes her heir at law, unless she died after the law of inheritance was changed.<sup>5</sup> And the husband of an heir may have an interest in the real estate descended to her as tenant by curtesy, which may be attached and levied on by execution immediately on the death of the ancestor.<sup>6</sup> And in Alabama, on the death of the wife intestate, the husband takes one half the personal property absolutely.<sup>7</sup>

<sup>1</sup> See statutes of all the states, and note the Maryland statute; but children and their descendants may, in the absence of husband or wife living, take in Delaware, Maryland, New York, North Carolina, and Tennessee. A distinction is also made both as to real and personal estate in regard to the *per stirpes* and *per capita* rule.

<sup>2</sup> *Marvin v. Collins*, 98 Ill. 510.

<sup>3</sup> *Carwell v. Schley*, 56 Ga. 101; *Allen v. Westbrook*, 16 Lea, 251.

<sup>4</sup> *Dodds v. Dodds*, 23 Iowa, 306.

<sup>5</sup> Code, sec. 2494; *Bailey v. Simpson*, 57 Ga. 523.

<sup>6</sup> *Hyde v. Barney*, 17 Vt. 280; 44 Am. Dec. 335. As to estate by curtesy, see specially the statutes of Alabama, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin.

<sup>7</sup> *Brown v. Grimes*, 60 Ala. 647.

So in Connecticut, the husband is, in certain cases, entitled to one half the estate left by his wife at her decease.<sup>1</sup> But in Nebraska the husband does not inherit his wife's personal estate, and is not "next of kin" within the meaning of those words as used in the statute.<sup>2</sup> Nor does the husband inherit his wife's share of her father's estate, where the wife dies without issue before her father, although the wife would have inherited such estate had she survived her father.<sup>3</sup>

§ 3121. **Descents Falling to Widow.**—In California, if the husband leaves no issue, the estate goes to the widow and the father equally.<sup>4</sup> It is held that the wife is her husband's heir;<sup>5</sup> although she intermarries before the property is reduced to possession by her;<sup>6</sup> that she may inherit personal estate from him;<sup>7</sup> that property exempt from execution descends to her;<sup>8</sup> that she may inherit as heir or take by descent where her husband dies intestate, leaving no issue;<sup>9</sup> and in Florida, where the husband dies intestate, and there are no children, the widow is, under the act of 1872 of that state, the sole heir at law.<sup>10</sup> Where a husband dies without issue living by a second wife, who survives him, but with living children by a former wife, the land which descends to such second wife descends at her death to his children by the first marriage.<sup>11</sup> It is, however, decided in Lou-

<sup>1</sup> See Connecticut statute. See also statutes of California, Colorado, Dakota, Florida, Idaho, Indiana, Montana, Nevada, Utah, Washington, Wyoming.

<sup>2</sup> Warren v. Englehart, 13 Neb. 283.  
<sup>3</sup> Graham v. Babcock, 109 Ind. 205.  
 See, as to husband's share, the statutes of California, Colorado, Connecticut, Dakota, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, Ohio, Oregon, South Carolina, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming.

<sup>4</sup> Jewell v. Jewell, 28 Cal. 232. See Descent of Community Property, § 3122.

<sup>5</sup> Judge of Probate v. Robbins, 5 N. H. 246; Ralston v. Thornton, 36 Ga. 546.

<sup>6</sup> Ralston v. Thornton, 36 Ga. 546.

<sup>7</sup> Demoss v. Demoss, 7 Cold. 256.

<sup>8</sup> Mason v. O'Brien, 42 Miss. 420.

<sup>9</sup> Dodds v. Dodds, 23 Iowa, 306; Fletcher v. Wormington, 24 Kan. 259, 264. See Barry v. Barry, 15 Kan. 587.

<sup>10</sup> Croll v. Clark, 20 Fla. 849.

<sup>11</sup> Thorp v. Hanes, 107 Ind. 324. See Armstrong v. Cavitt, 78 Ind. 476.

isiana that a widow is not an heir of her husband;<sup>1</sup> and in Michigan that she is neither his heir nor legal representative.<sup>2</sup> The statutes vary in the different states in regard to the share which the wife takes in her deceased husband's estate. In some states she has only her dower interest; in others, if there is no issue living, she takes all the real estate in fee, subject only to creditors' rights therein;<sup>3</sup> while in other states she takes in such case only one half of the real estate.<sup>4</sup> In some states if there is issue living, the rule limits the widow to one third the surplus remaining after the settlement of the estate;<sup>5</sup> such third being limited to a life estate in two of the states.<sup>6</sup> In many of the states she takes in such case one half the estate absolutely.<sup>7</sup> These statutes are, however, constantly changing, and growing much more liberal in the allotment to the widow, as legislatures are showing an ever increasing tendency to favor women's rights in property. This is evinced by the fact that the statutes of several states place the widow and surviving husband on an equal footing in relation to their share in the property of the one dying intestate.<sup>8</sup>

<sup>1</sup> *Dirmeyer v. O'Hern*, 39 La. Ann. 961.

<sup>2</sup> *Barnett v. Powers*, 40 Mich. 317.

<sup>3</sup> See statutes of Colorado, Florida, Georgia, Kansas, Mississippi, Ohio, Oregon, Wisconsin.

<sup>4</sup> See statutes of Arkansas, California, Connecticut, Dakota, Idaho, Illinois, Iowa, Massachusetts, Missouri, Montana, Nevada, New Hampshire, Pennsylvania, South Carolina, Texas, Utah, Vermont, Washington.

<sup>5</sup> See statutes of California, Connecticut, Dakota, Florida, Idaho, Montana, Nevada, New Hampshire, South Carolina, Utah, Washington. Same rule as to personal property: See statutes Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia.

<sup>6</sup> See statutes of Pennsylvania and Texas.

<sup>7</sup> See statutes of California, Colorado, Dakota, Florida, Idaho, Indiana, Montana, Nevada, Utah, Washington, Wyoming. Same rule as to personalty: See statutes of Alabama, Florida, Indiana, Michigan, Oregon, Washington. As to husband's right to take all wife's separate personalty in all cases, see statutes of Connecticut, Delaware, Kentucky, Maryland, New Jersey, North Carolina, Oregon, Rhode Island, Virginia.

<sup>8</sup> See particularly the statutes of California, Dakota, Idaho, Illinois, Iowa, Kansas, Maine, Michigan, Montana, New York, South Carolina, Texas, Utah, Washington, Wyoming; and examine also statutes of Colorado, Connecticut, Florida, Nevada, West Virginia.

ILLUSTRATIONS.—A husband and wife joined in a conveyance to M. of real estate, in trust, to immediately convey the same to the wife in lieu of all her interest in lands still remaining in fee in the husband, or afterwards acquired by him, "as her jointure in her said husband's lands forever." M. at once conveyed by a proper deed the real estate to the wife which had been conveyed in trust to him. Subsequently the husband died, seised of other real estate, and leaving no children or father or mother, although he left surviving him brothers and sisters of the half-blood. The statute provided that "if a husband or wife die intestate, leaving no child, and no father or mother, the whole of his or her property, real and personal, shall go to the survivor." *Held*, that the deeds operated as a jointure, and affected the wife's rights as widow only, and that, as against the brothers and sisters of the half-blood, the whole estate of which her husband died seised descended to her as heir: *Glass v. Davis*, 118 Ind. 593. A devisee died before the testator leaving a widow and a brother. The statute provided that "if a devisee die before the testator, his heirs shall inherit," etc. *Held*, that the widow was not an "heir" of the devisee, and that the brother inherited: *Blackman v. Wadsworth*, 65 Iowa, 80.

§ 3122. **Descent of Community Property.**—In regard to community property, it is held in California that, on the death of the husband, one half of all such property vests in the surviving wife;<sup>1</sup> and if the wife die, one half goes to the surviving husband, in a few states;<sup>2</sup> while, in some states, all such property goes at once to the husband on his wife's decease.<sup>3</sup> In Texas, if an intestate leave children, the wife cannot inherit his interest in the community estate.<sup>4</sup>

<sup>1</sup> *Hart v. Robinson*, 21 Cal. 346. See *Jewell v. Jewell*, 28 Cal. 232; see also statutes of California, Idaho, and Montana. One half goes to the surviving husband or wife after community debts are satisfied; and if there is no legitimate issue, then all: See statutes of Arizona, Texas, and Washington.

<sup>2</sup> See statutes of Arizona, Texas, and Washington.

<sup>3</sup> See statutes of California, Idaho, Montana, and Nevada. As to descent of community property on wife's death,

see *Payne v. Payne*, 18 Cal. 291; *Moore v. Jones*, 63 Cal. 12.

<sup>4</sup> *Eckford v. Knox*, 67 Tex. 200, 202. See *Boone v. Hulsey*, 71 Tex. 176. As to descent of community property, and the exceptions governing the rule, see statutes of Arizona, California, Idaho, Louisiana, Montana, Nevada, New Mexico, Texas, and Washington. As to how far the rules governing the descent of community property are affected by homestead rights, see that title in the statutes of the several states.

§ 3123. **Descents Falling to Brothers and Sisters.**—In Alabama, on the death of one of several children without issue, the title to his share of land inherited from his father goes to his surviving brothers and sisters.<sup>1</sup> In many states, if there is no issue living, the estate descends to the brothers and sisters, and their descendants *per stirpes*.<sup>2</sup> In New Hampshire, if there are none nearer of kin living, the children of deceased brothers and sisters take *per capita*.<sup>3</sup> So in Maryland, the representatives of a deceased sister will take her share of an estate;<sup>4</sup> and under the Massachusetts statute of 1876, an estate will go to the children of deceased brothers and sisters to the exclusion of children of deceased nephews or nieces;<sup>5</sup> and in Arkansas, where the owner of real estate, which he has received from a paternal uncle, dies intestate, leaving a mother, brothers, and a paternal aunt, the estate goes to his brothers.<sup>6</sup>

ILLUSTRATIONS.—A person died intestate without issue, wife, father, or mother, but there were living heirs of a deceased sister cut off by his father's will. *Held*, that such heirs of the sister inherited the estate: *Lash v. Lash*, 57 Iowa, 88.

§ 3124. **Brothers, Sisters, and Kindred of the Half-blood.**—"Brothers and sisters" in Ohio include brothers and sisters of the half-blood.<sup>7</sup> It was held in New Hamp-

<sup>1</sup> *Cockrell v. Coleman*, 55 Ala. 583.

<sup>2</sup> See statutes of Alabama, Connecticut, Delaware, Maryland, Mississippi, New Jersey, Ohio, and Tennessee.

<sup>3</sup> *Nichols v. Shepard*, 63 N. H. 391.

<sup>4</sup> *Kendall v. Mondell*, 67 Md. 444.

<sup>5</sup> *Conant v. Kent*, 130 Mass. 178.

<sup>6</sup> *Oliver v. Vance*, 34 Ark. 564. As to brothers and sisters, and their representatives taking with surviving parents or parent, see statutes of Illinois, South Carolina, Missouri, and Wyoming. As to one half going to brothers, sisters, and descendants, see statutes of Indiana, Louisiana, and Texas. As to mother, brothers, and sisters taking equally, see statutes of Arizona, Dakota, Florida, Idaho,

Maine, Montana, Nebraska, Nevada, New Hampshire, Oregon, Rhode Island, Texas, Vermont, Virginia, and West Virginia. As to brothers' and sisters' and their representatives' share of real estate, in case of death of father and mother, see especially statutes of Arizona, Arkansas, California, Colorado, Dakota, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, New York, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin.

<sup>7</sup> *Oliver v. Saunders*, 8 Ohio St. 501; *Armstrong v. Miller*, 6 Ohio St. 118. See Ohio statutes.

shire in 1854 that, independent of statutory provisions, there is no distinction between the whole and half blood,<sup>1</sup> though in the last-named state the rule as to the rights of the half-blood to inherit seems to depend upon whether the estate came to the intestate by descent, gift, or devise. In the former case, brothers and sisters of the half-blood are excluded; in the latter, not.<sup>2</sup> But in that state it is held that brothers and sisters of the half-blood may with the mother inherit the estate of a child of the intestate who dies unmarried after attaining the age of twenty-one.<sup>3</sup> In North Carolina, where the person last seised dies without issue, or brother or sister of the blood of the first purchaser, but leaves a half-sister not of such blood, and remote collaterals of such blood, such collaterals take to the exclusion of the half-sister.<sup>4</sup> In Alabama, under a code provision that there is no distinction between the whole and the half blood in the "same degree," if an intestate leaves no children or their descendants, the children of a deceased brother or sister of the half-blood occupy the "same degree" of relationship as the surviving brothers and sisters, and take by right of representation the share which their ancestor, if living, would have taken.<sup>5</sup> It is held in Texas that brothers and sisters of the half-blood inherit the whole estate, where there are no brothers and sisters of the full-blood, and inherit equally with brothers and sisters of the whole-blood who may be living;<sup>6</sup> although by the civil law in force in that state in 1836, brothers and sisters of the full-blood, or the children of brothers and sisters of the full-blood, inherited to the exclusion of brothers and sisters of the half-blood.<sup>7</sup> In

<sup>1</sup> *Prescott v. Carr*, 29 N. H. 453; 61 Am. Dec. 652.

<sup>2</sup> *Prescott v. Carr*, 29 N. H. 453; 61 Am. Dec. 652; *Crowell v. Clough*, 23 N. H. 209; *Perley, J., arguendo*.

<sup>3</sup> *Clark v. Pickering*, 16 N. H. 284. See, as to exceptions regarding infant who dies under age and unmarried, *Prescott v. Carr*, 29 N. H. 453; 61 Am. Dec. 652.

<sup>4</sup> *Dozier v. Grandy*, 66 N. C. 484; *Bell v. Dozier*, 1 Dev. 333; *Lawrence v. Pitt*, 1 Jones, 344.

<sup>5</sup> *Stallworth v. Stallworth*, 29 Ala. 76.

<sup>6</sup> *Marlow v. King*, 17 Tex. 177.

<sup>7</sup> *Wardlow v. Miller*, 69 Tex. 395, 398; 2 *Domat's Civil Law*, 2929.

Wisconsin the half-blood inherit equally with whole-blood, except that the ancestral estate must follow the blood from which derived.<sup>1</sup> And a similar rule seems to obtain in Kentucky, since in that state lands acquired otherwise than by descent go without distinction to the half-blood and whole-blood, or to the heirs of both parents;<sup>2</sup> and in Iowa, children of the half-blood inherit equally with children of the whole-blood when the inheritance was derived through the common parent.<sup>3</sup> In Michigan, where the statute of descents mentions brothers and sisters generally, those of the half-blood are included, since it has always been the policy of that state to put the half-blood on a footing of equality in most respects with the whole-blood in the law of descents,<sup>4</sup> though it is held in the last state, as if to qualify the above rule, that one's half-sister inherits from him equally with a sister of the full-blood in lands obtained by purchase by the intestate.<sup>5</sup> And this qualification is supported by an earlier decision than that last noted, where it is held that under a statute that "degrees of kindred shall be computed according to the rules of the civil law, and kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance," if there are several next of kin in the same degree who are not all of the same blood, then only such of them will take as are of the same blood as the ancestor from whom the estate was derived. The statute is not to be construed to divert the descent of an ancestral inheritance from the nearest of kin.<sup>6</sup> Under the statute of 1881 in Indiana a

<sup>1</sup> *McCracken v. Rogers*, 6 Wis. 278; *Perkins v. Simond*, 28 Wis. 90. See *Cramer's Appeal*, 43 Wis. 167.

<sup>2</sup> *Wells v. Head*, 12 B. Mon. 170; *Bell v. Dozier*, 1 Dev. 333. See *Turner v. Patterson*, 5 Dana, 297.

<sup>3</sup> *Neeley v. Wise*, 44 Iowa, 544.

<sup>4</sup> *Rowley v. Stray*, 32 Mich. 70.

<sup>5</sup> *Van Sickle v. Gibson*, 40 Mich.

170. See *Rowley v. Stray*, 32 Mich. 70.

<sup>6</sup> *Ryan v. Andrews*, 21 Mich. 229.

half-brother not of the blood of the ancestor from whom the property descended will take to the exclusion of kindred of the blood more distantly related to the intestate.<sup>1</sup> Kindred of the half-blood on the mother's side inherit equally in Vermont with kindred of the whole-blood in the same degree,<sup>2</sup> and brothers and sisters of the half-blood are, under an early decision in that state, entitled as next of kin to each other.<sup>3</sup> In Tennessee, half brothers and sisters take in preference to uncles and aunts on the mother's side, though the land descended from her.<sup>4</sup> Where by a statute lands descend to the brothers and sisters of the father of the intestate, those of the half-blood take equally with those of the whole-blood.<sup>5</sup> In nearly all the states provision of some kind is made relative to the rights of the half-blood to inherit. These provisions differ largely, however, and there seems to be no general rule under which all the several provisions could be grouped.<sup>6</sup>

ILLUSTRATIONS. — H. devised an estate in trust to his son for life, and directed that upon the death of the son without children or their descendants it should be divided among the next of kin of the son the same as if he had owned the property and died intestate. The son died without children or their descendants. There were left surviving children of the half-sisters of H., and children of his brothers and sisters of the whole-blood. *Held*, that those of the half-blood took equally with those of the whole-blood in the same degree: *Larrabee v. Tucker*, 116 Mass. 562. A died, of age, unmarried, intestate, and without issue, leaving personal property not derived by descent or devise. There survived A brothers and sisters and their representatives of the half-blood, and also brothers and sisters of the whole-blood. *Held*, that the whole and half blood shared equally: *Prescott v. Carr*, 29 N. H. 453; 61 Am. Dec. 652. Y. patented land, of which he died seised, intestate, and unmarried, and without father or mother living, but leaving surviving him G., a legitimate half-sister, and the children of a deceased sister of the whole-blood. *Held*, that the half-sister inherited from Y. equally with the sister of the whole-blood: *Van Sickel v. Gibson*, 40 Mich. 170.

<sup>1</sup> *Pond v. Irwin*, 113 Ind. 243.

<sup>2</sup> *Hatch v. Hatch*, 21 Vt. 450.

<sup>3</sup> *Brown v. Brown*, 1 D. Chip. 360.

<sup>4</sup> *Chaney v. Barker*, 3 Bart. 424.

<sup>5</sup> *Beebe v. Griffing*, 14 N. Y. 235.

<sup>6</sup> See *Ancestral Estate*, § 3125.

§ 3125. **Ancestral Estates.**—Ancestral estates embrace not only descended estates, but also all others which may have come to the intestate by gift or devise from either parent, or from any relative of the blood of either parent,<sup>1</sup> since the term “ancestor” includes any one from whom the estate was inheritable, even though it were an infant.<sup>2</sup> So in New York, when used with reference to the descent of real property, the word “ancestor” embraces collaterals as well as lineals through whom an inheritance is derived.<sup>3</sup> This term is, however, qualified as to its meaning in Connecticut, since “ancestor,” in that state, is the one by whom the estate immediately, and not the one from whom it remotely, descended.<sup>4</sup> An estate coming to a wife from a deceased husband is not ancestral.<sup>5</sup> So if heirs exchange lands, the estate ceases to be ancestral.<sup>6</sup> In Arkansas, the rule of the common law is followed in respect to such estates, to the extent that they are as far as possible preserved in the line of the blood from which they descended.<sup>7</sup> And the grandfather, grandmother, uncles, and aunts of the line from which the estate came may take.<sup>8</sup> So if one dies, without issue, seised of a new acquisition, the mother, being the sole surviving parent, takes an estate for life, with remainder, first to the line of the paternal ancestor in postponement of the maternal line until the former becomes extinct, and then to the maternal line.<sup>9</sup> Where the inheritance is ancestral, and comes from the father’s side, then it will go to the line on the part of the father, from whence it came, in exclusion of the mother’s

<sup>1</sup> West v. Williams, 15 Ark. 692.

<sup>2</sup> Prickett v. Parker, 3 Ohio St. 394.

<sup>3</sup> Wheeler v. Clutterbuck, 52 N. Y. 67, 70.

<sup>4</sup> Clark v. Shailer, 46 Conn. 119.

<sup>5</sup> Brower v. Hunt, 18 Ohio St. 311; Birney v. Wilson, 11 Ohio St. 426.

<sup>6</sup> Brower v. Hunt, 18 Ohio St. 311. As to what is and what is not ancestral estate, see Lathrop v. Young, 25 Ohio St. 451; Shepard v. Taylor, 15 R. I. 204; Watson v. Thompson, 12 R.

I. 466. As to ancestral estates, see statutes of Arizona, Arkansas, Connecticut, Indiana, Maryland, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Texas. See Descent from Infants, § 3132, post.

<sup>7</sup> West v. Williams, 15 Ark. 692.

<sup>8</sup> Kountz v. Davis, 34 Ark. 590.

<sup>9</sup> Magness v. Arnold, 31 Ark. 103. See Galloway v. Robinson, 19 Ark. 396.

line; but if the inheritance came from the mother's side, it follows the maternal line to the exclusion of the father's line.<sup>1</sup> In Georgia, cousins inherit without distinction as to blood of the ancestor from whom the estate descended.<sup>2</sup> The fact that the property was inherited from the father gives no preference in Maine to the paternal grandfather.<sup>3</sup> The Michigan statute of distributions deals only with the particular estate of the decedent, irrespective of its origin or previous ownership; but provisions which relate to the further distribution of ancestral estates after the death of the heir are mainly to perfect an administration of the ancestor's estate in real property when it has failed in consequence of the heir's death.<sup>4</sup> In New Hampshire, the statute of descents is copied substantially from the English statute of distributions, and no regard is had to the source from which the estate is derived, except in cases where the statute has made that circumstance material.<sup>5</sup>

A statute concerning descents, which provides that in case an inheritance came to an intestate by descent, devise, or gift of one of his ancestors, all those not of the blood of such ancestor shall be excluded from such inheritance, refers to the immediate ancestor from whom the intestate received the inheritance, not a remote "ancestor" who was the original source of title.<sup>6</sup> In New Jersey, where the lands have come to the person dying seised by descent, gift, or devise of some ancestor, those who stand in the nearest degree of consanguinity to the person so seised shall inherit, if they are of the blood of the ancestor, although they may not stand nearest by virtue of the blood of such ancestor to the person last seised.<sup>7</sup> So in the last-named state first cousins on the

<sup>1</sup> *Campbell v. Ware*, 27 Ark. 65; *cott v. Carr*, 29 N. H. 453, 459; 61  
*Beard v. Mosely*, 30 Ark. 517. Am. Dec. 652; *Bell v. Scammon*, 15 N.

<sup>2</sup> *Redd v. Clopton*, 17 Ga. 230.

<sup>3</sup> *Albee v. Vose*, 76 Me. 448.

<sup>4</sup> *Jenks v. Trowbridge*, 48 Mich. 94.  
 See *Rowley v. Stray*, 32 Mich. 70.

<sup>5</sup> *Parker v. Mims*, 2 N. H. 460; *Pres-*

*H. 381, 393; 41 Am. Dec. 706.*

<sup>6</sup> *Wheeler v. Clutterbuck*, 52 N. Y.  
 67.

<sup>7</sup> *Miller v. Speer*, 38 N. J. Eq.  
 567.

paternal side take in preference to the uncles and aunts of the blood of the father, although the intestate obtained the land by descent from the father.<sup>1</sup> Under the Ohio statutes the blood of the intestate is preferred to that of the ancestor,<sup>2</sup> and property inherited by a son from a father, and descending to the son's daughter, passes on her death without issue to her father's half brothers and sisters, though not of the blood of the grandfather.<sup>3</sup> So lands inherited from the paternal ancestor descend to his brothers and sisters, where there are no children and brothers and sisters of the intestate, or representatives of them.<sup>4</sup> The real estate of an intestate must in Pennsylvania be kept within the blood of the perquisitor, without reference to any other relationship.<sup>5</sup> In Rhode Island, when a legal and equitable estate coming through different persons unite in the same holder, it is the course of the legal, rather than the equitable, estate which determines whether it be an ancestral estate in the holder.<sup>6</sup> In Texas, the sole surviving parent takes the inheritance, no matter from which ancestral stock the title to the estate came.<sup>7</sup> Under the Vermont statutes no distinction is made in descent and distribution of estates in consequence of the manner in which the estate is obtained, whether by purchase or inheritance.<sup>8</sup> In Wisconsin, brothers and sisters of a deceased child intestate may take from him, not as his heirs, but as heirs of the mother, property which came to the intestate from a deceased mother.<sup>9</sup> It is held in several states that uncles and aunts inherit without distinction as to the blood of the ancestor from whom the estate descended.<sup>10</sup>

<sup>1</sup> *Speer v. Miller*, 37 N. J. Eq. 492.

<sup>2</sup> *Brower v. Hunt*, 18 Ohio St. 311.

<sup>3</sup> *White v. White*, 19 Ohio St. 531.

<sup>4</sup> *Curren v. Taylor*, 19 Ohio 36; *Stannard v. Case*, 40 Ohio St. 211.

<sup>5</sup> *Appeal of Ranck*, 113 Pa. St. 98; *Roberts's Appeal*, 39 Pa. St. 417.

<sup>6</sup> *Shepard v. Taylor*, 15 R. I. 204.

<sup>7</sup> *Chandler v. Copeland*, 31 Tex. 151.

<sup>8</sup> *Hatch v. Hatch*, 21 Vt. 450.

<sup>9</sup> *Wiesner v. Zaun*, 39 Wis. 188.

<sup>10</sup> *Peacock v. Smart*, 17 Mo. 402; *De-loney v. Walker*, 9 Port. 497; *Danner v. Shisler*, 31 Pa. St. 289; *Jones v. Barnett*, 30 Tex. 637; *Cozzens v. Joslin*, 1 R. I. 122; *Beebe v. Griffing*, 14 N. Y. 235; *Murphy v. Henry*, 35 Ind. 442.

**ILLUSTRATIONS.**—Two brothers, A and B, were owners jointly by purchase of land. A died. His father, mother, brothers, and sisters survived him. Subsequently B died, leaving a child, which afterwards died, leaving its grandfather, grandmother, uncles, and aunts on the paternal side surviving. *Held*, that upon A's decease his interest in the land ascended to his father for life, remainder in fee to his brothers and sisters, and that the child's interest ascended to its grandfather, grandmother, uncles, and aunts on the paternal side in equal parts: *Kountz v. Davis*, 34 Ark. 590. C. inherited from his mother, and died intestate and without issue, or brothers and sisters, or their representatives. *Held*, not ancestral estate, and that it descended to C's next of kin, though not of the blood of the ancestor from whom the estate descended: *Clark v. Shailer*, 46 Conn. 119. A died intestate, leaving a widow and son, who afterwards died intestate, unmarried, and without issue. *Held*, that the mother could not succeed to the estate of the son, because she was not of the blood of the first purchaser: *Roberts's Appeal*, 39 Pa. St. 417.

**§ 3126. Descents Falling to Parents.**—In a number of states the father of the intestate inherits the property in case there are no descendants, and the wife or husband is dead;<sup>1</sup> and if the father is not living, his share goes, in many states, to the mother.<sup>2</sup> The rule of the common law, that the inheritance could not lineally ascend, has by statute in New Jersey been modified so as to let in the father, and to some extent the mother; but it has not been abolished, so that a grandparent cannot inherit lands from a grandson.<sup>3</sup> Under the law of 1859 in Kansas, the mother would take only in case there was neither wife nor husband nor issue living.<sup>4</sup> In Arkansas, all the

<sup>1</sup> See statutes of Arizona, Arkansas, Colorado, Dakota, Florida, Idaho, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New York, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia.

<sup>2</sup> See statutes of states enumerated in last note, and see also states noted in Stimson's American Statute Law, secs. 3107, 3108, 3111-3113.

<sup>3</sup> *Taylor v. Bray*, 32 N. J. L. 182; *Bray v. Taylor*, 36 N. J. L. 415. As to descent to father and mother, or to

the survivor of them, see statutes of the several states. Father may take: *Shown v. McMackin*, 9 Lea, 601. Parent may inherit: *Brother v. Francisco*, 1 Heisk. 511. Parent may take in preference to brothers and sisters: *Cosgray v. Core*, 2 W. Va. 353. Father may take from son, but mother must be dead: *Haywood v. Ormsbee*, 7 Wis. 111. As to the parents inheriting ancestral real estate under the act of 1866 in Connecticut, see *Austin v. Wight*, 38 Conn. 405.

<sup>4</sup> *Brown v. Belmarda*, 3 Kan. 41.

personal estate of which an intestate dies possessed, or to which he has a vested interest in remainder, goes to his mother, if he leaves no father, wife, or children.<sup>1</sup> But the mother may not, in Iowa, under the law in force in 1878, inherit from the children of her child who died before the death of her husband.<sup>2</sup> Under the Mexican law, where a father dies having devised his estate to his wife and children in certain proportions, and, after his death, certain of his children die intestate, the interests of the children vest in the mother as the nearest ascendant, and not in the brothers and sisters.<sup>3</sup> Under the law of 1879 in Kansas, if the intestate leave no issue or wife, and if both parents are dead, one half the estate goes to the heirs of the deceased father, and the other half to the heirs of the deceased mother.<sup>4</sup> In Texas, if an intestate leave either children or their descendants, no collateral or relative in the ascending line can take any part of his separate property.<sup>5</sup> Except where a husband is sole heir of the wife, real estate may, in Florida, descend to the father, where there are no children or their representatives.<sup>6</sup> The law of Missouri, by making the father the heir to the son, totally abolishes the English law of keeping an estate in the blood of the first purchaser.<sup>7</sup> But in Iowa, parents succeed only to the estate which a child had at his death,<sup>8</sup> and property which might have descended to the child or its issue had it lived does not descend to the parent. This rule, however, does not obtain in Alabama.<sup>10</sup>

ILLUSTRATIONS. — A died intestate, leaving a widow and child. The child died. *Held*, that the mother became heir of the child: *Lynde v. Williams*, 68 Mo. 360. A child survived its father, but

<sup>1</sup> *Oliver v. Vance*, 34 Ark. 564.

<sup>2</sup> *Journell v. Leighton*, 49 Iowa, 601.

<sup>3</sup> *Emeric v. Alvarado*, 64 Cal. 529, 530.

<sup>4</sup> *Russell v. Hallett*, 23 Kan. 276.

<sup>5</sup> *Eckford v. Knox*, 67 Tex. 200, 202.

<sup>6</sup> *McGee v. Alba*, 9 Fla. 382.

<sup>7</sup> *Harbison v. Swan*, 58 Mo. 147.

<sup>8</sup> *Leonard v. Lining*, 57 Iowa, 648.

<sup>9</sup> *Leonard v. Lining*, 57 Iowa, 648.

As to parents inheriting from adopted and illegitimate children, see *Descents Falling to and from Adopted Children*, § 3136, *post*; and *Descents Falling to and from Illegitimate Children*, § 3137, *post*.

<sup>10</sup> *Fowler v. Trewhit*, 10 Ala. 622. See *Descent from Infants*, § 3132, *post*.

died without issue before the death of its grandfather, from whom the property was descended. *Held*, that the child never had any vested estate in the property, and that his mother, surviving, took nothing by descent: *Leonard v. Lining*, 57 Iowa, 648. A mother died, leaving issue a child. Subsequently her father died intestate; then the child died. *Held*, that the father of the child inherited his portion of the estate: *Fowler v. Trewhit*, 10 Ala. 622.

§ 3127. **Descents Falling to Step-father and Step-mother.**—A step-father will, under the laws of 1862 of Kansas, inherit, as heir of the mother, property of the step-son;<sup>1</sup> and in that state, if one dies leaving a step-father and collateral relatives, the step-father inherits, to the exclusion of the collaterals, by virtue of his relationship to the mother of the deceased.<sup>2</sup> So in Iowa a step-mother may inherit from a step-child.<sup>3</sup>

§ 3128. **Rule as to the Heirs of Parents.**—Under the Iowa code in force in 1874, the heirs of the father and mother of a deceased intestate who leaves neither wife nor issue inherit the same as they would have done if both parents had survived the intestate, and each died in possession of one half the estate.<sup>4</sup>

§ 3129. **Descents Falling to Grandparents.**—The grandparent takes in preference to uncles or aunts;<sup>5</sup> and under the civil law the maternal grandfather of a child would inherit the estate coming to a child by descent, in preference to its paternal aunt, and this rule was followed in Iowa in 1854.<sup>6</sup> The great-grandmother excludes the great-uncle.<sup>7</sup>

<sup>1</sup> *Sarver v. Beal*, 36 Kan. 555.

<sup>2</sup> *Sarver v. Beal*, 36 Kan. 555.

<sup>3</sup> *Moore v. Weaver*, 53 Iowa, 11.

<sup>4</sup> *Bassil v. Loffer*, 38 Iowa, 451. See Next of Kin, § 3133, *post*. See also Stinson's American Statute Law, sec. 3121.

<sup>5</sup> *Decoster v. Wing*, 76 Me. 450; *Kelsey v. Hardy*, 20 N. H. 479; *McDowell v. Adams*, 45 Pa. St. 430; *Kirkendall's Case*, 43 Wis. 167; *Ryan v.*

*Andrews*, 21 Mich. 229; *Barger v. Hobbs*, 67 Ill. 592; *Cables v. Prescott*, 67 Me. 582; *Bassil v. Loffer*, 38 Iowa, 451. See *Bray v. Taylor*, 36 N. J. L. 415; *Curren v. Taylor*, 19 Ohio, 36; *Ligon v. Fuqua*, 6 Munf. 281; *Phillips v. Peteet*, 35 Ala. 696.

<sup>6</sup> *Martindale v. Kendrick*, 4 G. Greene, 307.

<sup>7</sup> *Cloud v. Bruce*, 61 Ind. 171.

§ 3130. **Descents Falling to Uncles, Aunts, Nephews, and Nieces.** — Where there are neither lineal descendants in the ascending or descending line, nor brothers and sisters, or their descendants, then the laws generally provide that uncles and aunts, nephews and nieces, take.<sup>1</sup> Children of deceased nephews and nieces of the intestate may share in his estate under the statutes of descents and distributions in Missouri.<sup>2</sup> But aunts or uncles exclude children of deceased aunts or uncles,<sup>3</sup> although where there are nephews, nieces, grand-nephews, and grand-nieces, nephews and nieces may take as distributees of personal property in Maryland, yet grand-nephews and grand-nieces whose parents have deceased cannot take.<sup>4</sup> So a grand-niece does not take any share in the distribution of an intestate's estate where there are brothers and sisters, nephews and nieces.<sup>5</sup> Grand-uncles exclude children and grand-children of grand-uncles dying before the intestate.<sup>6</sup>

§ 3131. **Descents Falling to Cousins.** — It is held in New Jersey that cousins of near degree exclude cousins of more remote degree;<sup>7</sup> and it was decided in the same state, in 1872, that first-cousins will take the personal estate of the intestate, to the exclusion of the children and grandchildren of other first-cousins deceased, since collateral relatives cannot take by representation, except in the case of the children of a deceased brother or sister of the intestate.<sup>8</sup>

§ 3132. **Descent from Infants.** — In Michigan, the share of an infant heir who dies unmarried goes to those who

<sup>1</sup> Jones v. Barnett, 30 Tex. 637; Snow v. Snow, 111 Mass. 389.

<sup>2</sup> Copenhaver v. Copenhaver, 78 Mo. 55.

<sup>3</sup> Levering v. Levering, 2 Md. Ch. 81; 3 Md. Ch. 365; Porter v. Askew, 11 Gill & J. 346; Parker v. Nims, 2 N. H. 46; Shaffer v. Nail, 2 Brev. 160; Montgomery v. Pentriken, 29 Pa. St. 118.

<sup>4</sup> McComas v. Amos, 29 Md. 120.

<sup>5</sup> Brother v. Francisco, 1 Heisk.

<sup>6</sup> Clayton v. Drake, 17 Ohio St. 367. See Cresoe v. Laidley, 2 Binn. 279.

<sup>7</sup> Schenck v. Vail, 24 N. J. Eq. 538; Stewart v. Collier, 3 Har. & J. 289.

<sup>8</sup> Davis v. Vanderveer, 23 N. J. Eq. 558. See Ancestral Estates, § 3126, ante.

would have taken it if he had so died in the ancestor's lifetime.<sup>1</sup> So a parent may inherit from an infant son, dying unmarried and without issue.<sup>2</sup> In Kentucky, under the statute in force in 1885, if an infant dies without issue, having title to real estate derived from one of its parents, the whole descends to the kindred of that parent, provided such kindred are not more remote than the grandfather, grandmother, uncles, and aunts of the infant.<sup>3</sup> And the statute in force in that state in 1887 providing for descent of real estate to the parents of a deceased intestate infant applies only to such real estate as the infant has derived from the father or mother.<sup>4</sup> In Michigan, the mother may inherit equally with the brothers and sisters from an infant distributee of his father's estate.<sup>5</sup> In Maine, under the statute in force in 1878, when a minor, unmarried, dies leaving no issue, father, mother, brother, or sister, the estate of the minor not inherited from the father descends to the maternal grandmother, rather than to an uncle on the father's side, or to the children of such uncle;<sup>6</sup> or when a minor dies unmarried, the property inherited from the father descends in equal shares to his father's other surviving children, and to issue of deceased children by right of representation;<sup>7</sup> and where an infant dies without issue, possessed of real estate derived by descent, gift, or devise from one of the maternal grandparents, the estate descends to the father of the infant, and not to the mother's kindred, the mother being dead.<sup>8</sup>

ILLUSTRATIONS. — A, an infant distributee of his father's estate, died a minor, intestate, and unmarried; his mother survived him; so, also, did other children of his father. The statute provided that in such case the mother should take an equal share with the brothers and sisters. *Held*, that the mother was entitled to share in the personal estate inherited from the father:

<sup>1</sup> *Burke v. Burke*, 34 Mich. 451.

<sup>2</sup> *McCullough v. Lee*, 7 Ohio, 15.

<sup>3</sup> *Power v. Dougherty*, 83 Ky. 187.

<sup>4</sup> *Walden v. Phillips*, 86 Ky. 302.

<sup>5</sup> *Jenks v. Trowbridge*, 48 Mich. 94.

<sup>6</sup> *Cables v. Prescott*, 67 Me. 582.

<sup>7</sup> *Benson v. Swan*, 60 Me. 160.

<sup>8</sup> *Walden v. Phillips*, 86 Ky. 302.

*Jenks v. Trowbridge*, 48 Mich. 94. An infant inherited an estate from its mother, but died without issue, and without brothers and sisters, but leaving uncles and aunts on the mother's side, and also a maternal grandfather. *Held*, that the estate passed to the grandfather: *Power v. Dougherty*, 83 Ky. 187.

§ 3133. **Who are Next of Kin.**—It was decided in Texas in 1878 that the next of kin are the nearest kindred to the paternal and maternal line, without regard to their relative nearness to the intestate, where the latter leaves neither wife, child, father, mother, nor descendants of either surviving; and in such case the estate is divided into two parts, one of which goes to the paternal line, and the other to the maternal line.<sup>1</sup> So paternal uncles and aunts and maternal uncles and aunts may take in Tennessee as next of kin;<sup>2</sup> so a son and grandson may be next of kin;<sup>3</sup> so the mother and brother and sisters may take equally as next of kin;<sup>4</sup> so nephews and nieces take as next of kin,<sup>5</sup> to the exclusion of grand nieces and nephews;<sup>6</sup> and grand uncles and aunts take to the exclusion of the issue of grand-uncles deceased;<sup>7</sup> so the grandmother may take as next of kin, to the exclusion of uncles and aunts.<sup>8</sup> But the husband is not "next of kin," within the meaning of those words as used in the Nebraska statute.<sup>9</sup> If a person die leaving no issue, father, mother, brother, or sister, but does leave nephews, nieces, and grand-nieces, his real property will not descend to a grand-niece under a statute requiring in such case that the property descend to the intestate's "next of kin in equal degree."<sup>10</sup> An equitable estate in fee-simple inherited from her mother by a daughter will not descend to her father, but to her sister, as next of kin of the blood of the mother, from

<sup>1</sup> *McKinney v. Abbott*, 49 Tex. 371. See *Morris v. Potter*, 10 R. I. 58.

<sup>2</sup> *In re Wills of Miller*, 2 Lea, 54, 62.

<sup>3</sup> *Gold v. Vaughan*, 4 Sneed, 245.

<sup>4</sup> *Smith v. Smith*, 4 R. I. 1. And see *Daboll v. Field*, 9 R. I. 266.

<sup>5</sup> *Snow v. Snow*, 111 Mass. 389.

<sup>6</sup> *Nelson v. Blue*, 63 N. C. 659.

<sup>7</sup> *Clayton v. Drake*, 17 Ohio St. 367.

<sup>8</sup> *McDowell v. Addams*, 45 Pa. St. 430.

<sup>9</sup> *Warren v. Englehardt*, 13 Neb. 283.

<sup>10</sup> *Davis v. Stinson*, 63 Me. 493.

whom the estate descended.<sup>1</sup> In Massachusetts, under the statute providing for descent to "next of kin in equal degree," the estate goes to the children of deceased brothers or sisters, to the exclusion of children of deceased nephews and nieces.<sup>2</sup> Under the New Hampshire statutes of descent and distribution, neither uncles nor cousins take by right of representation, but the uncles, being next of kin, take the whole estate as against the cousins.<sup>3</sup> If an intestate dies possessed of an estate by purchase, and leaves no descendants, but a mother, the estate descends to the mother as next of kin, to the exclusion of a sister.<sup>4</sup> In New Hampshire, land inherited from the father descends to the uncles and aunts, both on the father's and mother's side, in equal shares, they being the next of kin, excluding the children of a deceased aunt.<sup>5</sup> A great-uncle and first-cousin may be next of kin,<sup>6</sup> unless the inheritance came to the intestate by descent, gift, or devise from some ancestor;<sup>7</sup> so the grandfather and grandmother may take as next of kin;<sup>8</sup> so a single uncle or aunt will take in preference to several cousins;<sup>9</sup> and the father of an intestate dying without issue takes an estate which descended to the intestate from her sister, although the sister inherited the same through her maternal ancestor.<sup>10</sup>

ILLUSTRATIONS. — A died intestate, leaving no issue, no parents, no brother or sister, but leaving a nephew, S., and a niece, C., as his next of kin. *Held*, that S. and C. took his estate: *Snow v. Snow*, 111 Mass. 389. L. died intestate, without issue, leaving estate, which came to her by descent from a deceased brother. The statute provided that ancestral estate "shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be." *Held*, that the estate passed to the intestate's mother, brothers, and sisters, since they were, by the statute, of the same degree of kindred to

<sup>1</sup> *Tillinghast v. Coggeshall*, 7 R. I. 383.

<sup>2</sup> *Conant v. Kent*, 130 Mass. 178.

<sup>3</sup> *Page v. Parker*, 61 N. H. 65.

<sup>4</sup> *McAfee v. Gilmore*, 4 N. H. 391, 396.

<sup>5</sup> *Parker v. Mima*, 2 N. H. 460.

<sup>6</sup> *Smith v. Gaines*, 35 N. J. Eq. 65.

<sup>7</sup> *Bailey v. Ross*, 32 N. J. Eq. 546.

<sup>8</sup> *Knapp v. Windsor*, 6 Cush. 156;

*Latimer v. Rogers*, 3 Head. 692.

<sup>9</sup> *Taylor v. Bray*, 32 N. J. L. 182.

<sup>10</sup> *Morris v. Potter*, 10 R. I. 58.

the intestate: *Smith v. Smith*, 4 R. I. 1. K. died intestate, and possessed of property, leaving surviving her M. K., the mother of K.'s father, and W. W. and E. W., who were the father and mother of the intestate's mother, and no other next of kin. *Held*, that M. K., W. W., and E. W. were each entitled to a distributive share of the intestate's personal estate: *Knapp v. Windsor*, 6 Cush. 156. An intestate died without issue, and without having had either brother or sister, and without leaving a wife or father surviving him. His mother survived him, and by statute took a life estate in the lands. His nearest relatives at his death were two uncles, brothers of his father, and his aunt, sister of his mother. He had several cousins then living, children of two uncles, then deceased. After his death, and during his mother's lifetime, the two uncles, brothers of his father, and his aunt died, each leaving children surviving. *Held*, that the children of the aunt and the two uncles last deceased took to the exclusion of the children of the uncles and aunts who were deceased when he died: *Bailey v. Ross*, 32 N. J. Eq. 544. A died in 1817, leaving a daughter, B, to whom he devised land. B died in 1826, leaving a mother and sister surviving her. The statute of 1822 provided that an intestate estate should descend in equal shares to the children and their representatives, and if there were no children, it should be inherited equally by the next of kin, but that when any of the children of such intestate should die before the age of twenty-one years, and unmarried, or when any child of a person deceased testate should die before twenty-one years of age, and unmarried, such deceased child's share in the estate should, although its other parent be alive, be inherited by its surviving brothers and sisters. The statute of 1789 contained no provision relating to the descent of a deceased child's share in a testate estate. The disposition of intestate estate was the same by both statutes. *Held*, that B's property could not be regarded as a deceased child's share in the estate, as the will had taken effect before that time, but must be considered as intestate estate, and that her mother was entitled to the property as her next of kin: *Bell v. Scammon*, 15 N. H. 381.

**§ 3134. Degrees of Kindred — How Computed.** — In most of the states the degrees of kindred are computed according to the rules of the civil law.<sup>1</sup> By an early

<sup>1</sup> *McCracken v. Rogers*, 6 Wis. 278; *Chester*, 3 Day, 166; 3 Am. Dec. 265; *Clayton v. Drake*, 17 Ohio St. 367; *Martindale v. Kendrick*, 4 G. Greene, 307; *Bennett v. Toler*, 15 Gratt. 625; *Cloud v. Bruce*, 61 Ind. 171; *Taylor v. Bray*, 32 N. J. L. 182; *McDowell v.* 78 Am. Dec. 638. But see *Miller v. Addams*, 45 Pa. St. 430; *Hillhouse v. Speer*, 38 N. J. Eq. 567, 571. See

decision in California, degrees of consanguinity are computed according to the common law, except in cases of descent and distribution, when the rule of the civil law prevails.<sup>1</sup>

§ 3135. **Posthumous Children.**—The rule prevails in all the states that subsequently born children inherit the same as if they were living at the death of the intestate;<sup>2</sup> although in some states the time within which such children must be born to thus inherit is limited;<sup>3</sup> and in Tennessee neither half brothers and sisters, nor brothers and sisters, inherit, unless born before the intestate's death, or within ten calendar months thereafter.<sup>4</sup>

§ 3136. **Descents to and from Adopted Children.**—In Texas, the adopted child inherits to a certain extent, although the parent has legitimate children.<sup>5</sup> So in California, the adopted child is entitled to succeed by inheritance to the adoptive parents' estate.<sup>6</sup> So in Georgia.<sup>7</sup> In most all the states there are statutes providing for the adoption of children, and the rights to inheritance which they thereby obtain. This is a matter of purely statutory enactment, since by the common law adoption was unknown.<sup>8</sup> As to inheritance from an

*Ramsay v. Ramsay*, 7 Ind. 607; *Brennerman's Appeal*, 40 Pa. St. 115. See statutes of Alabama, Arizona, Connecticut, Delaware, Idaho, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, Oregon, South Carolina, Vermont, Washington, and Wisconsin.

<sup>1</sup> *People v. De la Guerra*, 24 Cal. 73. See statute of California, Georgia, Maryland, and North Carolina. Examine *Stimson's American Statute Law*, sec. 3139.

<sup>2</sup> See *Stimson's American Statute Law*, sec. 1413.

<sup>3</sup> See statutes of Kentucky, North Carolina, Virginia, and West Virginia.

<sup>4</sup> *Melton v. Davidson*, 86 Tenn.

129. See *Gaines v. Orrand*, 2 Heisk. 298.

<sup>5</sup> *Eckford v. Knox*, 67 Tex. 200, 204.

<sup>6</sup> *Deering's Civ. Code*, secs. 227, 228, 1386; *Estate of Newman*, 75 Cal. 213.

<sup>7</sup> *Face v. Klink*, 51 Ga. 220.

<sup>8</sup> *Eckford v. Knox*, 67 Tex. 200, 204; *Humphries v. Davis*, 100 Ind. 274, 276; 50 Am. Rep. 588; *King v. Davis*, 87 Ind. 590; *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321. See *Burrage v. Briggs*, 120 Mass. 103; *Wagner v. Varner*, 50 Iowa, 532; *Reinders v. Koppelman*, 68 Mo. 482; 30 Am. Rep. 802; *Stimson's American Statute Law*, secs. 6647, 6649. An adopted child of the husband does not, because of such adoption, become the heir of the wife: *Sharkey v. McDermott*, 16 Mo. App. 80.

adopted child, it was formerly held in Wisconsin that its estate will go to his blood relations, rather than to those by adoption, or that it would descend to his next of kin.<sup>1</sup> This rule was subsequently changed by statute in that state.<sup>2</sup> The early Wisconsin rule seems to prevail in Missouri, even though the estate came from the adoptive parent.<sup>3</sup> In Indiana, however, the surviving husband and adoptive father will inherit, in preference to the natural mother, land descended to an adopted child from the adoptive mother.<sup>4</sup>

ILLUSTRATIONS. — A statute provided that as to adopted children "the rights, duties, and relations between the parent and child by adoption shall thereafter, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth." A father adopted two children of his daughter's, and subsequently died intestate. *Held*, that the children so adopted would inherit from him the same as his own children, and would also inherit the share of their deceased mother: *Wagner v. Varner*, 50 Iowa, 532.

### § 3137. Descents to and from Illegitimate Children.

— In nearly all the states illegitimate children may inherit from their mother, and their mother may inherit from them. In many states they may inherit through their mother, while in others they may inherit from the father, where he has subsequently intermarried with the mother, and has acknowledged that he was the father of such child, or has adopted him in the manner provided by statute.<sup>5</sup> Under the Pennsylvania statute of 1855, illegitimate children may inherit from the mother, and the mother from them; but they may not inherit from each other.<sup>6</sup> By the common law an illegitimate child was

<sup>1</sup> *Hole v. Robbins*, 53 Wis. 514.

<sup>2</sup> See section 2272a of statute of Wisconsin.

<sup>3</sup> *Reinders v. Koppelman*, 68 Mo. 482.

<sup>4</sup> *Paul v. Davis*, 100 Ind. 422; *Humphries v. Davis*, 100 Ind. 274; 50 Am. Rep. 588; 100 Ind. 369.

<sup>5</sup> See *Stimson's American Statute Law*, sec. 6632; *Neil's Appeal*, 92 Pa. St. 193; *McBryde v. Patterson*, 78 N. C. 412; *Morison v. Palmer*, 8 Allen, 551; *Stoelz v. Doering*, 112 Ill. 234.

<sup>6</sup> *Woltemate's Appeal*, 86 Pa. St. 219. See *Grubbs's Appeal*, 58 Pa. St. 55; *Stoeckel's Appeal*, 64 Pa. St. 493.

*filius nullius*, and could not inherit his father's estate.<sup>1</sup> It is held in Kentucky that a bastard cannot inherit from his mother through her ancestors.<sup>2</sup> But a directly opposite rule has been laid down in Connecticut, since it is there held that a bastard has inheritable blood for the purposes of collateral as well as lineal descent through him, although there is no statute defining the rights of bastards, the court holding that that state had a common law of its own which regulated the matter.<sup>3</sup> A similar rule to that in Kentucky obtains in Michigan, where it is held that an illegitimate child is the heir of its mother, but may not claim as such any part of the estate of any of her kindred, either lineal or collateral.<sup>4</sup> In Virginia, an illegitimate child may take with one legitimate, under a devise to the mother for life, and upon the death to be divided among her children.<sup>5</sup> So in the last-named state a bastard may transmit an inheritance on the part of its mother; and where such bastard dies without children or descendants, the mother may inherit, as may also bastard brothers by other fathers;<sup>6</sup> and it has been held in Massachusetts, under a statute in that state, that an illegitimate child inherits a vested remainder belonging to his mother.<sup>7</sup> So the son of an illegitimate child will inherit the estate of an illegitimate aunt through his grandmother, in preference to the sister of such grandmother.<sup>8</sup> Illegitimate children as heirs of the mother differ nothing in law from the other children, and such child, omitted unintentionally from the mother's will, takes as though the mother had died intestate.<sup>9</sup> In Rhode Island, the

<sup>1</sup> Sneed v. Ewing, 5 J. J. Marsh. 460, 474; 22 Am. Dec. 41; Stoelz v. Doering, 112 Ill. 234.

<sup>2</sup> Jackson v. Jackson, 78 Ky. 390; 39 Am. Rep. 246. The statute relied on in this case reads: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother." See further, Stevenson v. Sullivan, 5 Wheat. 207; Curtis v. Hewens, 11 Met. 294.

<sup>3</sup> Dickinson's Appeal, 42 Conn. 491; 19 Am. Rep. 553.

<sup>4</sup> Watson v. Lion Brewing Co., 61 Mich. 595, 604.

<sup>5</sup> Bennett v. Toler, 15 Gratt. 588; 78 Am. Dec. 638.

<sup>6</sup> Garland v. Harrison, 8 Leigh, 368.

<sup>7</sup> White v. Curtis, 12 Gray, 54.

<sup>8</sup> Estate of Magee, 63 Cal. 414.

<sup>9</sup> Estate of Wardell, 57 Cal. 484.

illegitimate children of the same mother transmit an inheritance on the part of their mother, and a bastard sister may inherit from a bastard brother.<sup>1</sup> In Indiana, an illegitimate child may take by descent from its mother any estate which she would, if living, have taken by gift, devise, or descent from another;<sup>2</sup> and a mother of an illegitimate child may inherit its share of an estate acquired by it by adoption.<sup>3</sup> In North Carolina, upon the death of an illegitimate son, intestate, married, and without issue, leaving a legitimate half-sister born of the same mother, his real estate descends to such sister.<sup>4</sup> As a rule, a bastard legitimized by the legislature may inherit,<sup>5</sup> and such legitimized bastard may take lineally or collaterally from its father.<sup>6</sup> But an illegitimate sister of an illegitimate married woman dying intestate cannot take to the exclusion of her husband;<sup>7</sup> and brothers and sisters take in preference to an illegitimate child, under the law in force in Indiana in 1876.<sup>8</sup> The code of Louisiana makes a distinction between acknowledged natural children and adulterine children, allowing the former to take as legatees, but not the latter, except to a small amount.<sup>9</sup> Whatever rights a bastard may possess under existing laws, a law cannot reach back so as to impart to an illegitimate child the right to inherit.<sup>10</sup>

<sup>1</sup> *Briggs v. Greene*, 10 R. I. 495.

<sup>2</sup> *Parks v. Kirnes*, 100 Ind. 148.

<sup>3</sup> *Krug v. Davis*, 87 Ind. 590.

<sup>4</sup> *Powers v. Kite*, 83 N. C. 157.

<sup>5</sup> *Shelton v. Wright*, 25 Ga. 636.

<sup>6</sup> *McKamie v. Baskerville*, 2 Pickle, 459. See also *Williams v. Williams*, 11 Lea, 652; *Swanson v. Swanson*, 2 Swan, 459.

<sup>7</sup> *Scoggins v. Barnes*, 8 Bart. 560. It was said that the course of descent under the code would be first to the child or children of the illegitimate, if any there be; if none, then to the surviving husband or wife. If neither of the latter survive, then to the mother; and if there be no surviving mother,

then to the brothers and sisters by the mother, and their descendants: *Scoggins v. Barnes*, 8 Bart. 561. See *Riley v. Byrd*, 3 Head, 20; *Webb v. Webb*, 3 Head, 69.

<sup>8</sup> *Borroughs v. Adams*, 78 Ind. 160.

<sup>9</sup> *Gaines v. Hennen*, 24 How. 553.

<sup>10</sup> *Brown v. Belmade*, 3 Kan. 41. For an able presentation of the law in relation to bastards' rights to inherit, see *Dickinson's Appeal*, 42 Conn. 491; 19 Am. Rep. 553. For a determination of what acknowledgment is necessary under the California statute relating to adoption of an illegitimate child, see *Jessup's Estate*, 81 Cal. 408.

ILLUSTRATIONS. — A survived his sister and her only child, an illegitimate daughter. A died intestate, leaving no issue, but B, the son of the illegitimate daughter, survived him. *Held*, that B could not inherit from A: *Berry v. Owens's Heirs*, 5 Bush, 452. A statute provided that illegitimate children of an unmarried woman should inherit from the mother. Another statute provided that the property of an intestate should descend to the "children." *Held*, that the word "children," in the latter statute, had reference to lawful children only, and that the illegitimate children of a married woman were left subject to the common-law rule, and could not inherit from her: *Blacklaws v. Milne*, 82 Ill. 505; 25 Am. Rep. 339. C. died, leaving no parents, brothers, or sisters, and no blood relative nearer than an own cousin. Before C.'s death her sister had an illegitimate daughter, who had legitimate sons. Both the sister and her illegitimate daughter deceased before C., but the sons survived C. *Held*, that C.'s estate was inheritable by the sons through their mother and grandmother: *Dickinson's Appeal*, 42 Conn. 491; 19 Am. Rep. 553.

#### § 3138. Evidence Necessary to Establish Heirship. —

It is a general rule that a person claiming land by descent must entitle himself as heir of the person last seised in fee;<sup>1</sup> or, as the rule has been elsewhere laid down, where a party claims as heir, he must first establish affirmatively his relationship with the deceased, and second, negatively, that no other descendant exists to impede the descent to the plaintiff.<sup>2</sup> So heirship will not be inferred from the mere fact of relationship, as that the parties are brothers and sisters of the deceased;<sup>3</sup> and if required, some evidence, other than the name is necessary.<sup>4</sup> So where title is claimed to be in the father, because of his son's death, not only must the death of the son be shown, but also that he died without issue.<sup>5</sup> In Pennsylvania, it is held that a written title, sufficient to satisfy the court of the

<sup>1</sup> *Jackson ex dem. Lawrence v. Hilton*, 16 Johns. 96; *Bates v. Schroeder*, 13 Johns. 260.

<sup>2</sup> *Anson v. Stein*, 6 Iowa, 150, 152; *Payne's Adm'r v. Payne*, 29 Vt. 172; 70 Am. Dec. 402. Parties claiming as heirs must show their connection as

such with the intestate: *Chandler v. Bailey*, 89 Mo. 641.

<sup>3</sup> *Payne's Adm'r v. Payne*, 29 Vt. 172; 70 Am. Dec. 402.

<sup>4</sup> *Mooers v. Bunker*, 29 N. H. 420.

<sup>5</sup> *Stinchfield v. Emerson*, 52 Me. 465; 82 Am. Dec. 524.

heirship claimed, must be produced.<sup>1</sup> An illegitimate child, in order to take by descent real estate of his father, must prove the intestacy, and that there are no heirs resident in the United States.<sup>2</sup> To prove heirship in the collateral line, a party must show the descent of himself and the person last seised from some common ancestor, and the extinction of all those lines of descent which would otherwise be entitled before him.<sup>3</sup>

ILLUSTRATIONS. — A witness testified that the person died without issue, leaving his brother, his nephew, and niece. *Held*, incompetent, and that, to sustain the claim of heirship of the persons named, the relationship of the alleged brother to the deceased must be shown by proof of his descent from the parents of the deceased, and their marriage; and that the relationship to the deceased of the parents of the alleged nephew and niece must be shown, also their marriage, and that such parties were the issue of such marriage: *Morrill v. Otis*, 12 N. H. 466,

<sup>1</sup> *Lipman's Appeal*, 30 Pa. St. 180; 72 Am. Dec. 692.

<sup>2</sup> *Emerson v. White*, 29 N. H. 482, 492.

<sup>3</sup> *Cox v. Rash*, 82 Ind. 519.

**TITLE XXXV.**

**WILLS.**



## TITLE XXXV.

# WILLS.

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## CHAPTER CLIV.

### THE INSTRUMENT.

- § 3139. Will defined.
- § 3140. What papers or writings constitute a will.
- § 3141. Whether a paper is a deed or a will.
- § 3142. Extraneous papers, when part of will.
- § 3143. Writings which are not wills.
- § 3144. Form and requisites of will.
- § 3145. Contingent wills.
- § 3146. Partial wills — Wills imperfectly executed, and unexecuted wills.
- § 3147. Olographic wills.
- § 3148. Nuncupative wills — What are — Requisites and validity of.
- § 3149. Nuncupative wills — Who may make.
- § 3150. Nuncupative wills — What property may be willed.
- § 3151. Agreement to make will or to leave property — Expectation of compensation by will for services.
- § 3152. Joint or mutual wills.
- § 3153. Codicils.
- § 3154. Inclosing and depositing will for preservation, and delivery of will so deposited.
- § 3155. At what time will takes effect.

§ 3139. **Will Defined.**—An instrument is said to be a will, whatever its form, if the intention of the maker to dispose of his estate after death be sufficiently manifested, and this intention be lawful in itself, and the writing have the statutory formalities.<sup>1</sup> A will has been also “defined to be any instrument whereby a person makes a disposi-

<sup>1</sup> Wall v. Wall, 30 Miss. 91; 64 Am. Dec. 147; Babb v. Harrison, 9 Rich. Eq. 111; 70 Am. Dec. 203. “Will” includes codicils, under California statute: Deering’s Pol. Code, sec. 17, p. 5; Deering’s Civ. Code, sec. 14, p. 5.

tion of his property to take effect after his death.”<sup>1</sup> Another definition, adopted from Blackstone by the court in a recent case before the United States supreme court, declares a will to be “the legal declaration of a man’s intention which he wills to be performed after his death.”<sup>2</sup> Another element which enters into the determination of what is a will is set forth in the definition given by the court in a late Maryland case, where it is said that the “word ‘will’ has a technical meaning, and implies an instrument executed in conformity with prescribed formalities, but subject to alteration or cancellation at the volition of the maker,” to take effect after death;<sup>3</sup> and “it is this ambulatory quality which forms the characteristic of wills.”<sup>4</sup> The instrument, however, should not vest a present interest, because it is not then testamentary; it must only appoint what is to be done after the maker’s death, in order to constitute a will within the meaning of that word as determined by the adjudicated cases.<sup>5</sup>

### § 3140. What Papers or Writings Constitute a Will.

—It is held that although the intent be to make some instrument other than a will, yet if language testamentary in law be used, it is a will.<sup>6</sup> So “an instrument in any form, whether a deed-poll or an indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. It may be by an indorsement on a note; or by letter. Whatever be its form, if it vests no present interest, but only directs what is to be done after the death of the maker. it

<sup>1</sup> *Cover v. Stem*, 67 Md. 449; *Care v. Dennis*, 13 Md. 1.

<sup>2</sup> 2 Bla. Com. 499; cited in *Colton v. Colton*, 127 U. S. 300, 309, and in *Frew v. Clarke*, 80 Pa. St. 170, 178. See also *Bailey v. Bailey*, 5 Cush. 245.

<sup>3</sup> *Wilks v. Burns*, 60 Md. 64, 68.

<sup>4</sup> 1 Jarman on Wills, Randolph and Talcott’s notes, 26.

<sup>5</sup> *Turner v. Scott*, 51 Pa. St. 126, 134; *Book v. Book*, 104 Pa. St. 240, 245; *Frederick’s Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159; *Frew v. Clarke*, 80 Pa. St. 170.

<sup>6</sup> *Turner v. Scott*, 51 Pa. St. 126, 134; *Book v. Book*, 104 Pa. St. 240, 245.

is testamentary. The essence of the definition is, that it is a disposition to take effect after death. Nor does it matter that the person intended to make a note instead of a will. If he used language which the law holds to be testamentary, his intention is to be gathered from the legal import of the words he employed. No form of words is necessary to make a valid will. The form of the instrument is immaterial, if its substance is testamentary."<sup>1</sup> In conformity with the foregoing principles, various instruments have been held to be testamentary, although their form was other than that of a will. A paper which appears to be an assignment or gift, intended to be consummated in the testator's lifetime, has been held to be a will.<sup>2</sup> So bonds, checks, or bills of exchange, contracts, diaries, and letters may be testamentary.<sup>3</sup> So may a gift of land or disposition of property, to take effect after the death of the donor.<sup>4</sup> So a paper is a will, although imperfectly executed, where such want of execution results from the act of God, and is not consequent upon any change of purpose or abandonment of intent to make a testament by the testator.<sup>5</sup>

In determining whether an instrument is a testament or contract, the courts do not allow the use of language peculiar to either class of instruments, nor even the belief of the maker as to the character of the instrument, to control inflexibly their conclusion as to its character; but giving due weight to these circumstances, the courts look further, and will weigh all the language, as well as the facts and circumstances surrounding the parties and

<sup>1</sup> The court in *Frew v. Clarke*, 80 Pa. St. 170, 178; citing *Habergham v. Vincent*, 2 Ves. Jr. 204; *Hunt v. Hunt*, 4 N. H. 434; 17 Am. Dec. 434; *Morell v. Dickey*, 1 Johns. Ch. 153; *Turner v. Scott*, 51 Pa. St. 126; *Redfield on Wills*, 5; *Patterson v. English*, 71 Pa. St. 458; *Rose v. Quick*, 30 Pa. St. 225; *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159.

<sup>2</sup> *Wareham v. Sellers*, 9 Gill & J. 98; *Skerrett's Estate*, 67 Cal. 585.

<sup>3</sup> *Note to Burlington University v. Barrett*, 92 Am. Dec. 384.

<sup>4</sup> *Singleton v. Bremar*, 4 McCord, 12; 17 Am. Dec. 699; *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159.

<sup>5</sup> *Guthrie v. Owen*, 2 Humph. 202; 36 Am. Dec. 311; *Couch v. Couch*, 7 Ala. 519.

attending the execution of the paper, and will give to it such character as will best effectuate the manifest intention of the maker.<sup>1</sup> And it is held that a paper may be made a last will and testament by adoption, although it was not such at the time it was written.<sup>2</sup> So a paper intended as a memorandum may be made a will by the act of God, happening when the scrivener has not completed the formal will from the memorandum, the intention of the testator having continued until the act of God prevented the execution of the instrument; nor is an immediate or sudden death necessary, if the jury are satisfied, from the evidence, that the intention was unchanged respecting the provisions of the will.<sup>3</sup>

ILLUSTRATIONS.—A paper read, "M'd, September 4, 1884. At my death, my estate or my executor pay to July Ann Cover three thousand dollars. David Engel, of P. [Seal.] Witness: Columbus Cover." *Held*, to be testamentary, and not an obligation for the payment of money: *Cover v. Stem*, 67 Md. 449. An instrument in writing read as follows: "Know all men by these presents, that I, James McCully, of Pittsburgh, Pa., do hereby order and direct my administrators or executors, in case of my death, to pay Robert D. Clarke the sum of seventy-five thousand dollars, as a token of my regard for him, and to commemorate the long friendship existing between us. Witness my hand and seal this seventeenth day of April, A. D. 1872. James McCully. [L. s.]" *Held*, to be testamentary: *Frew v. Clarke*, 80 Pa. St. 170. A decedent wrote and signed on the back of a business letter, addressed to a man and his wife, the following, addressed to the wife: "After my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death." *Held*, a valid testamentary gift of personalty: *Byers v. Hoppe*, 61 Md. 207; 48 Am. Rep. 89. The payee of a note wrote upon the back: "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," and, having signed it, died before the note was paid. *Held*, entitled to be admitted to probate as a will: *Hunt v. Hunt*, 4 N. H. 434; 17 Am. Dec. 434. A paper properly attested and other-

<sup>1</sup> *Burlington University v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 376.

<sup>2</sup> *Boofter v. Rogers*, 9 Gill, 44; 52 Am. Dec. 680.

<sup>3</sup> *Boofter v. Rogers*, 9 Gill, 44; 52

Am. Dec. 680. A conveyance of what the grantor shall die seized of is a will: *Note to Kimbro v. Lytle*, 31 Am. Dec. 585. See note to *Carlton v. Cameron*, 38 Am. Rep. 621.

wise regular in form read: "I, A, out of my love for my sister B, do agree to make her my heir if she outlives me; and I, A, out of my love for my sister A, do agree to make her my heir if she outlives me." *Held*, a will: *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751. A soldier, in active military service during the late Civil War in the United States, wrote a letter to his sister substantially to the effect that if he was killed, he desired her to have all his property. *Held*, a will: *Botsford v. Krake*, 1 Abb. Pr., N. S., 112.

§ 3141. **Whether a Paper is a Deed or a Will.**—An instrument may be a will, although it is in the form of a deed, if it is revocable at pleasure, and is not to take effect until the death of the maker, and is properly attested and otherwise regular in form;<sup>1</sup> and this was also held where the writing commenced with the words "this deed of conveyance," and was in form a deed, and was acknowledged as such, it appearing that the words used were testamentary, and it was not to "take effect until after" the maker's death, and gave only the remainder of the property left after the payment of all the maker's debts.<sup>2</sup> "The line of separation between what constitutes a deed and a will is sometimes so shadowy as to make it extremely doubtful whether it is the one or the other. . . . If the intention be to convey a present estate, though the possession be postponed until after his death, the instrument is a deed; if an interest accruing, and having an effect after his death, it is a will."<sup>3</sup> And if it appear doubtful from the face of an instrument whether the person executing it intended it to operate as a deed or a will, it is proper to ascertain the intention of such person not only from the contents of the paper, but also from evidence showing how the maker really considered it.<sup>4</sup> An instrument in form of a deed is a will, where the property it purports to convey is an undivided interest in that of which the

<sup>1</sup> *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751. See *Jackson v. Culpepper*, 3 Ga. 569.

<sup>2</sup> *Cunningham v. Davis*, 62 Miss. 366.

<sup>3</sup> The court in *Williams v. Tolbert*, 66 Ga. 127-128.

<sup>4</sup> *Robertson v. Dunn*, 2 Murph. 133; 5 Am. Dec. 525.

grantor shall die seised.<sup>1</sup> So a paper may be partly a deed and partly testamentary.<sup>2</sup> But there is no middle ground in determining whether a paper is a deed or will, and it being not absolutely a will, it must be a deed, especially where it passes property in the donor's lifetime.<sup>3</sup>

ILLUSTRATIONS. — An instrument read: "Due at my death, to Haney Johnson, the sum of two thousand five hundred dollars from the general fund of my estate, as a gift. The condition of the above bond or obligation is such that whereas for the fidelity and obedience as well as the natural love and affection that I have for my daughter, Haney Johnson, I donate in the above manner what I design for her at my death." Said paper was duly attested, dated, and signed. *Held*, a will and not a deed: *Johnson v. Yancey*, 20 Ga. 707; 65 Am. Dec. 646. A deed was made by a father to his child, but was not delivered. *Held*, that it could operate as a will: *Crain v. Crain*, 21 Tex. 790. An instrument in the form of a deed granted certain property after the payment of debts and funeral expenses. *Held*, a will: *Hall v. Bragg*, 28 Ga. 330.

§ 3142. **Extraneous Papers, when Part of Will.** — A paper may be referred to and made a part of a will, if such paper is then in existence, and is so referred to in the will that it is capable of being identified from inspection or by the aid of parol or other evidence.<sup>4</sup> So notes made by the testator, payable at his death, when folded up with his will, referred to and clearly identified therein, and remaining in his possession at his death, are a part of his will.<sup>5</sup> And schedules referred to in a will and attached thereto should be construed with the will as one instrument together constituting the will of the testator.<sup>6</sup> But a paper purporting to be a schedule of advancements made

<sup>1</sup> *Watkins v. Dean*, 10 Yerg. 320; 31 Am. Dec. 583; *Brewer v. Baxter*, 41 Ga. 212; 5 Am. Rep. 530.

<sup>2</sup> *Burlington University v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 376. So in Georgia: *Stimson's American Statute Law*, sec. 2652.

<sup>3</sup> *Hileman v. Bouslaugh*, 13 Pa. St. 344; 53 Am. Dec. 474. As to distinction between wills and deeds or contracts, see note to *Burlington*

*University v. Barrett*, 92 Am. Dec. 383.

<sup>4</sup> *In re Shillaber*, 74 Cal. 144; 5 Am. St. Rep. 433; *Newton v. Seaman's Friend Society*, 130 Mass. 91; 39 Am. Rep. 433.

<sup>5</sup> *Fickle v. Snapp*, 97 Ind. 289; 49 Am. Rep. 449, and note 454. See also *Redfield on Wills*, 264.

<sup>6</sup> *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117.

by the alleged testator to some of his children does not form part of the will;<sup>1</sup> nor may a paper referred to in a will, but not in existence until after the will is executed, be admitted to probate as a part thereof.<sup>2</sup>

ILLUSTRATIONS. — A will bequeaths property to the executor, to be disposed of as directed in a letter to him, from the testator, of the same date, and such letter was written and signed after the will was executed, though on the same day. *Held*, that it could not be admitted to probate as a part thereof: *In re Shillaber*, 74 Cal. 144; 5 Am. St. Rep. 433.

§ 3143. **Writings Which are not Wills.** — Memoranda of advancements made by the deceased, no matter how strictly kept or clearly proved, or his dying words, spoken in the presence of all his family, no matter how just, unless they can be proved as a will, cannot be held to constitute a testament;<sup>3</sup> and a testamentary paper, by its terms, to take effect only on the happening of a certain contingency, cannot be admitted to probate as a will, if the contingency does not happen;<sup>4</sup> nor will an instrument constitute a will or testament, which is only an agreement, made before marriage, whereby the wife is vested with certain property, with the right to hold and dispose of the same;<sup>5</sup> nor will a paper which passes a present estate, or the present possession or interest in the property, and which is not dependent on the decease of the maker for effect.<sup>6</sup>

ILLUSTRATIONS. — A deed of gift contained the following provision: "It is hereby expressly stipulated and agreed between the parties to this deed of gift, that the said Elijah [grantor] reserves to himself a life estate in the tract of land herein, and hereby conveyed, to have, use, and enjoy the same during his natural life, and to take and enjoy the rents, issues,

<sup>1</sup> *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418.

<sup>2</sup> *In re Shillaber*, 74 Cal. 144; 5 Am. St. Rep. 433. As to adopting existing paper by reference, see note to *Fickle v. Snepp*, 49 Am. Rep. 454.

<sup>3</sup> *Sims v. Sims*, 39 Ga. 108; 99 Am. Dec. 450.

<sup>4</sup> *Morrow's Appeal*, 116 Pa. St. 440; 2 Am. St. Rep. 616.

<sup>5</sup> *Michael v. Baker*, 12 Md. 158; 71 Am. Dec. 593.

<sup>6</sup> See §§ 3140, 3141, *ante*.

and profits of the same during his life only." *Held*, not a will: *Williams v. Tolbert*, 66 Ga. 127. One who was about to leave home for a neighboring town wrote and signed a paper, commencing: "I am going to town with my drill, and i aint feeling good, and in case if i shouldend get back, do as i say on this paper," etc.; and he went to town, where he became ill, but was taken home, and died soon afterwards. *Held*, that the paper could not be admitted to probate as a will: *Morrow's Appeal*, 116 Pa. St. 440; 2 Am. St. Rep. 616.

§ 3144. **Form and Requisites of Will.** — No particular form of words is necessary to be followed in making a will of personal property;<sup>1</sup> and it is no doubt a rule which equally obtains in regard to all property which is disposable by will, the principle being, as deduced from the cases under the preceding sections, that, whatever the form of the instrument, if the language used be testamentary in law, and the intent of the maker is that the writing should have the force and effect of a will, it is sufficient to have it operate as such; and the statutes of Georgia and Louisiana provide that no particular form of words is necessary.<sup>2</sup>

Statutory provisions exist in most of the states to the effect that wills must be in writing. There are in certain states, however, exceptions as to nuncupative and olographic wills.<sup>3</sup> The construction of this statutory requirement is, however, more liberal than the words "in writing" would seem to imply, since a will written in lead pencil instead of ink may under such a statute be valid;<sup>4</sup>

<sup>1</sup> *Leathers v. Greenacre*, 53 Me. 561; *Mealing v. Pace*, 14 Ga. 596; *Brown v. Shand*, 1 McCord, 409; *High, Appellant*, 2 Doug. 515.

<sup>2</sup> *Stimson's American Statute Law*, sec. 2652. And see *Estate of Wood*, 36 Cal. 75; *Means v. Means*, 5 Strob. 167; *Rose v. Quick*, 30 Pa. St. 225; *Swett v. Boardman*, 1 Mass. 258; 2 Am. Dec. 16; *Lyles v. Lyles*, 2 Nott & McC. 531; *Johnson v. Yancey*, 20 Ga. 707, 708; 65 Am. Dec. 646; *Stewart v. Stewart*, 5 Conn. 317, 320; *In re Goods of Morgan*, L. R. 1 Pro. &

D. 214; *Robertson v. Smith*, L. R. 2 Pro. & D. 43; *Morvell v. Dickey*, 1 Johns. Ch. 153; 1 Jarman on Wills, Randolph and Talcott's notes, 33.

<sup>3</sup> *Stimson's American Statute Law*, sec. 2640, and supplement, sec. 2640; Cal. Civ. Code, sec. 1276; *Everhart v. Everhart*, 34 Fed. Rep. 82; *Sutton v. Sutton*, 5 Harr. Del. 459; *Rigg v. Wilton*, 13 Ill. 15; 54 Am. Dec. 419; 1 *Redfield on Wills*, 165, 166.

<sup>4</sup> *Myers v. Vanderbilt*, 84 Pa. St. 510; 24 Am. Rep. 227; *In re Dyer*, 1 Hagg. Ecc. 219.

and it is further held that the fact that a will is engraved, or wholly or partly printed or lithographed, does not invalidate it,<sup>1</sup> since "the method of recording the body of the instrument is not of great moment, the formality of the execution being the essential part. Nor will the leaving of blank spaces in the will render it void."<sup>2</sup> While a will should be dated, yet the fact that it is wrongly dated, or not dated at all, does not of itself make the will void, since the date is not a material part of the will.<sup>3</sup>

**§ 3145. Contingent Wills.**—A contingent will is one which is made to depend upon the happening of a contingency, and if it does not happen, the will ought not to be admitted to probate.<sup>4</sup> "But there are two points to be settled before a will can be rejected from probate on

<sup>1</sup> 2 Bla. Com., Chitty's notes, 376; 1 Jarman on Wills, Randolph and Talcott's notes, 32; 1 Redfield on Wills, 165, 166.

<sup>2</sup> 1 Jarman on Wills, Randolph and Talcott's notes, 33, note. In connection with this requirement that a will must be in writing, it is held in a late Wisconsin case that a will may be valid though written in a language not understood by the testator: Will of Walter, 64 Wis. 487; 54 Am. Rep. 641. The court says: "This is an interesting, and perhaps an important, question. It has not heretofore been raised in this court, to our knowledge, and the industry of counsel has failed to find a direct adjudication of the question elsewhere. However, in Redfield on Wills, to the statement in the text that 'it seems to be well settled that the testator may put his will in any language he may choose,' there is a note, in which the author says: 'We doubt if the common law will allow of a written will being expressed in a language not understood by the testator; that would seem indispensable to any understanding execution of the instrument': Vol. 1, 166 (4th ed.), note 8. No case or authority is cited to support the opinion intimated in the last extract. The reason given for this opinion is, in effect, that a person cannot have an

understanding of the contents of an instrument unless it be written in a language he knows. True, he may not get such an understanding by reading the instrument himself, but there are other methods by which he can be accurately informed thereof, although he may not be able to read understandingly a word of the instrument. A vast amount of accurate knowledge is alone imparted to the mass of mankind by means of translations from languages understood by but few. . . . The question is not by what means or instrumentalities the signer was informed of the contents of the instrument, but did he know its contents when he signed it? No good reason is perceived why this is not also true of wills; . . . the court should require satisfactory proof that the testator was correctly informed of the contents of the instrument he was about to execute."

<sup>3</sup> Deakins v. Hollis, 7 Gill & J. 311; Wright v. Wright, 5 Ind. 389. As to the use of particular words, such as "devise," "bequest," "land," "gift," "premises," and the like, see 1 Redfield on Wills, 5, 6, 681; Lawson's Concordance.

<sup>4</sup> 1 Jarman on Wills, Randolph and Talcott's notes, 28; 1 Redfield on Wills, 257 et seq.

the ground that it is a conditional will, and that the condition has failed: 1. Whether the intention of the testator is to make the validity of the will dependent upon the condition, or merely to state the circumstances and inducements which led him to make a testamentary provision; and 2. If the language clearly imports a condition, whether it applies to and affects the whole will, or only some parts of it.”

ILLUSTRATIONS. — A will read, “If I never get back home, I leave you everything I have,” and the maker of the will returned home. *Held*, a contingent will, but that it should not be probated as a will: *Maxwell v. Maxwell*, 3 Met. (Ky.) 101.

§ 3146. **Partial Wills — Wills Imperfectly Executed, and Unexecuted Wills.** — A person of sound mind even *in extremis* may make a partial will or gift; and the fact that he attempts at the same time, and as part of the same transaction, to dispose of the whole of his property, but for some cause the disposition is ineffectual as to part of it, will not prevent its being effectual as to the other part.<sup>2</sup> So a will which purports to dispose of both real and personal estate may be established as a valid testamentary disposition of the personalty, although it may not have been so published as to constitute a legal disposition of the realty.<sup>3</sup> And where a will was finished with the exception of the attestation clause and the clause appointing an executor, and the draughtsman left, and did not return until the next day, when the testator was mentally incapable of finishing it, and filled in those clauses himself, it was admitted to probate as far as the personalty was concerned, it comprising within its scope all the objects of the testator’s bounty, and the instrument showing that nothing in the nature of a deduction from or charge upon the bequests would have been added.<sup>4</sup>

<sup>1</sup> *Damon v. Damon*, 8 Allen, Am. Dec. 183. See *Ellis v. Ellis*, 15 Ala. 296; 50 Am. Dec. 132.

<sup>2</sup> *Henschel v. Maurer*, 89 Wis. 576; 2 Am. St. Rep. 757.

<sup>3</sup> *Guthrie v. Owen*, 2 Humph. 202; 38 Am. Dec. 311. As to unexecuted wills, see note *Id.* 316.

<sup>4</sup> *Offutt v. Offutt*, 3 B. Mon. 162; 38

§ 3147. **Olographic Wills.**—Any instrument intended as a will, entirely written, dated, and signed by the testator, is clothed with all the formalities of law required to constitute a valid olographic will.<sup>1</sup> The requisites of an olographic will are a matter of statutory enactment in many states. These provisions, however, differ but little. Some of them provide that such will must be subscribed by the testator, or his name inserted, while in others it is sufficient if it is signed like any other will; and three of the states require that such will shall be proved by a certain number of witnesses; while in some states it is necessary that the will be found among the testator's valuable papers, or in a special place, lodged for safe-keeping; while in none of them is attestation by witnesses required.<sup>2</sup> But it is decided in California that a will consisting of a printed form, with the blanks filled in with the testator's handwriting, is not an olographic will, and that no part of it can stand;<sup>3</sup> though script may be proved as an olographic will, although attested by subscribing witnesses.<sup>4</sup> And an instrument will be established as such will, although it has upon it an attestation clause unwitnessed.<sup>5</sup> But such will is not sufficiently signed when the testator writes his name at the commencement thereof, unless it appears affirmatively, from something on the face of the paper, that the testator meant it as his signature.<sup>6</sup> Although an olographic will is otherwise complete, yet it is not sufficiently signed by an indorsement on the back as follows: "Roy's will,"—that being the testator's name.<sup>7</sup>

<sup>1</sup> Ehrenberg's Succession, 21 La. Ann. 280; 99 Am. Dec. 729. See also, as to the requisites and sufficiency of an olographic will in Louisiana, the statutes of that state; *State v. Martin*, 2 La. Ann. 667; *Lagrange v. Merle*, 5 La. Ann. 278; 52 Am. Dec. 591; *Philbrick v. Spangler*, 15 La. Ann. 46; *Williams v. Hardy*, 15 La. Ann. 286. See also, on olographic wills, note to *Lagrange v. Merle*, 52 Am. Dec. 591.

<sup>2</sup> Stimson's American Statute Law, sec. 2645, and supplement, sec. 2645.

<sup>3</sup> *Estate of Rand*, 61 Cal. 468; 44

Am. Rep. 555; see *Estate of Billings*, 64 Cal. 427.

<sup>4</sup> *Brown v. Beaver*, 3 Jones, 516; 67 Am. Dec. 255.

<sup>5</sup> *Hill v. Bell*, Phill. (N. C.) 122; 93 Am. Dec. 583.

<sup>6</sup> *Ramsey v. Ramsey's Executor*, 13 Gratt. 664; 70 Am. Dec. 438; *Roy v. Roy*, 16 Gratt. 418; 84 Am. Dec. 696.

<sup>7</sup> *Roy v. Roy*, 16 Gratt. 418; 84 Am. Dec. 696. Olographic will should be dated: *Estate of Martin*, 58 Cal. 530; see *Clarke v. Ransom*, 50 Cal. 595.

**ILLUSTRATIONS.**—The writer of an olographic will placed it in a trunk with his moneys and valuable papers, and left the trunk and contents in a friend's house for safe-keeping, informing him of all the contents, and that he had a presentiment of soon dying. *Held*, that the olograph was "found among the valuable papers or effects," within the meaning of a statutory requirement for deposit: *Hill v. Bell*, Phill. (N. C.) 122; 93 Am. Dec. 583. A document, written, signed, and dated entirely by the hand of the testator, read as follows: "\$100,000. New Orleans, January 25, 1848. Four years from and after my death I hereby authorize and direct (and will) my executors to pay unto Francis Pena one hundred thousand dollars. John McDonogh." *Held*, valid as an olographic will: *Pena v. New Orleans*, 13 La. Ann. 86; 71 Am. Dec. 506.

**§ 3148. Nuncupative Wills—What Are—Requisites and Validity of.**—A verbal disposition of his property made by the testator *in extremis* constitutes a nuncupative will, and should be afterwards reduced to writing.<sup>1</sup> This last provision is a statutory requirement in most of the states, and in some of them the will is declared to be absolutely void unless it is so written out. Such statutes limit the time within which the will must be reduced to writing.<sup>2</sup> Nuncupative testaments in Louisiana must be drawn up in writing by the testator, or some person for him, and may be by public act or private signature, and must be signed by the testator, if he knows how; or if he does not, then his inability so to do must be noted, and must be signed by witnesses, or by one for all if the others cannot write. If it be under private signature, it must be written by the testator, or by some one for him, and must be read to the witnesses in the testator's presence, signed

<sup>1</sup> 4 Kent's Com. 576; *In re Hebdon's Will*, 20 N. J. Eq. 473; *Sykes v. Sykes*, 2 Stew. 364; 20 Am. Dec. 40. See *Winn v. Bob*, 3 Leigh, 140; 23 Am. Dec. 258; *Prince v. Hazleton*, 20 Johns. 503; 11 Am. Dec. 307; *Yarnall's Will*, 4 Rawle, 46; 26 Am. Dec. 115. Any person may at any time make a verbal will in some of the states: See statutes of Arizona, Iowa, Michigan, and New Mexico.

<sup>2</sup> Statutes of Alabama, Arizona, Arkansas, California, Colorado, Dakota, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, and Wisconsin: *Stimson's American Statute*

and witnessed.<sup>1</sup> In California such wills are not required to be in writing nor attested with any formalities.<sup>2</sup> But as a rule, statutes relative to nuncupative wills must be strictly construed; and where certain formalities are required by statute, they must be complied with.<sup>3</sup> So a signed writing intended as a will, but not duly attested, cannot be set up as a nuncupative will,<sup>4</sup> although an imperfect written will may have effect as a nuncupative will, if its non-completion in legal form resulted from the act of God, or from any cause other than an actual intention to abandon it or postpone its consummation.<sup>5</sup> But if such nuncupative will nowhere contains a declaration that it was written by a notary, it is a nullity.<sup>6</sup> And in the same state in which the last case was decided it was determined that, under an early statute which required such will to be dictated by the testator, the word "dictation" was used in a technical sense, and meant to pronounce orally what was destined to be written at the same time by another;<sup>7</sup> also, that a nuncupative will resting upon the testimony of the notary before whom it was executed and two witnesses was void, and not in compliance with the then existing law.<sup>8</sup>

The reason of the rule as to strict compliance with the statutory requisites partly exists because nuncupative wills are not favored in law, owing to the temptation and

Law, sec. 2704, supplement, sec. 2704; *Welling v. Owings*, 9 Gill, 467. As to nuncupative wills, see note to *Sykes v. Sykes*, 20 Am. Dec. 44; and to *Arnett v. Arnett*, 27 Ill. 247; 81 Am. Dec. 230.

<sup>1</sup> *Voorhies's Rev. Civ. Code*, 1875, arts. 1575, 1582.

<sup>2</sup> *Deering's Civ. Code*, secs. 1288, 1289.

<sup>3</sup> *Taylor's Appeal*, 47 Pa. St. 31; *Morgan v. Stevens*, 78 Ill. 287; *Yarnall's Will*, 4 Rawle, 46; 26 Am. Dec. 115; *Biddle v. Biddle*, 36 Md. 630; *Lucas v. Goff*, 33 Miss. 629; *Mitchell v. Vickers*, 20 Tex. 377.

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<sup>4</sup> *Stamper v. Hooks*, 22 Ga. 603; 68 Am. Dec. 511; *Reese v. Hawthorn*, 10 Gratt. 548.

<sup>5</sup> *Offutt v. Offutt*, 3 B. Mon. 162; 38 Am. Dec. 183.

<sup>6</sup> *Dorrie's Succession*, 37 La. Ann. 833. See further, as to the form and requisites of such will in Louisiana, *Devall v. Palma*, 20 La. Ann. 202; *Shannon v. Shannon*, 16 La. Ann. 8; *Lawson v. Lawson*, 12 La. Ann. 603.

<sup>7</sup> *Prendergast v. Prendergast*, 16 La. Ann. 219; 79 Am. Dec. 575.

<sup>8</sup> *Breaux v. Gallusseaux*, 14 La. Ann. 233; 74 Am. Dec. 430.

facility of committing frauds in setting up such wills.<sup>1</sup> And for the same reason the testamentary capacity of the maker of such wills and the *animus testandi* must be shown by clear evidence.<sup>2</sup> The rule as to strict compliance with the statutes in making nuncupative wills does not, however, conflict with the rule that no set form of words is necessary, and that any words that express a clear intention to give the estate to a certain person will be sufficient to pass the property. Nor is it necessary that the testator should call upon persons present, by name, to become witnesses to his will. Any form of expression, however imperfectly stated, so that it conveys to the minds of those to whom it is addressed the idea that the testator desires them, or some of them, to bear witness to the disposition he is making of his property, will be deemed a compliance with the statute in that regard.<sup>3</sup> But the statutes of most of the states require that two—in some states three—witnesses should have been present, and have been requested by the testator to be witnesses to such nuncupative will;<sup>4</sup> and it would seem that at least one such witness is necessary to the validity of such will.<sup>5</sup>

ILLUSTRATIONS. — B., being *in extremis*, requests R. to write his will, which he does at B.'s dictation, and B. attempts to sign it, but cannot, and requests R. to sign it for him. While R. is complying, B. swoons, and dies without further attempt to execute the will. Three witnesses are present, and hear the bequests, and sign the will as witnesses. *Held*, a good nuncupative will: *Phoebe v. Boggess*, 1 Gratt. 129; 42 Am. Dec. 543. A testator made a valid nuncupative will, but lived nine days thereafter,

<sup>1</sup> Yarnall's Will, 4 Rawle, 46; 26 Am. Dec. 115; *Lucas v. Goff*, 33 Miss. 629.

<sup>2</sup> Yarnall's Will, 4 Rawle, 46; 26 Am. Dec. 115; *Dorsey v. Sheppard*, 12 Gill & J. 192; 37 Am. Dec. 77; *Lucas v. Goff*, 33 Miss. 629.

<sup>3</sup> *Weir v. Chidester*, 63 Ill. 455; *In re Will of Hebden*, 20 N. J. Eq. 478; *Winn v. Bob*, 3 Leigh, 140; 23 Am. Dec. 258; *Garner v. Lansford*, 12 Smedes & M. 729; *Sampson v. Brown*, 22 Ga. 293; *Babineau v. Le Blanc*,

14 La. Ann. 729; *Gwin v. Wright*, 8 Humph. 639; *Arnett v. Arnett*, 27 Ill. 247; 81 Am. Dec. 227. But see *Dawson's Appeal*, 23 Wis. 90.

<sup>4</sup> *Stimson's American Statute Law*, sec. 2703.

<sup>5</sup> *Arnett v. Arnett*, 27 Ill. 247; 81 Am. Dec. 227; *Dockenn v. Robinson*, 26 N. H. 372; *Lucas v. Goff*, 33 Miss. 629; *Biddle v. Biddle*, 36 Md. 630; *Babineau v. Le Blanc*, 14 La. Ann. 729; *Garner v. Lansford*, 12 Smedes & M. 558.

and possessed the capacity meanwhile to execute a written one, and could have executed it. *Held*, that the nuncupative will was void: *Carroll v. Bonham*, 42 N. J. Eq. 625. A statute provided that a nuncupative will must be made "in the time of the last sickness" of the testator. Where one in his last illness, believing it would probably result in death, but not without hope of recovery, executed his will as required by the statute, *held*, not invalid because he may have had time and opportunity to reduce it to writing: *Harrington v. Stees*, 82 Ill. 50; 25 Am. Rep. 290. One suffering from pulmonary consumption made an alleged nuncupative will, but lived for nine days thereafter. *Held*, that it could not be admitted to probate as his will: *Yarnall's Will*, 4 Rawle, 46; 26 Am. Dec. 115. The testator, in making a nuncupative will, said to two witnesses: "I wish to make a disposition of my effects." *Held*, a sufficient compliance with the statute concerning a requirement as to witnesses: *Baker v. Dodson*, 4 Humph. 342; 40 Am. Dec. 650.

**§ 3149. Nuncupative Wills—Who may Make.**—Soldiers engaged in active service and sailors at sea may make nuncupative wills, and in some states any person *in extremis*, or any person at home or away from home and taken suddenly ill, may make such will.<sup>1</sup> But a soldier at home on a furlough is not in actual military service within the statutory provisions relating to a soldier's right to make a nuncupative will.<sup>2</sup>

**§ 3150. Nuncupative Wills—What Property may be Willed.**—Only personal property is disposable by a nuncupative will in many of the states, while in other states the amount of property which may be disposed of by such wills is limited; but in a number of the states such wills may be of real or personal estate, or both.<sup>3</sup> But the term "property," in a statute, may include land.<sup>4</sup>

**§ 3151. Agreement to Make Will or to Leave Property—Expectation of Compensation by Will for Services.**—

<sup>1</sup> *Stimson's American Statute Law*, secs. 2700-2702. See *Ex parte Turner*, 24 S. O. 211; *Jarman on Wills*, Randolph and Talcott's notes, 240, and note.

<sup>2</sup> *Will of Smith*, 6 Phila. 104.

<sup>3</sup> *Stimson's American Statute Law*, secs. 2700, 2702, 2705.

<sup>4</sup> *Moffett v. Moffett*, 67 Tex. 642.

"There can be no doubt of the legal right of one having the exclusive ownership of property to enter into a contract to execute a will in favor of the other contracting party, but such transaction cannot be properly termed a testamentary disposition of property." So one may make a valid agreement, binding himself legally to make a particular disposition of his property by last will and testament.<sup>1</sup> And a grantee in a deed absolute may bind himself by parol to devise the property to a designated beneficiary, and if in pursuance thereof he makes a will, it is irrevocable, and if he fails to execute it, it will be a fraudulent violation of his contract, against which the beneficiary may have relief in equity.<sup>2</sup> So parties may agree to make mutual wills, which agreement will be valid.<sup>4</sup> Instances other than that of express agreements to make wills exist, as where services are rendered by a son or other person or relative, in expectation or promise of reward, in which case, if the will be not made, the agreement may be enforced as a contract; although where a son remains at home, and renders services to his father under a belief that he will be compensated by will or otherwise, but leaves the amount and mode of compensation to the father, in such case, if a provision be made by will, or in any mode, the son will be bound, without regard to the fact whether such provision be satisfactory or not.<sup>5</sup>

ILLUSTRATIONS. — A nephew, induced by a letter written to him by his uncle, to the effect that if he would come and take care of him and his wife, he would leave him all his fortune,

<sup>1</sup> Wilks v. Burns, 60 Md. 64, 70.

<sup>2</sup> Johnson v. Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773.

<sup>3</sup> Anding v. Davis, 38 Miss. 574; 77 Am. Dec. 658.

<sup>4</sup> Izard v. Middleton, 1 Desaus. Eq. 116; Rivers v. Rivers, 3 Desaus. Eq. 190; 4 Am. Dec. 609. See note to Johnson v. Hubbell, 66 Am. Dec. 783-790, as to agreement to dispose of property to a particular person; agreement to devise, validity of, and how

enforced; power of equity to enforce agreements to make wills; power of court, where there is a contract, to devise. As to liability on agreements to make disposition of property by will, see note to Hawkins v. Ball's Adm'r, 68 Am. Dec. 759.

<sup>5</sup> Lee's Appeal, 53 Conn. 363. As to agreement to dispose of property by will, see notes to Bolman v. Overall, 60 Am. Rep. 111, and note to Johnson v. Hubbell, 66 Am. Dec. 783.

went to the uncle's and took care of both him and his aunt for ten years, when the uncle died, leaving all his property to others. *Held*, that the promise to the nephew might be enforced as a contract: *Schutt v. Methodist etc. Society*, 41 N. J. Eq. 115. A and B mutually agreed by parol to make wills of their real and personal estate, each in favor of the other, and the wills were so made; but B afterwards made another will in favor of other parties, and died. *Held*, that the agreement was a contract for the sale of lands within the statute of frauds, and was void: *Gould v. Mansfield*, 103 Mass. 408; 4 Am. Rep. 573.

§ 3152. **Joint or Mutual Wills.**—Joint or mutual wills are valid by statute in California;<sup>1</sup> but such will may be revoked by either party by a subsequent will, or by other express or implied acts.<sup>2</sup> So a will executed jointly by two persons is valid where it simply professes to dispose of all the estate of the one who should first die to the survivor;<sup>3</sup> and a will executed jointly by a husband and wife, devising an estate of which he is the sole owner, may, on his death, be sustained as a valid will of the husband alone.<sup>4</sup> But an instrument by which a husband and wife jointly attempt to make a testamentary disposition of the property of both, to treat it as a joint fund, jointly devising the real property of the wife, and jointly giving legacies out of the personalty of both, cannot be admitted to probate as the will of either or both. Such an instrument is in its nature irrevocable, and contravenes the policy of the law.<sup>5</sup> Such testament is not in its character either a joint will or a separate one.<sup>6</sup> So a joint will conditioned to take effect on the death of both is invalid;<sup>7</sup> though tenants in common of land owning personalty in severalty may make a joint will disposing of all their property severally which will take effect on the death of all.<sup>8</sup> But if a will is

<sup>1</sup> Deering's Civ. Code, sec. 1279. See also statutes of Dakota, Georgia, Louisiana, Montana, and Utah.

<sup>2</sup> See statutes of the states cited under last note; *Schumaker v. Schmidt*, 44 Ala. 454; 4 Am. Rep. 135.

<sup>3</sup> *Lewis v. Scofield*, 26 Conn. 452; 68 Am. Dec. 404.

<sup>4</sup> *Rogers*, Appellant, 11 Ma. 303.

<sup>5</sup> *Walker v. Walker*, 14 Ohio St. 157; 82 Am. Dec. 474.

<sup>6</sup> *Clayton v. Leverman*, 2 Dev. & B. 558.

<sup>7</sup> *Hershy v. Clark*, 35 Ark. 17; 37 Am. Rep. 1.

<sup>8</sup> *Betts v. Harper*, 39 Ohio St. 639; 48 Am. Rep. 477.

made jointly by a husband and wife, in which some of the bequests are several and some joint, the former cannot be executed and the latter rejected, as the several provisions may have been influenced by the joint, and the intention of the testator would be thus defeated.<sup>1</sup>

ILLUSTRATIONS.—A writing was executed by two persons, purporting to be a will, whereby, in consideration of mutual friendship, they mutually promised that, in the event of the death of either, the survivor should pay the expenses of sickness and burial, and should enter into the possession of the estate of the other. *Held*, not a compact, but a will, revocable by either, and that a subsequent separate will of either would operate as such revocation: *Schumaker v. Schmidt*, 44 Ala. 454; 4 Am. Rep. 135. Two sisters executed a duly attested instrument, substantially as follows: "Know all men, that we, J. and P., do covenant and agree that, for the love we bear to each other, whichever of us be the longest lived shall be the heir of the other." *Held*, that this was a good will: *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751. Two sisters executed an instrument in due form as a will, which read as follows: "We, A and B, make this our last will and testament, in manner and form as follows, viz.: That in the event of the death of either of us, testators, the surviving sister shall have and hold for her own use and benefit, to dispose of in any manner whatever that shall seem most expedient, all of the real and personal estate we shall be possessed of." *Held*, that it was a valid will, which would operate on the death of the sister who should die first: *Lewis v. Scofield*, 26 Conn. 452; 68 Am. Dec. 404.

§ 3153. **Codicils.**—A codicil is an *addendum* to a will, and it may enlarge or curtail the dispositions made in the will, may add new devisees or legatees, and in any other manner change the dispositions made in the will, and it is regarded with the will as but one instrument, taking effect from the date of the codicil;<sup>2</sup> and it is to be construed with the will.<sup>3</sup> But it is held that although for some pur-

<sup>1</sup> *Walker v. Walker*, 14 Ohio St. 157; 82 Am. Dec. 474. As to joint wills, see note to *Lewis v. Scofield*, 68 Am. Dec. 407.

<sup>2</sup> *Williams on Executors*, 8; *Payne v. Payne*, 18 Cal. 291; *Leavens v. Butler*, 8 Port. 380. See also *Rose v.*

*Drayton*, 4 Rich. Eq. 260; *Moors v. White*, 6 Johns. Ch. 360; *Murray v. Oliver*, 6 Ired. Eq. 55; *Negley v. Gard*, 20 Ohio, 310.

<sup>3</sup> *Leavens v. Butler*, 8 Port. 380; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Lee v. Pindle*, 12 Gill & J. 288.

poses a will and a codicil will be regarded as one instrument, yet that they should not be so regarded in opposition to a manifest intention of the testator to the contrary.<sup>1</sup> A codicil should be attested with all the solemnity required for the original will; and a legal attestation of the codicil may by reference, or where it is on the same piece of paper, supply a defective attestation of the will.<sup>2</sup>

**§ 3154. Inclosing and Depositing Will for Preservation, and Delivery of Will so Deposited.**—Special provisions exist in many of the American states relative to the inclosure of the will; the sealing of, and indorsement upon the wrapper; the depositing of the will with a certain official; the giving by such official of a certificate of deposit; the person to whom the will may be delivered during the life of the maker, or to whom delivery should be made after the testator's death; and the manner and place of opening the will. These provisions, however, seem only to be permissive, and are evidently designed for the testator's benefit, and to avoid the loss of his will, or its destruction, or the exercise of fraud by third parties.<sup>3</sup>

**§ 3155. At What Time Will Takes Effect.**—It is a legal maxim that *testamentum omne morte consummatum*.<sup>4</sup> Since, therefore, a will is completed by the testator's death, it necessarily follows that its ambulatory character is not lost until that time, and that the will does not take effect till then.<sup>5</sup> So words of survivorship in a will

<sup>1</sup> Alsop's Appeal, 9 Pa. St. 374, 382.

<sup>2</sup> 1 Jarman on Wills, Randolph and Talcott's notes, 217, 260, et seq. As to validity and effect of unattested codicils, see *Id.* 229, 232, 234-237, 264. As to revocation, republication, and revival by codicil, see the several sections under this title relating thereto.

<sup>3</sup> Stimson's American Statute Law, secs. 2690-2692. See § 3192, *Ante-mortem Probate*.

<sup>4</sup> Co. Lit. 232. See 1 Jarman on Wills, Randolph and Talcott's notes, 591 et seq.

<sup>5</sup> Stimson's American Statute Law, sec. 2806; *Marsh v. Marsh*, 3 Jones, 77; 64 Am. Dec. 598; *Schouler on Executors and Administrators*, sec. 55; *Lorieux v. Keller*, 5 Iowa, 196; 68 Am. Dec. 696; *Grimes's Estate v. Norris*, 6 Cal. 261; 65 Am. Dec. 645; *Wakesfield v. Phelps*, 37 N. H. 295;

refer to the date of the testator's death, wherever a gift takes effect in possession immediately upon the death, unless some other time is indicated by the will.<sup>1</sup> And it is of no importance, in determining when a will is to be deemed to have been made for the purpose of ascertaining what statute governs it, that an erasure was made by the testator of the executor's name after the execution of the will, and that another name was inserted in its place.<sup>2</sup>

By the very act of executing a will, the presumption arises that the testator at that time intended to dispose of all his property, and did not intend that any part of it should be intestate estate.<sup>3</sup> The effect, however, of a will depends in a great measure on its construction, and any law which changes a rule of construction that applies to and governs any of the provisions of the will does to that extent determine its legal effect.<sup>4</sup>

*Fox v. Phelps*, 17 Wend. 393; *Gold v. Judson*, 21 Conn. 616; *Hamilton v. Flinn*, 21 Tex. 713. As to the English rule, see *Raines v. Barker*, 13 Gratt. 128; 67 Am. Dec. 762.

<sup>1</sup> *Presley v. Davis*, 7 Rich. Eq. 105; 62 Am. Dec. 396; *Vass v. Freeman*, 3 Jones Eq. 221; 69 Am. Dec. 734. See statutes of California, Dakota, Montana, and Utah: *Stimson's American Statute Law*, sec. 2806.

<sup>2</sup> *Raines v. Barker*, 13 Gratt. 128; 67 Am. Dec. 762.

<sup>3</sup> *Leigh v. Savidge*, 14 N. J. Eq. 124; *Gilpin v. Williams*, 17 Ohio St. 396; *Gourley v. Thompson*, 2 Sneed, 387; *Foust v. Ireland*, 1 Jones, 184.

<sup>4</sup> *Cunningham v. Cunningham*, 18 B. Mon. 19; 68 Am. Dec. 718. As to effect of subsequently enacted statutes, see *Raines v. Barker*, 13 Gratt. 128; 67 Am. Dec. 762.

## CHAPTER CLV.

## THE TESTATOR.

- § 3156. Who may make will.
- § 3157. Will drawn by person other than testator.
- § 3158. Definition and test of testamentary capacity.
- § 3159. Fraud and undue influence in procuring will.
- § 3160. Belief in spiritualism.
- § 3161. Insanity.
- § 3162. Lucid intervals.
- § 3163. Partial insanity.
- § 3164. Delirium.
- § 3165. Drunkenness.
- § 3166. Imbeciles — Deaf, dumb, and blind persons.

§ 3156. **Who may Make Will.** — In a majority of the states, every person, male or female, of the age of twenty-one, if otherwise legally competent, may, by force of statutes to such effect, make a will.<sup>1</sup> In some of the states, however, the provision is extended to males of the age of twenty-one, and females over eighteen;<sup>2</sup> and in still other states, all persons, male or female, of the age of eighteen;<sup>3</sup> while in two states every married person may make a will, without regard to age.<sup>4</sup> In Oregon and Washington every married woman whose husband has attained majority may will her estate.<sup>5</sup> In California a married woman may dispose by will of all her separate estate without her husband's consent, the same as if she were a *feme sole*.<sup>6</sup>

<sup>1</sup> See statutes of Alabama, Arizona, Delaware, Florida, Indiana, Kentucky, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, West Virginia, Wisconsin, and Wyoming: Stimson's American Statute Law, sec. 2602. See Title Husband and Wife.

<sup>2</sup> Arkansas, Colorado, Illinois, Iowa, Kansas, Maryland, Missouri, Minnesota, Nebraska, Vermont, and Washington: Stimson's American Statute Law, sec. 2602 b.

<sup>3</sup> California, Connecticut, Dakota, Montana, Nevada, and Utah: Stimson's American Statute Laws, sec. 2602 c. And Idaho: Id., supplement, sec. 2602. Every person of sound mind over eighteen may make a will: Deering's Cal. Civ. Code, sec. 1270.

<sup>4</sup> Iowa and Texas: Stimson's American Statute Law, sec. 2604 d; Id., supplement, sec. 2602.

<sup>5</sup> Stimson's American Statute Law, sec. 2602 d.

<sup>6</sup> Deering's Civ. Code, sec. 1273.

In Kansas and Wisconsin all married women of eighteen may make disposition of their estates by will. In Nebraska all married women of sixteen have the like privilege, while in Georgia all persons of fourteen have the power to make testamentary disposition. In New Mexico, all males of fourteen and females of twelve may make wills. And married women may devise or bequeath their separate property in many states. In a few other states a male person or *feme sole* may make a will of personal property.<sup>1</sup> The laws of New Mexico provide that a person under guardianship cannot make a will,<sup>2</sup> and in Massachusetts there are cases which decide substantially that the fact that one was under guardianship at the time of making a will is *prima facie* evidence of incapacity.<sup>3</sup> But it would seem that this question is sufficiently settled by the statutes referred to herein, which provide at what age the legal right to make a will exists. In regard to infants, it is held that they have no capacity to dispose of their estate by will;<sup>4</sup> and this would seem to be the construction which the legislators evidently intended in passing the statutes, noted in this section, which fix the age at which testamentary capacity exists.<sup>5</sup> Formerly, it would seem that a married woman might not, without her

<sup>1</sup> Stimson's American Statute Law, secs. 2602 e, f, g, 2603, 6450. But see *Id.*, sec. 6601. Of the age of seventeen in Colorado: *Id.*, sec. 2603. Male of eighteen or *feme sole* of sixteen in New York: *Id.* See, as to construction of the Kentucky statute, which permits any one *ex jure* to make a will, *Porter v. Ford*, 82 Ky. 191.

<sup>2</sup> Stimson's American Statute Law, sec. 2604. See further, on the general capacity to make wills, 1 Jarman on Wills, 58 et seq., and note.

<sup>3</sup> *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. 115. But see *Deane v. Littlefield*, 1 Pick. 239.

<sup>4</sup> *Goodel v. Pike*, 40 Vt. 319; *Moore v. Moore*, 23 Tex. 637.

<sup>5</sup> See *Moore v. Moore*, 23 Tex. 637;

Georgia Rev. Code, sec. 2406; Kentucky Gen. Stats. 1873, c. 113, sec. 3; *Wardwell v. Wardwell*, 9 Allen, 518, 519. "The recent legislation in the United States has tended towards the same standard of age requisite for the making of a will as that adopted by the recent wills act in England. In many of the states the power of making any will has been entirely denied to minors. In some of the states, on the other hand, a will of personalty may be made by a minor, although he is not capable so to dispose of realty": 1 Jarman on Wills, Randolph and Talcott's notes, 60, note; and see 3 *Id.* 748, and note. See also Swinburne on Testaments and Wills, pt. 2; sec. 2, pl. 6; 1 Williams on Executors, 13.

husband's consent, make a valid will;<sup>1</sup> nor was she able to devise lands by will, even with her husband's consent, but the same disability in such case did not extend to a disposition by will of chattels.<sup>2</sup> But, as has been already noted, this disability has been removed in a great measure in the United States by statutes.<sup>3</sup>

**§ 3157. Will Drawn by Person Other than Testator.**—Although it is not requisite to the validity of a will that the testator should himself have drawn it by his own hand, yet in New Hampshire the statute prohibits a judge of probate from making a will for another;<sup>4</sup> though a will drawn by a judge of probate is not void, notwithstanding the law prohibits him from drawing a will;<sup>5</sup> and where the party drawing a will is largely benefited under it, this of itself raises a strong presumption against the validity of the will, although such fact does not *per se* render the will void.<sup>6</sup>

**§ 3158. Definition and Test of Testamentary Capacity.**—The question as to what constitutes a sound and legal disposing mind and memory sufficient to warrant a valid testamentary disposition of property has been frequently before the courts, and various definitions have been given upon this point. It has been held that a valid will may be executed by any one having the soundness and strength of mind necessary to make a contract.<sup>7</sup> So it has been

<sup>1</sup> 4 Kent's Com. 506; 2 Bla. Com. 498; 1 Williams on Executors, 42. See note to *Cutter v. Butler*, 57 Am. Dec. 340.

<sup>2</sup> *Reed v. Blaisdell*, 16 N. H. 194; 41 Am. Dec. 742; *Van Winkle v. Shoonmaker*, 15 N. J. Eq. 384; *Osgood v. Breed*, 12 Mass. 525; *West v. West*, 10 Serg. & R. 445.

<sup>3</sup> See also 3 Jarman on Wills, Randolph and Talcott's notes, 752, and note; 1 Redfield on Wills, 22-29. As to the effect of the homestead laws as affecting devises by husbands of homestead lands, see 3 Jarman on Wills, Randolph

and Talcott's notes, 740; and *Title Husband and Wife*, §§ 760, 761, *ante*.

<sup>4</sup> *Stimson's American Statute Law*, sec. 2640 c.

<sup>5</sup> *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114.

<sup>6</sup> *Beall v. Mann*, 5 Ga. 456. See *post*, Special Instances of Wills Held to be Valid and Void. See note to *Hughes v. Meredith*, 71 Am. Dec. 129.

<sup>7</sup> *Chandler v. Barrett*, 21 La. Ann. 58; 99 Am. Dec. 701. See also, as to competency, *Stimson's American Statute Law*, sec. 2604. See note to *Peck v. Cary*, 84 Am. Dec. 240.

said that a person of sound mind may dispose of his property in any manner he pleases, consistent with the policy of the law.<sup>1</sup>

The question is, Was the testator's mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will? And in determining the question, the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case.<sup>2</sup> Mere decay of the faculties by old age is not sufficient evidence of the want of the requisite soundness of mind and memory;<sup>3</sup> nor that the testator was in a sinking and dying condition at the time he made his will;<sup>4</sup> nor eccentricity in manners and disposition, however great; nor that he was of a nervous temperament;<sup>5</sup> nor irritability of temper, caused by physical ailments, coupled with age;<sup>6</sup> nor sickness, bodily infirmity, or extreme distress;<sup>7</sup> nor forgetfulness of family,

<sup>1</sup> *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666. The following definition of testamentary capacity has been approved: "A person of sound mind, within the meaning of the law, . . . is one who has full intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts, and do business generally, nor to engage in complex and intricate business matters": *Meeker v. Meeker*, 74 Iowa, 352; 7 Am. St. Rep. 489, 493. See also *McElwee v. Ferguson*, 43 Md. 485; *Coleman v. Robertson*, 17 Ala. 84; *Ford v. Ford*, 7 Humph. 92; *Shropshire v. Reno*, 5 J. J. Marsh. 91; *Stancell v. Kenan*, 33 Ga. 56; *Sutton v. Sutton*, 5 Harr. (Del.) 459; *Horne v.*

*Horne*, 9 Ired. 99; *Converse v. Converse*, 21 Vt. 168; 52 Am. Dec. 58; *Den v. Johnson*, 5 N. J. L. 454; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Tompkins v. Tompkins*, 1 Bail. 92; 19 Am. Dec. 656; *Comstock v. Hadlyme*, 8 Conn. 254; 20 Am. Dec. 100; *St. Leger's Appeal*, 34 Conn. 434; 91 Am. Dec. 735; *Stevenson v. Stevenson*, 33 Pa. St. 469; *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282.

<sup>2</sup> *Irish v. Newell*, 62 Ill. 196; 14 Am. Rep. 79; *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402; *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Kinne v. Kinne*, 9 Conn. 102; 21 Am. Dec. 732; *Terry v. Buffington*, 11 Ga. 337; 56 Am. Dec. 423.

<sup>3</sup> *Higdon's Will*, 6 J. J. Marsh. 444; 22 Am. Dec. 84; *Kirkwood v. Gordon*, 7 Rich. 474; 62 Am. Dec. 418.

<sup>4</sup> *Hall v. Hall*, 18 Ga. 40.

<sup>5</sup> *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722; *Mercer v. Kelso*, 4 Gratt. 106; *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329.

<sup>6</sup> *Jackson v. Hardin*, 83 Mo. 175.

<sup>7</sup> *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666.

largeness of a legacy, and the low rank of the legatee;<sup>1</sup> nor mere defect of memory;<sup>2</sup> nor mere weakness of understanding.<sup>3</sup> It is not necessary that the memory be perfect and the mind unimpaired.<sup>4</sup> It has been held that less mind is required to make a will than a contract.<sup>5</sup> In determining the question of whether the testator had the requisite soundness of mind, the reasonableness of the will, and the facts that the provisions of the will are suitable, and conform to the testator's prior expressed determinations relative to the disposition of his estate, have great weight.<sup>6</sup> A change of intention on the part of a testator in relation to his will is of no importance, if there was a sound mind unconstrained; but when the question is, whether there was such a mind, such change may be adduced to aid the inquiry.<sup>7</sup> And the fact that the provisions of a will are unjust and injudicious, imprudent, and not to be accounted for, may be considered in deciding the question of the testator's capacity or incapacity. So, also, may the unreasonableness of the will be considered;<sup>8</sup> though an unjust will is not necessarily an irrational act.<sup>9</sup> But a will may not be impeached by proof of the testator's condition subsequent to the making of the will.<sup>10</sup> So the fact that the testator had a paralytic stroke

<sup>1</sup> *Chandler v. Barrett*, 21 La. Ann. 58; 99 Am. Dec. 701.

<sup>2</sup> *Bleecker v. Lynch*, 1 Bradf. 458.

<sup>3</sup> *Abraham v. Wilkes*, 17 Ark. 292; *Dornick v. Reichenback*, 10 Serg. & R. 84; *Weir v. Fitzgerald*, 2 Bradf. 42; *Elliott's Will*, 2 J. J. Marsh. 340.

<sup>4</sup> *Taylor v. Kelley*, 31 Ala. 59; 68 Am. Dec. 150.

<sup>5</sup> *Converse v. Converse*, 21 Vt. 168; 52 Am. Dec. 58; *Terry v. Buffington*, 11 Ga. 337; 56 Am. Dec. 423. See also *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329; *Morris v. Stokes*, 21 Ga. 552; *Stewart v. Leispenard*, 26 Wend. 255; *Gaither v. Gaither*, 20 Ga. 709; *Tomkins v. Tomkins*, 1 Bail. 92; 19 Am. Dec. 656, — substantially to the effect that the most ordinary

capacity merely sufficient to understand common ideas is sufficient.

<sup>6</sup> *Tomkins v. Tomkins*, 1 Bail. 92; 19 Am. Dec. 656; *Couch v. Couch*, 7 Ala. 519; 42 Am. Dec. 602. See also *Eddy's Appeal*, 109 Pa. St. 406.

<sup>7</sup> *Titlow v. Titlow*, 54 Pa. St. 216; 93 Am. Dec. 691.

<sup>8</sup> *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Higgins v. Carlton*, 23 Md. 115; 92 Am. Dec. 666; *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402.

<sup>9</sup> *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722.

<sup>10</sup> *Kinne v. Kinne*, 9 Conn. 102; 21 Am. Dec. 732; *Terry v. Buffington*, 11 Ga. 337; 56 Am. Dec. 423. But see *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Irish v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648.

at some time prior to its execution, by which his intellect was impaired, and so continued up to the time of making the will and afterwards, may be considered upon the question of testamentary capacity.<sup>1</sup>

**§ 3159. Fraud and Undue Influence in Procuring Will.**

—A will obtained by fraud is void; for fraud vitiates everything with which it is connected.<sup>2</sup> But the fact that a will is secretly executed by the testator is not in itself a badge of fraud,<sup>3</sup> and fraud must be proven; it is not to be presumed.<sup>4</sup> “Fraud will not,” however, “have the effect necessarily of invalidating the whole will. If, indeed, the person who practiced the wrong be the sole beneficiary under it, to the exclusion of other natural objects of the testator’s bounty, or if the fraud taint the whole will, though committed by but one of the beneficiaries, the whole will is invalid; but if one only of several legatees or devisees, or if all but one of them, procured the gifts to themselves by fraud not extending further, other gifts of the instrument would still be good.”<sup>5</sup> But the terms “fraud” and “undue influence” are not the same in meaning when applied to wills. Fraud is the successful employment of deception upon the testator, whereby he is made to believe that to be true which is false in fact, and thereby his will is affected; while undue influence “consists in substituting virtually the will of the person executing it for that of the testator.”<sup>6</sup> Undue influence may, however, be fraudulently exerted.<sup>7</sup>

It is a cardinal principle that a will should be volun-

<sup>1</sup> *Irish v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648.

<sup>2</sup> *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282. See *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402.

<sup>3</sup> *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235.

<sup>4</sup> *Kinloch v. Palmer*, 1 Mill Const. 216.

<sup>5</sup> *Bigelow on Fraud*, 572; *Smith v. Fenner*, 1 Gall. 170; *Florey v. Florey*,

24 Ala. 241; 1 Jarman on Wills, Randolph and Talcott’s notes, 48, 66, and note, 69, and note, 131, 143, 331. See *State v. McGlynn*, 20 Cal. 233; 81 Am. Dec. 118.

<sup>6</sup> *Bigelow on Fraud*, 571, 572; *Terry v. Buffington*, 11 Ga. 337; 56 Am. Dec. 423. See further, as to fraud, *Stimson’s American Statute Law*, sec. 2605.

<sup>7</sup> *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282.

tarily made.' Therefore undue influence sufficient to avoid a will must be such as in some degree to destroy free agency at the time, and operating as a present restraint.<sup>2</sup> It must be an unlawful importunity which on account of the manner or motive of its exertion so embarrasses and restrains the testator's mind in its operation that he was not master of his own opinions in respect to the disposition of his estate.<sup>3</sup> So a will made under a general controlling and continuing influence of fear or dominion over the testator by one who has put him in fear is void.<sup>4</sup> Undue influence must not only be unlawful in order to vitiate a will, but it must be exerted to such a degree as to amount to force, fear, or coercion which the testator is too weak to resist, and the exercise of which not only destroys his free agency, but also in effect substitutes the will of the person exercising it for that of the testator, or causes him to make a will contrary to that intended by him.<sup>5</sup> And undue influence may be based upon fear, favor, or affection, or any other cause unduly exercised to destroy the testator's will.<sup>6</sup> It has been held that fraud is an essential element in the factor of undue influence.<sup>7</sup> So a person of weak mind, or one laboring under sickness, may, by false statements, subtle insinuations, and encouraged enmities against kindred, be moved to make a will which is invalid by reason of undue influence.<sup>8</sup> An important question in the consideration of all

<sup>1</sup> Stimson's American Statute Law, sec. 2605.

<sup>2</sup> Woodward v. James, 3 Strob. 552; 51 Am. Dec. 649; Eckert v. Flowry, 43 Pa. St. 46; McMahon v. Ryan, 20 Pa. St. 329.

<sup>3</sup> Potts v. House, 6 Ga. 324; 50 Am. Dec. 329.

<sup>4</sup> Davis v. Calvert, 5 Gill & J. 269; 25 Am. Dec. 282.

<sup>5</sup> Morris v. Stokes, 21 Ga. 552; Gardner v. Gardner, 22 Wend. 526; 34 Am. Dec. 340; Taylor v. Kelly, 31 Ala. 59; 68 Am. Dec. 150; Baldwin v. Parker, 99 Mass. 79; 96 Am. Dec. 697;

Floyd v. Floyd, 3 Strob. 44; 49 Am. Dec. 626; Gilbert v. Gilbert, 22 Ala. 529; 58 Am. Dec. 268; Trost v. Dinger, 118 Pa. St. 259; 4 Am. St. Rep. 593; Eckert v. Flowry, 43 Pa. St. 46; McMahon v. Ryan, 20 Pa. St. 329; Almon v. Pigg, 82 Ill. 149; 25 Am. Rep. 303.

<sup>6</sup> Batton v. Watson, 13 Ga. 63; 58 Am. Dec. 504.

<sup>7</sup> Monroe v. Barclay, 17 Ohio St. 302; 93 Am. Dec. 620.

<sup>8</sup> Floyd v. Floyd, 3 Strob. 44; 49 Am. Dec. 626.

this class of cases is, not merely whether the testator was under restraint at the time of the execution of the will, but whether such undue influence had been acquired and did actually operate upon the testator and affect the disposition of his estate.<sup>1</sup> Mere suggestions not amounting to importunity are not sufficient ground to set aside a will for undue influence;<sup>2</sup> nor is influence acquired over the testator by kind offices, or even by persuasion unconnected with fraud or contrivance, sufficient;<sup>3</sup> nor do appeals to affection, attachment, and sense of duty and obligation, accompanied by honest intercessions and modest persuasions, vitiate a will, where the testator is of sound mind;<sup>4</sup> nor does a preference for collateral relatives of the testator's wife necessarily show undue influence or fraud.<sup>5</sup> But bequests, gifts, grants, or donations obtained from a ward by his guardian, from a *cestui que trust* by a trustee, from a child by the parent, or from a client by his attorney, are generally held to be presumptively void, and obtained through undue influence.<sup>6</sup> And the like presumption obtains where a will is made to the guardian's wife.<sup>7</sup>

The fact, however, that a draughtsman takes a legacy under a will is at the most only a suspicious circumstance.<sup>8</sup> And solicitations, however importunate, cannot

<sup>1</sup> Taylor v. Wilburn, 20 Mo. 306; 64 Am. Dec. 186. As to fraud, duress, and undue influence under the statutes, see Stimson's American Statute Law, sec. 2605. In support of the propositions stated in the text as to undue influence, see also Dunlap v. Robinson, 28 Ala. 100; Turley v. Johnson, 1 Bush, 116; Wittman v. Goodhand, 26 Md. 95; Blakey v. Blakey, 33 Ala. 611; Hall v. Hall, 38 Ala. 131; Gardiner v. Gardiner, 34 N. Y. 155; Wampler v. Wampler, 9 Md. 540; Turner v. Cheesman, 15 N. J. Eq. 243; Marshall v. Flinn, 4 Jones, 199; Pool v. Pool, 35 Ala. 12; O'Neill v. Farr, 1 Rich. 80.

<sup>2</sup> Tunison v. Tunison, 4 Bradf. 138.

<sup>3</sup> Trumbull v. Gibbons, 22 N. J. L. 117; 51 Am. Dec. 253.

<sup>4</sup> Floyd v. Floyd, 3 Strob. 44; 49 Am. Dec. 626; Gay v. Gillilan, 92 Mo. 250; 1 Am. St. Rep. 712.

<sup>5</sup> Coffin v. Coffin, 23 N. Y. 9; 80 Am. Dec. 235.

<sup>6</sup> St. Leger's Appeal, 34 Conn. 434; 91 Am. Dec. 735; Garvin v. Williams, 44 Mo. 465; 100 Am. Dec. 314; Meek v. Perry, 36 Mass. 190.

<sup>7</sup> Bridwell v. Swank, 84 Mo. 455.

<sup>8</sup> Coffin v. Coffin, 23 N. Y. 9; 80 Am. Dec. 235; Vickery v. Hobbs, 21 Tex. 570; 73 Am. Dec. 238. See also Peck v. Carey, 27 N. Y. 9; 84 Am. Dec. 220. See post, § 3236, Special Instances of Valid and Void Wills.

of themselves constitute undue influence;<sup>1</sup> nor does honest and moderate intercession, persuasion, or flattery, unaccompanied by fraud or deceit, where the testator is not threatened or put in fear, vitiate the will,<sup>2</sup> since one may by fair argument and persuasion induce another to make a will, even in his own favor.<sup>3</sup> Especially is this true in case of a child.<sup>4</sup> So a will is not invalidated because produced by influences springing from a lawful or unlawful marital relation, unless such influence has been unduly exerted; that is, unless the influence places some restraint upon and prevents the free exercise of the testator's judgment and motives in making the will.<sup>5</sup> So the unlawful cohabitation of a testator with the mother of an illegitimate child, a legatee in the will, is not of itself sufficient evidence to justify a jury in finding undue influence on the part of the mother.<sup>6</sup> And fraud or undue influence does not exist merely because of partial intoxication, or an imperfect knowledge of English by the testator.<sup>7</sup> And the charge of undue influence is not sustained by statements alone pointing to that conclusion, where it also appears that the details of the making and execution of the will were attended to personally by the testatrix.<sup>8</sup> But importunity or threats, such as the testator has not the courage to resist, moral command asserted, and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influ-

<sup>1</sup> *Trost v. Dingler*, 118 Pa. St. 259; 4 Am. St. Rep. 593.

<sup>2</sup> *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282.

<sup>3</sup> *Miller v. Miller*, 3 Serg. & R. 266; 8 Am. Dec. 651.

<sup>4</sup> *Gilreath v. Gilreath*, 4 Jones Eq. 142.

<sup>5</sup> *Monroe v. Barclay*, 17 Ohio St. 302; 93 Am. Dec. 620; *Dean v. Negley*, 41 Pa. St. 312; 80 Am. Dec. 620.

See *Moore v. Spier*, 80 Ala. 129; *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Small v. Small*, 4 Greenl. 220; 16 Am. Dec. 253.

<sup>6</sup> *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 238. See post, § 3238, *Special Instances of Wills Held to be Valid and Void*.

<sup>7</sup> *Bouse v. Will*, 18 Ill. App. 433.

<sup>8</sup> *Pemberton's Case*, 40 N. J. Eq. 520.

ence, though no force is used.<sup>1</sup> Whether there was sufficient undue influence to avoid a will is a question of fact;<sup>2</sup> and although undue influence has been exerted, yet after it is removed, the subsequent ratification of the will by the testator destroys the effect of such undue influence.<sup>3</sup>

**ILLUSTRATIONS.**—The proof was that the beneficiaries had subjected the testator to persistent and irritating importunities, but that he was of unquestioned testamentary capacity, and the will was drawn up from his dictation in the absence of such beneficiaries, and executed by him in due form in the presence only of the scrivener, and of witnesses selected by him. *Held*, that the will was not thereby invalidated: *Trust v. Dingler*, 118 Pa. St. 259; 4 Am. St. Rep. 593. A testator was unlawfully cohabiting with a woman, and devised to her by will all his estate, to the exclusion of his kindred. *Held*, not sufficient to raise a presumption of undue influence: *Porschett v. Porschett*, 82 Ky. 93; 56 Am. Rep. 880. A person, standing in a relation of confidence to a testator, who was old and in *extremis*, prepared a will in his own favor, and procured a kinsman of his to witness the same, and caused the relatives and friends of the testator to leave the room while the will was read and executed. *Held*, that the jury had a right to infer, from these facts and circumstances, fraud or undue influence, and that the *onus* was on the party propounding the paper to prove that it expressed the true will of the testator: *Harvey v. Sullens*, 46 Mo. 147; 2 Am. Rep. 491.

§ 3160. **Belief in Spiritualism.**—A belief in spiritualism does not incapacitate one from making a valid will;<sup>4</sup> and this rule is held to apply, even though the testator acted under supposed instructions from the spirit of her deceased brother, there being found no actual unsoundness of mind.<sup>5</sup> Since a belief in so-called spiritualistic communications or revelations is not in itself an insane delusion, such communications come under the general rule

<sup>1</sup> *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712.

<sup>2</sup> *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150.

<sup>3</sup> *Monroe v. Barclay*, 17 Ohio St. 302; 93 Am. Dec. 620; *Eelbeck v. Granberry*, 2 Hayw. (N. C.) 232; 2 Am. Dec. 624.

<sup>4</sup> *Will of Smith*, 52 Wis. 543; 38 Am. Rep. 756.

<sup>5</sup> *Brown v. Ward*, 53 Md. 376; 36 Am. Rep. 422, and note 426.

as to undue influence. If they influence the mind of a testator, but do not control it, in making the will, or any part of it, the will is not void on the ground of undue influence.<sup>1</sup>

§ 3161. **Insanity.**—By force of the positive statutory requirements that the testator must be of a sound mind and memory, a person who is not sane cannot make a valid disposition of his estate by will.<sup>2</sup> The statutory requirements, however, raise at once the question as to what is a sound and disposing mind and memory; and the distinctions made between insanity legally sufficient to invalidate a will, and delusions, mental idiosyncracies, and hallucinations, are very finely and nicely drawn by the various decisions and text-book writers.<sup>3</sup>

<sup>1</sup> Robinson v. Adams, 62 Me. 369; 16 Am. Rep. 473; 1 Wharton and Stillé's Medical Jurisprudence, sec. 59. See note to Brown v. Ward, 36 Am. Rep. 426.

<sup>2</sup> Boofter v. Rogers, 9 Gill, 44; 52 Am. Dec. 680; 3 Jarman on Wills, Randolph and Talcott's notes, 100, note, 745, note; 1 Redfield on Wills, 30, 107, 120; Harrison v. Rowan, 3 Wash. 585; 586; Lee v. Scudder, 31 N. J. Eq. 633; Stewart v. Lispenard, 26 Wend. 255; Brown v. Riggis, 94 Ill. 560; Potts v. House, 6 Ga. 324; 50 Am. Dec. 325; Boyd v. Eby, 8 Watts, 70; Brooke v. Townshend, 7 Gill, 10.

<sup>3</sup> 1 Wharton and Stillé's Medical Jurisprudence, secs. 34 et seq.; 1 Jarman on Wills, Randolph and Talcott's notes, 100, note; Elwell's Medical Jurisprudence, 435; Buswell on Insanity, secs. 271, 365, 374-383. "The party's mental weakness must exist to such a degree as to amount to actual unsoundness of mind": Id., sec. 366. "The true test of insanity as affecting testamentary capacity, excepting in cases of *dementia* or total loss of mind and intellect, is delusion": Id., sec. 374. "It is always a question of law for the court whether a particular delusion is in its quality sane or insane": Id., sec. 374. "It has been said that when there is delusion of mind there is

insanity. . . . This delusion may sometimes exist on one or two particular subjects, though generally there are other concomitant circumstances, such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may tend to confirm the existence of delusion and to establish its insane character": Elwell's Medical Jurisprudence, 435. "The intermediate degrees between the highest and lowest grade of insanity are almost infinite. . . . What, then, is the true criterion of insanity? The true criterion—the true test—of the absence or presence of insanity . . . is comprisable in a single term, namely, delusion. Whenever the patient once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination; and whenever at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of their conception, such a patient is said to be under a delusion in a peculiar, half-technical sense of the term, and the absence or presence of delusion so understood forms in my judgment the true and only test or criterion of absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity, to be almost

It is said that "a disposing mind, the existence of which is essential to testamentary capacity, is a mind intelligent enough to have a general idea of the property to be disposed of, and of the objects among which the distribution ought to be made."<sup>1</sup> But there must also be "capacity as well to resist undue influence as to take a general view of the estate to be bestowed, and the objects among whom it is to be distributed."<sup>2</sup> Insanity of the testator is never presumed;<sup>3</sup> but on the contrary, his sanity is to be presumed until the contrary is clearly proved.<sup>4</sup> Sanity may also be presumed from the fact that the testator had sufficient ability to accumulate and care for property.<sup>5</sup> Singularity is not insanity, nor is a weakened intellect proof that the testator was not sane.<sup>6</sup> There must be a total want of understanding;<sup>7</sup> aversion to relations is not an evidence *per se* of insanity;<sup>8</sup> nor is an unjust will necessarily an irrational act;<sup>9</sup> nor the resentment of a testator against his son not amounting to delusion;<sup>10</sup> nor a belief in witchcraft;<sup>11</sup> nor is the fact that testator disinherited his children for undutiful conduct, which he attributed to the fact that they were bewitched, insanity sufficient to invalidate a will;<sup>12</sup> nor are insane delusions of themselves sufficient proof of insanity to vitiate a will; something more is

if not altogether controvertible terms": *Houston*, 33 Ala. 555; *Trumbull v. Dew v. Clarke*, 3 Add. Ecc. 79. See also *Duffield v. Morris*, 2 Harr. (Del.) 375; *Forman's Will*, 54 Barb. 274, 289; *Seaman's Friend Soc. v. Hopper*, 33 N. Y. 619; 1 Jarman on Wills, Randolph and Talcott's notes, 101 et seq.; *Lucas v. Parsons*, 24 Ga. 640; 71 Am. Dec. 147. See note to *McMechen v. McMechen*, 41 Am. Rep. 686.

<sup>1</sup> 1 Wharton and Stillé's Medical Jurisprudence, sec. 19.

<sup>2</sup> *Id.* See also *Den v. Johnson*, 5 N. J. L. 455; 8 Am. Dec. 610.

<sup>3</sup> *Chandler v. Barrett*, 21 La. Ann. 58; 99 Am. Dec. 701.

<sup>4</sup> *Farrell v. Brennan*, 32 Mo. 328; 82 Am. Dec. 137; *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722; *Kinloch v. Palmer*, 1 Mill Const. 216; *Stubbs v.*

*Houston*, 33 Ala. 555; *Trumbull v. Gibbons*, 22 N. J. L. 117; 51 Am. Dec. 253. But see *contra*, *Gerrish v. Nason*, 22 Me. 438; 39 Am. Dec. 589.

<sup>5</sup> *Gass v. Gass*, 3 Humph. 278.

<sup>6</sup> *Kinne v. Kinne*, 9 Conn. 102; 21 Am. Dec. 732.

<sup>7</sup> *Blanchard v. Nestle*, 3 Denio, 37.

<sup>8</sup> *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722.

<sup>9</sup> *Id.*

<sup>10</sup> *Lucas v. Parsons*, 24 Ga. 640; 71 Am. Dec. 147. See *Coit v. Patchen*, 77 N. Y. 533; *Florey v. Florey*, 24 Ala. 241; *Coles v. Will*, 49 Wis. 179.

<sup>11</sup> *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722; *Addington v. Wilson*, 5 Ind. 137; 61 Am. Dec. 81.

<sup>12</sup> *Addington v. Wilson*, 5 Ind. 137; 61 Am. Dec. 81.

requisite. It must appear that the will resulted directly from the operation of such delusions;<sup>1</sup> and mere prejudices or suspicions are not insanity.<sup>2</sup> In the case of the existence of insane delusions, if there is otherwise capacity enough remaining for the testator to appreciate and understand the relative claims of his relations or other persons entitled to his bounty, the amount and kinds of his property, and the nature of the dispositions made by him in his will, and their effect, he has a sound and disposing mind and memory sufficient to make a valid will.<sup>3</sup>

ILLUSTRATIONS. — In the contest of a will the judge charged that "unless the jury believe, from the evidence, that the testator, if of sound mind, would have included C. or his children in the benefit of his will, they cannot set the will aside because he may have excluded them under an insane delusion as to C." *Held*, error, on the ground that when a will is ascertained to be the result of an insane delusion it should be declared void, without inquiring what the testator would or would not have done if he had been of sound mind: *Cotton v. Ulmer*, 45 Ala. 378; 6 Am. Rep. 703.

§ 3162. **Lucid Intervals.** — Insanity which vitiates a will must exist at the time of making it.<sup>4</sup> Therefore, although a person is insane so as to be thereby incompetent to make a valid will, yet if an intermission of the malady is shown at the time of making the will, it is valid, and the habitual insanity of the testator will not affect it.<sup>5</sup> So in California, a person who has been actually declared insane, and committed in consequence, has, after his discharge, and being restored to reason, legal

<sup>1</sup> *Tawney v. Long*, 76 Pa. St. 106; *Robinson v. Adams*, 62 Me. 369; 16 Am. Rep. 473; *Cotton v. Ulmer*, 45 Ala. 378; 6 Am. Rep. 703; *Coit v. Patchen*, 77 N. Y. 533; *Benoist v. Murrin*, 58 Mo. 307; *Brown v. Ward*, 53 Md. 376; 36 Am. Rep. 422; *Lee v. Scudder*, 31 N. J. Eq. 633; *Evans v. Arnold*, 52 Ga. 179. But see *Eggers v. Eggers*, 57 Ind. 461.

<sup>2</sup> *Clapp v. Fullerton*, 34 N. Y. 190; 90 Am. Dec. 681; *Boardman v. Wood-*

*man*, 47 N. H. 120, 138; *Hall v. Hall*, 38 Ala. 131.

<sup>3</sup> *Dunham's Appeal*, 27 Conn. 192. See also *Boardman v. Woodman*, 47 N. H. 120; *James v. Langdon*, 7 B. Mon. 193.

<sup>4</sup> *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418.

<sup>5</sup> *Wright v. Lewis*, 5 Rich. 212; 55 Am. Dec. 714; *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722. See *Case of Cochran's Will*, 1 T. B. Mon. 264; 15 Am. Dec. 116.

capacity to make a valid testament.<sup>1</sup> And if one is competent at the time of making the will, his subsequent insanity will not invalidate it.<sup>2</sup>

§ 3163. **Partial Insanity.**—A will which is the direct offspring of partial insanity is void.<sup>3</sup> But where the facts of the case are sufficient to account for the motives of the testator in making the disposition of his property that he does, there is no reason for resorting to the explanation of monomania or any other form of insanity.<sup>4</sup> And it is declared in a Pennsylvania case that partial unsoundness of mind not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will.<sup>5</sup> So the ruling obtains in Louisiana, that partial insanity does not disqualify from making a will; a will made in a lucid interval by a person habitually insane is valid, and where there is nothing unreasonable on the face of the will of one habitually insane, it will be presumed to have been made in a lucid interval.<sup>6</sup>

**ILLUSTRATIONS.**—A testator harbored insane delusions that his wife was guilty of infidelity, and that she was accustomed at times to go to certain places of assignation for the purposes of illicit intercourse; that his wife, together with certain relatives, had conspired together to kill him in order to obtain his property; and had peculiar notions as to the particular mode in which they were to cause his death; believed that they intended to confine him in a lunatic asylum, and took precautions at one time to prevent such incarceration; and conceived an idea that an attempt was made to murder him by throwing him upon a hot stove, he having as a matter of fact been found thereon by

<sup>1</sup> Deering's Civ. Code, sec. 40. See also *Estate of Johnson*, 57 Cal. 529.

<sup>2</sup> *Guyaling v. Van Kuren*, 35 N. Y. 70.

<sup>3</sup> *Cotton v. Ulmer*, 45 Ala. 378; 6 Am. Rep. 703; *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329; *Trumbull v. Gibbons*, 22 N. J. L. 117; 51 Am. Dec. 253; *Lucas v. Parsons*, 27 Ga. 593; *Townshend v. Townshend*, 7 Gill, 10; *Denson v. Beasley*, 34 Tex.

191. See also *Tawney v. Long*, 76 Pa. St. 106; *Stancell v. Keenan*, 33 Ga. 56; *Converse v. Converse*, 21 Vt. 168;

52 Am. Dec. 58.

<sup>4</sup> *Trumbull v. Gibbons*, 22 N. J. L. 117; 51 Am. Dec. 253.

<sup>5</sup> *Pidecock v. Potter*, 68 Pa. St. 342. 8 Am. Rep. 181, and note 184.

<sup>6</sup> *Kingsbury v. Whitaker*, 32 La. Ann. 1055; 36 Am. Rep. 278.

one who had been detailed to watch him, having apparently fallen there from helplessness, and being unable from lack of strength to remove himself; and the testator, with this exception, was sound in mind and memory. *Held*, that such facts having no real existence, if the will was the direct offspring of such partial insanity, it was void: *Seamen's Friend Society v. Hopper*, 33 N. Y. 619.

§ 3164. **Delirium.**—Where one, from disease or otherwise, suffers from delirium which affects his reason and memory, and during its continuance he makes a will which is the direct outcome of the paroxysm, it is held that the will is thereby vitiated.<sup>1</sup> Delirium is classed by one of the most eminent of the old law-writers as among those failings of the mind which constitute one *non compos mentis*, who says: "*Non compos mentis* is of four sorts: . . . 4. Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding."<sup>2</sup>

§ 3165. **Drunkenness.**—Perhaps the most common cause of delirium is that occasioned by drunkenness, and this came within the last subdivision made by Coke of those *non compos mentis*;<sup>3</sup> and here the same rule applies as in other cases, the test being whether the will was the direct offspring of the drunken delirium or loss of mind consequent thereon. Blackstone refers to this class of disabled persons as those who "have their senses besotted with drunkenness," and adds, referring to others within the designation of *non compos mentis*, "all these are incapable, by reason of mental disability, to make any will so long as such disability lasts";<sup>4</sup> although drunkenness does not necessarily constitute a man of unsound mind,<sup>5</sup> even though such habits be long continued.<sup>6</sup> So an habitual

<sup>1</sup> Taylor on Medical Jurisprudence, 626; Ray on Insanity, secs. 253-254, 290; Wharton and Stillé's Medical Jurisprudence, secs. 36, 235.

<sup>2</sup> Co. Lit. 246 b; 1 Jarman on Wills, Randolph and Tolcott's notes, 103.

<sup>3</sup> Co. Lit. 246 b. "Drunkenness it-

self is a species of insanity": Duffield v. Robeson, 2 Harr. (Del.) 375.

<sup>4</sup> 2 Bla. Com. 497.

<sup>5</sup> Estate of Johnson, 57 Cal. 529.

<sup>6</sup> Gardner v. Gardner, 22 Wend. 526; 34 Am. Dec. 340.

drunkard is presumed competent, when sober, to make a valid will, unless it appears that intemperance has produced a settled derangement of the faculties.<sup>1</sup> And a will made by one then under the influence of intoxicating liquor is not for that reason void, unless he was so excited by the liquor as to disorder his faculties, and pervert his judgment.<sup>2</sup>

§ 3166. **Imbeciles — Deaf, Dumb, and Blind Persons.** — Idiots are totally incapacitated from making a will.<sup>3</sup> And since one born deaf, dumb, and blind was generally looked upon as of not greater capacity than an idiot, such person could not make a valid will.<sup>4</sup> But blindness alone, or mere physical incapacity, such as deafness and being dumb, unless coupled with fraud or undue influence, or unless such infirmity affects the mind, so as to cause a loss of the requisite intellect, does not constitute incapacity which vitiates the will;<sup>5</sup> and in Georgia and New Mexico, by statute, a person deaf, dumb, and blind may make a will.<sup>6</sup>

<sup>1</sup> *Gardner v. Gardner*, 22 Wend. 526; 34 Am. Dec. 340.

<sup>2</sup> *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220, and note 240; *Harper's Will*, 4 Bibb, 244; *Thompson v. Kyner*, 65 Pa. St. 368; *Starrett v. Douglass*, 2 Yeates, 48; 1 *Jarman on Wills*, Randolph and Talcott's notes, 97, note c; *Stebbins v. Hart*, 4 Denio, 501; *Duffield v. Robeson*, 2 Harr. (Del.) 375, 383.

<sup>3</sup> 1 *Jarman on Wills*, Randolph and Talcott's notes, 63, and note a, 91; 2 *Tomlins's Law Dict.*, tit. Wills.

<sup>4</sup> 1 *Bl. Com.* 303, 304. See *Ray's*

*Medical Jurisprudence of Insanity*, 86, 743; 1 *Wharton and Stillé's Medical Jurisprudence*, sec. 1; *Taylor's Medical Jurisprudence*, 89-791; 1 *Jarman on Wills*, Randolph and Talcott's notes, 63.

<sup>5</sup> *Ray v. Hill*, 3 Strob. 297; 49 Am. Dec. 647; *In re Axford*, 1 Swab. & T. 540. See *Reynolds v. Reynolds*, 1 Speers, 253, 257; 40 Am. Dec. 599; 1 *Jarman on Wills*, Randolph and Talcott's notes, 63, note b, et seq.

<sup>6</sup> *Stimson's American Statute Law*, sec. 2604.

## CHAPTER CLVI.

## EXECUTION AND ATTESTATION.

- § 3167. Execution of will. •
- § 3168. Manner and mode of signing.
- § 3169. Sealing.
- § 3170. Acknowledgment of signature.
- § 3171. Publication.
- § 3172. Reading of will to or by testator, and knowledge by him of contents.
- § 3173. Will must be attested or subscribed.
- § 3174. Whether attestation clause is part of will.
- § 3175. Witnesses need not read or know contents of will.
- § 3176. Who are competent or credible witnesses.
- § 3177. How witnesses should sign.
- § 3178. Where witnesses should sign.
- § 3179. Order of signing.
- § 3180. Request to witness.
- § 3181. Attestation as to sanity.
- § 3182. Attestation at different times.
- § 3183. Attestation in presence of testator.
- § 3184. Signing by witnesses in presence of each other.
- § 3185. Witnesses should see testator's signature.

§ 3167. **Execution of Will.**—It is requisite to the validity of a will that it should be signed by the testator, duly attested by competent witnesses, and that it should be published and declared by him to be his last will and testament.<sup>1</sup>

§ 3168. **Manner and Mode of Signing.**—While the signing should be by the testator personally, if able, yet it may also be done by some one for him, who may subscribe the testator's name in his presence and by his direction.<sup>2</sup> So the signing may be by the testator's

<sup>1</sup> Stimson's American Statute Law, secs. 2640-2644. See generally, as to execution, attestation, and publication, notes to *Chaffee v. Baptist Miss. Conv.*, 40 Am. Dec. 231; *Jauncey v. Thorne*, 45 Am. Dec. 442; *Coffin v. Coffin*, 80 Am. Dec. 242.

<sup>2</sup> *Rigg v. Wilton*, 13 Ill. 15; 54 Am.

Dec. 419; Stimson's American Statute Law, sec. 2640. But see *Northcutt v. Northcutt*, 20 Mo. 266; *Carty v. Hoffman*, 23 Pa. St. 507; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567; *Assay v. Hoover*, 5 Pa. St. 21; 45 Am. Dec. 713.

mark.<sup>1</sup> It is said that the signature to a will should be subscribed or written at the end, the purpose contemplated being to prevent fraudulent additions to the will.<sup>2</sup> And where the statute requires that the testator, "unless prevented by the extremity of his last sickness, shall" sign at the end of the will, the statute must be followed; and if the testator's signature in such case precedes a final clause appointing executors, the document is not properly executed as a testamentary paper, and should not be admitted to probate;<sup>3</sup> and the same rule obtains where the testator's signature precedes a clause appointing executors, and this is followed by additional provisions subscribed by the testator.<sup>4</sup> But a mere memorandum under the signature does not invalidate the will.<sup>5</sup> Signing at the end, however, was not a requisite under the statute of frauds,<sup>6</sup> since the place of the testator's signature under that statute was not material. The fact that some further act, such as the proper acknowledgment of the instrument, was necessary, seems to have been sufficient, and the presumption in such case arose that a former writing of the name became, by the final act of authentication, an adoption of the testator's signature.<sup>7</sup> So an unsigned addition to a will does not

<sup>1</sup> Will of Jenkins, 43 Wis. 610; *Rosser v. Franklin*, 6 Gratt. 1; 52 Am. Dec. 97; *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666; *Bailey v. Bailey*, 35 Ala. 687; *Guthrie v. Price*, 23 Ark. 396; *St. Louis Hospital v. Wegeman*, 21 Mo. 17; *St. Louis Hospital v. Williams*, 19 Mo. 17; 1 Jarman on Wills, Randolph and Talcott's notes, 201, 255, note, 256. But see *Greenough v. Greenough*, 11 Pa. St. 489; 61 Am. Dec. 567; *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418; *Assay v. Hoover*, 5 Pa. St. 21; 45 Am. Dec. 713. So the mark of a blind testator may be a sufficient signature: *Ray v. Hill*, 3 Strob. 237; 49 Am. Dec. 647.

<sup>2</sup> *Younger v. Duffie*, 94 N. Y. 535, 539; 46 Am. Rep. 156; 1 Jarman on Wills, Randolph and Talcott's notes, 249; 1 Perkins's Williams on Executors, 117, note; *McDonough v. Laughlin*, 20 Barb. 238; *Chaffee v. Bap-*

*tist Miss. Conv.*, 10 Paige, 85; 40 Am. Dec. 225; *Watts v. Public Adm'r*, 4 Wend. 168; *Schouler on Executors and Administrators*, sec. 74; *Sisters of Charity v. Kelley*, 67 N. Y. 409.

<sup>3</sup> *Wineland's Appeal*, 118 Pa. St. 37; 4 Am. St. Rep. 571. See 1 Williams on Executors, 69; 2 Bla. Com. 377, note 6; *Showers v. Showers*, 27 Pa. St. 485; 67 Am. Dec. 485, and note; *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418.

<sup>4</sup> *McGuire v. Kerr*, 2 Bradf. 244. See also *Glaney v. Glancy*, 17 Ohio St. 134.

<sup>5</sup> *Wikoff's Appeal*, 15 Pa. St. 281; 53 Am. Dec. 597.

<sup>6</sup> 29 Car. II., c. 3. But see 1 Vict. 26, and 15 & 16 Vict., c. 24; 2 Bla. Com. 377, note 6.

<sup>7</sup> *Lemayne v. Stanley*, 3 Lev. 1; *Allen v. Everett*, 12 B. Mon. 379. See *Waller v. Waller*, 1 Gratt. 454; 42

invalidate it, although the statute requires a signing at the end if it bears neither upon the contents of the will nor on its interpretation.<sup>1</sup> And if a will be signed by the testator on any part of it after he cuts off a portion, of the original instrument, it is still valid if it appears from the circumstances that the testator intended that the uncanceled part should remain as his will.<sup>2</sup> Where a will is on several sheets of paper, it is held that it is not necessary that each sheet should be signed.<sup>3</sup> So an unsigned written sheet may be part of a will, which is itself properly signed and executed.<sup>4</sup> But it must appear that the testator's signature was intended to be regarded as such, and that the instrument is complete, and the paper itself must show this.<sup>5</sup>

ILLUSTRATIONS.—A will was written down at the dictation of the testator and in his presence, and he read over the will after it was written, and declared that it was right, and the will was properly attested, but the testator, from physical inability, was not able to sign the will, and his name did not appear otherwise than in the first clause of the will, which was as follows: "In the name of God, amen, I, James Armstrong," etc.; and the testator, at the time of declaring his inability from weakness to sign the will, stated that he desired the witnesses to note that it was his will. *Held*, that the will was sufficiently signed by the testator: *Armstrong v. Armstrong*, 29 Ala. 538. A will was not subscribed, nor the testator's name written in any place except the first clause, which commenced, "I, Samuel Adams," etc., and it appeared that the will was written at different times by the testator, and was in his own handwriting, and was followed by the attestation clause written in the usual form at the end, and was legally

Am. Dec. 564, and note 571; *Glancy v. Glancy*, 17 Ohio St. 134; 2 Bla. Com. 376, 377, and note 6; *Ramsey v. Ramsey*, 13 Gratt. 664; 70 Am. Dec. 438; *Bouvier's Law Dict.*, tit. Wills; 1 Jarman on Wills, Randolph and Talcott's notes, 206; 1 Redfield on Wills, 210; Williams on Executors, 104. In Connecticut and Kentucky wills must be subscribed; in Arkansas, California, Dakota, Kansas, Minnesota, Montana, New York, Ohio, Pennsylvania, and Utah, must be

signed at the end: *Stimson's American Statute Law*, sec. 2640.

<sup>1</sup> *Wikoff's Appeal*, 15 Pa. St. 281; 53 Am. Dec. 597. But see *Hays v. Harden*, 6 Pa. St. 409.

<sup>2</sup> *Brown's Will*, 1 B. Mon. 56; 35 Am. Dec. 174.

<sup>3</sup> *Pearson v. Wightman*, 1 Mill Const. 336; 12 Am. Dec. 636.

<sup>4</sup> *Martin v. Hamlin's Ex'rs*, 4 Strob. 188; 53 Am. Dec. 673.

<sup>5</sup> *Waller v. Waller*, 1 Gratt. 454; 42 Am. Dec. 564.

witnessed at the testator's request, and was declared by him to be his will. *Held*, that the word "sign," in the statute, did not necessitate a signing at the end, and that the name written at the beginning of the will was adopted as his final signature by the testator, and that it was a sufficient signing: *Adams v. Field*, 21 Vt. 256.

§ 3169. **Sealing.**—The Nevada statute provides that a will should be sealed by the testator's seal;<sup>1</sup> and a similar provision requiring a seal seems to exist in New Hampshire,<sup>2</sup> though where the objection that a will was invalid for want of a seal was urged for the first time in the supreme court, it was decided that such lack of a seal could not then be availed of, since a compliance with the statute might have been proved to the satisfaction of the court below; and the court refers to the statutory provision requiring a seal as a thoughtless enactment, and that it might have been complied with by the testator by "attaching a wafer, or by affixing a piece of paper with mucilage, or appending a seal to the will with a string or ribbon, or by writing on it any symbol or hieroglyphic which it was his habit to use as a seal," and "that it was unnecessary to make mention of the seal in the instrument."<sup>3</sup> With the exception of the two states above noted, we do not find that the statutes require a seal to a will; and in the absence of such requirement, a will is good without a seal. "It would do violence to all known rules of construction to annex any forms to an instrument as essential to its validity which are not specifically required by statute."<sup>4</sup> But where a will was executed by virtue of a power requiring such paper to be under hand and seal, it was held that it must have a seal to be valid, and the fact that the will was otherwise duly executed and attested did not make it valid.<sup>5</sup>

<sup>1</sup> Nevada Gen. Stats. 1886, sec. 3002.

<sup>2</sup> Gen. Laws 1878, c. 193, sec. 6.

<sup>3</sup> In the matter of the Estate of Sticknoth, 7 Nev. 223, 233, 234.

<sup>4</sup> Heirs of Piatt v. Heirs of McCul-

lough, 1 McLean, 69, 71; Avery v. Pixley, 4 Mass. 460.

<sup>5</sup> Dormer v. Thurland, 2 P. Wms. 506. And see Arndt v. Arndt, 1 Serg. & R. 256; Hight v. Wilson, 1 Dall. 94.

§ 3170. **Acknowledgment of Signature.**—In several of the states there is a provision substantially to the effect that the testator may, in lieu of signing in the presence of witnesses, acknowledge in their presence that his signature was made by him or by his authority.<sup>1</sup> As to the manner and form of the acknowledgment, it is held that where a will has been signed for the testator by another person, in his presence and by his express direction, in the absence of the attesting witnesses, the requisite acknowledgment of the fact by the testator in the hearing of the witnesses need not be in any particular form of words, nor in any specified manner; but if the witnesses are made to understand by signs, motions, conduct, or attending circumstances that the testator acknowledges the signature as his, and the instrument as his will, it is sufficient; it is not necessary that the testator should acknowledge to the attesting witnesses that such signing was in pursuance of his previous express authority and in his presence; and the fact of such signing and of such authority may be shown by the acknowledgment to the witnesses, or by other competent testimony, or may be presumed from the facts and circumstances.<sup>2</sup>

**ILLUSTRATIONS.**—The testator had his will written in the house, went out and called the two subscribing witnesses from a field, said he wanted them to come in and sign a paper. They went into the house, and the scrivener read over to them the attesting clause, the testator being present. After the read-

<sup>1</sup> Deering's Cal. Civ. Code, sec. 1276; Webb v. Fleming, 30 Ga. 808; 76 Am. Dec. 675; Burwell v. Corbin, 1 Rand. 131; 10 Am. Dec. 494; Dewey v. Dewey, 1 Met. 349; 35 Am. Dec. 367; Rush v. Cornell, 2 Harr. (Del.) 458; Rutherford v. Rutherford, 1 Denio, 33; 43 Am. Dec. 644. "And it seems strange that any question should ever have been made upon this point": 1 Redfield on Wills, 227, note 54. See also, to same effect as text, the statutes of Arkansas, Dakota, Illinois, Kansas, Kentucky, Montana, New Jersey, New York, Ohio, Virginia, and West

Virginia, referred to in Stimson's American Statute Law, sec. 2642. See Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666; Sutton v. Sutton, 5 Harr. 459; Rigg v. Wilton, 13 Ill. 15; 54 Am. Dec. 419. In Utah, signing and acknowledging in the witnesses' presence are both necessary: Comp. Laws 1888, sec. 2651.

<sup>2</sup> Haynes v. Haynes, 33 Ohio St. 598; 31 Am. Rep. 579; Allison v. Allison, 48 Ill. 61; 92 Am. Dec. 666; Roeser v. Franklin, 6 Gratt. 1; 52 Am. Dec. 97; Jauncey v. Thorne, 2 Barb. Ch. 40; 45 Am. Dec. 424.

ing the testator handed the pen to the witnesses, who signed the instrument. No words were spoken during this time. *Held*, a sufficient acknowledgment by the testator: *Allison v. Allison*, 46 Ill. 61; 92 Am. Dec. 237.

§ 3171. **Publication.**—Whether publication is an act essential to the validity of a will is, and has been, a question on which there is much diversity of opinion. It is required, however, in California that the testator must declare to the attesting witnesses that the instrument is his will.<sup>1</sup> And a like provision exists in Arkansas, Dakota, New Jersey, New York, Montana, and Utah.<sup>2</sup> In those states where publication is required the declaration should be made at the time of signing or acknowledging the signature by the testator;<sup>3</sup> and the publication must be in the presence of all the witnesses.<sup>4</sup> There is, it seems, no necessity under the English law that the witnesses be informed or know that the instrument which they are requested to attest by the testator is his will.<sup>5</sup> But it is said in a recent work of authority on wills that “this is not so held in the American states.” The proposition, however, is qualified by the addition of the words “at least not universally, though the doctrine varies in the different states”;<sup>6</sup> and so qualified, the proposition accords with the statement made at the beginning of this section. In those states where publication is necessary no exact form of words is required, but there must be some communication by the testator to the witnesses at

<sup>1</sup> Deering's Cal. Civ. Code, sec. 1276.

<sup>2</sup> Stimson's American Statute Law, sec. 2841. See also Remsen v. Brinckerhoff, 26 Wend. 325; 37 Am. Dec. 251; Chaffee v. Baptist Missionary Convention, 10 Paige, 85; 40 Am. Dec. 225.

<sup>3</sup> Baskin v. Baskin, 36 N. Y. 416; Lewis v. Lewis, 11 N. Y. 220; Sechrest v. Edward, 4 Met. (Ky.) 163; Parramore v. Taylor, 11 Gratt. 220; Swift v. Wiley, 1 B. Mon. 114.

<sup>4</sup> Coffin v. Coffin, 23 N. Y. 9; 80 Am. Dec. 235; Seymour v. Van Wyck, 6

N. Y. 120; Tyler v. Mapes, 19 Barb. 448. But see Small v. Small, 4 Me. 220; 16 Am. Dec. 253.

<sup>5</sup> Jauncey v. Thorne, 2 Barb. Ch. 40; 45 Am. Dec. 424; 1 Jarman on Wills, Randolph and Talcott's notes, 207; 1 Redfield on Wills, 284, 285. “It is not necessary that the testator should declare the instrument he executed to be his will”: Bond v. Seawell, 3 Burr. 1775; Moodie v. Reid, 7 Taunt. 361.

<sup>6</sup> 1 Jarman on Wills, Randolph and Talcott's notes, 207, note 7.

the time which indicates an intention to give effect to the paper as the testator's will.<sup>1</sup> But any form of communication by the testator to the witnesses is sufficient, provided he makes known to them that he intends the instrument to operate as his will.<sup>2</sup> Where the declaration that a paper is a will is made by a third person, if sufficient in any case, it must be distinct and unequivocal, not indefinite, as that the instrument is the testator's "will or agreement."<sup>3</sup>

"It is largely, if not universally, held in the various American states that the acknowledgment of his signature to the witnesses by the testator is a sufficient compliance with the statute."<sup>4</sup> So it is held that the signing

<sup>1</sup> *Remsen v. Brinkerhoff*, 26 Wend. 325; 37 Am. Dec. 251, and note 260; *Compton v. Mitton*, 12 N. J. L. 70; *Buntin v. Johnson*, 28 La. Ann. 796; *Heyer v. Berger*, 1 Hoff. Ch. 1; *Gilbert v. Knox*, 52 N. Y. 125; *Rogers v. Diamond*, 13 Ark. 474; *Lewis v. Lewis*, 11 N. Y. 220. See *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220.

<sup>2</sup> *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235. "It is not necessary that the testator should in express terms declare the instrument in process of execution to be his will; another may speak for him. It is a sufficient compliance with the statute when enough is said or done in the presence and with the knowledge of the testator to give the witnesses to understand distinctly that the testator desires them to know that the paper is his will, and that they are to attest it": *Elkinton v. Brick*, 44 N. J. Eq. 154, 167.

<sup>3</sup> *Rutherford v. Rutherford*, 1 Denio, 33; 43 Am. Dec. 644. It is decided in a recent case in Connecticut that knowledge by the witness that the instrument he is attesting is a will is not necessary. The statute of that state on which the decision is based only requires a will to be "in writing, subscribed by the testator, and attested by" witnesses, in the presence of the testator and of each other, and the court held that it would attribute "too much meaning to the word 'at-

testation'" to declare that a knowledge by the witness that the instrument he was signing was a will was a requisite to the due attestation of the testator's signature, and that the purpose of having a witness was to enable him, "with a great degree of certainty at all times, possibly at a great length of time after his attestation, to testify that the testator put his name upon the identical piece of paper upon which he placed his own": *Canada's Appeal*, 47 Conn. 450, 460, 461. The court discusses *Wyndham v. Chetwynd*, 1 Burr. 421; *Bond v. Seawell*, 3 Burr. 1775; *Wright v. Wright*, 7 Bing. 457; *White v. Trustees of British Museum*, 6 Bing. 310; *Trimmer v. Jackson*, 4 Burn's Ecc. Law, 102; and cites *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Hogan v. Grosvenor*, 10 Met. 54; 43 Am. Dec. 414; *Osborn v. Cook*, 11 Cush. 532; 59 Am. Dec. 155; *Nickerson v. Buck*, 12 Cush. 332; *Tilden v. Tilden*, 13 Gray, 110.

<sup>4</sup> 1 Jarman on Wills, Randolph and Talcott's notes, 211, note; citing *Rosser v. Franklin*, 6 Gratt. 1; 52 Am. Dec. 97; *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424; *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220; *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235; *Allison v. Allison*, 46 Ill. 61; 92 Am. Dec. 237; *Higgins v. Carlton*, 28 Md. 116; 92 Am. Dec. 666; and several others.

and attestation of a will amount to a sufficient publication in themselves.<sup>1</sup>

ILLUSTRATIONS. — One of the witnesses could remember nothing, and could only identify his signature, and the other witness remembered that he signed a paper as witness, but that it was folded, and he could see nothing except a part of the attestation clause, although the testator signed it before him, and requested that he witness it. *Held*, not a publication: *Porteus v. Holm*, 4 Demarest, 14. The will was read before all the witnesses, and approved of, sentence by sentence, by the testator, and at the end of the reading he answered affirmatively the question whether it was his will. *Held*, not a presentation by the testator to the witnesses, as required by the code of Louisiana: *McCaleb v. Douglass*, 16 La. Ann. 327. The will was read aloud to the testator, and he was asked: "Is this paper that has just been read your will?" To which the testator replied, "It is," and signed it, and it was attested. *Held*, a sufficient presentation to witnesses under the code: *Bourke v. Wilson*, 38 La. Ann. 320. The testator handed a document to a witness, and said, "This is my last will and testament," but did not acknowledge the signature to be his. *Held*, sufficient to warrant its admission to probate: *Baskin v. Baskin*, 36 N. Y. 416. A person who was old and infirm had submitted to him an instrument in writing, which he signed, and which was legally attested, but neither the deceased nor the witnesses gave any intimation at the time that the paper so signed was a will. *Held*, that there was no publication: *Swett v. Boardman*, 1 Mass. 258; 2 Am. Dec. 16. The witness was asked by the son of the testator to come and witness some writings for his father, and the witness went and found the testator partly sitting up in bed, and the paper was produced from a chest by the son at the father's request, spread out upon a table, and the witness asked the father if this was the writing he was to witness, to which an affirmative answer was given, but nothing was said about its being a will; but the witness judged from the circumstances that it was a will. *Held*, a sufficient acknowledgment that the paper was a will: *Raudebaugh v. Shelley*, 6 Ohio St. 307. The will was read to the testatrix by the draughtsman, and was also read aloud by her in the presence of witnesses,

<sup>1</sup> *Black v. Ellis*, 3 Hill (S. C.) 68; *Ray v. Walton*, 2 A. K. Marsh. 71; *Dean v. Dean*, 27 Vt. 746. "The testator need not declare in words to the subscribing witnesses that the instrument which they are called to witness is his will, though it would be wise for

him to do so; but by acts and words he may make it sufficiently clear to his witnesses that he so accepts and regards the instrument": *Schouler on Executors and Administrators*, sec. 75; *Etchison v. Etchison*, 53 Md. 348.

and declared to be correct, was then signed by her before all the witnesses, and was attested by them at her request. *Held*, a sufficient compliance with the statute: *Thompson v. Stevens*, 62 N. Y. 634. The testator said: "I want you to witness this." *Held*, a sufficient execution of the will: *Tilden v. Tilden*, 13 Gray, 110.

§ 3172. **Reading of Will to or by Testator, and Knowledge by Him of Contents.**—The law does not require that a will should be read by or to the person executing it. "It is sufficient if the court is satisfied by competent evidence that the contents of the will were known to and approved by the person executing it at the time it was executed as a will."<sup>1</sup> Where a will has been in the testator's possession for a long time, and he has had ample opportunity to read and examine it, the presumption is, that he did so and knows its contents.<sup>2</sup> Nor need the will of a blind person, or one so illiterate as to be unable to read or write, be read over to him, at the time of its execution, in the presence of the witnesses, in order to render it valid.<sup>3</sup>

§ 3173. **Will must be Attested and Subscribed.**—With the exception of Pennsylvania, where signing does not seem to be a necessity, the statutes of all the states require the will and signature of the testator to be attested and subscribed by witnesses, to make it valid to pass any estate;<sup>4</sup> and this statutory requirement must be complied

<sup>1</sup> *Worthington v. Klemm*, 144 Mass. 167; citing *Day v. Day*, 3 N. J. Eq. 549; *Pettes v. Brigham*, 10 N. H. 514; *Parker v. Felgate*, L. R. 8 P. D. 171; *Morrell v. Morrell*, L. R. 7 P. D. 68; *Hastilow v. Stoby*, L. R. 1 Pro. & D. 64; *Cleare v. Cleare*, L. R. 1 Pro. & D. 655; *Moore v. Paine*, 2 Lee, 595.

<sup>2</sup> *Brick v. Brick*, 44 N. J. Eq. 282. As to knowledge of contents, see *Hemphill v. Hemphill*, 2 Dev. 291; 21 Am. Dec. 331; *Gerrish v. Nason*, 22 Me. 438; 39 Am. Dec. 589; *Hughes v. Meredith*, 24 Ga. 325; 71 Am. Dec.

127. As to the rule in Georgia, see *Stimson's American Statute Law*, sec. 2643. As to what is and is not a sufficient knowledge of the contents, see *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329.

<sup>3</sup> *Clifton v. Murray*, 7 Ga. 564; 50 Am. Dec. 411; *Hemphill v. Hemphill*, 2 Dev. 291; 21 Am. Dec. 331; *Wampler v. Wampler*, 9 Md. 540.

<sup>4</sup> Conn. Gen. Stats. 1887, sec. 538; *Stimson's American Statute Law*, sec. 2644; supplement, sec. 2644; 1 Jarman on Wills, Randolph and Talcott's notes, 197, note 1; 249.

with,<sup>1</sup> though where a will consists of several detached sheets it is not necessary that each sheet should be separately attested.<sup>2</sup>

No particular form of words for attestation is required. It is especially provided by statute in Virginia that "no form of attestation shall be necessary,"<sup>3</sup> and the same provision exists in West Virginia.<sup>4</sup> This rule also obtains in those states where no provision is made therefor;<sup>5</sup> and there are decisions which hold that no attestation clause is necessary.<sup>6</sup>

**§ 3174. Whether Attestation Clause is Part of Will.—**

This question has arisen in determining whether a subscription by the witnesses at the end of a will is within the meaning of a statutory requirement to that effect, and the court said what is ordinarily "called the attestation clause, when it follows the signature, is no part of the will."<sup>7</sup> It is not essential to the validity of a will; and when "it follows the signature, it cannot be taken as a part thereof. But if the testator chooses to insert the attestation clause before his signature, thus making it a part of the instrument, then, like any other matter contained in the will which does not relate to the disposition of property, it becomes a part of the instrument called a will."<sup>8</sup>

**§ 3175. Witnesses need not Read or Know Contents of Will.—** A will need not be read by or to the subscribing witnesses, nor need they know its contents.<sup>9</sup>

<sup>1</sup> *Burlington University v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 376. See *Houston v. Houston*, 2 McCord, 491; 15 Am. Dec. 647.

<sup>2</sup> *Martin v. Hamlin's Executors*, 4 Strob. 188; 53 Am. Dec. 673.

<sup>3</sup> Va. Code 1887, sec. 2515.

<sup>4</sup> *Warth's Amended Code 1884*, c. 77, sec. 3, p. 569.

<sup>5</sup> 1 *Jarman on Wills*, Randolph and Talcott's notes, 218; *Fatheree v. Lawrence*, 33 Miss. 585.

<sup>6</sup> *Leaycraft v. Simmons*, 3 Bradf. 35; *Fry's Will*, 2 R. I. 88; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85; 40 Am. Dec. 225.

<sup>7</sup> *Jackson v. Jackson*, 39 N. Y. 153.

<sup>8</sup> *Younger v. Duffie*, 94 N. Y. 535, 540; 46 Am. Rep. 156.

<sup>9</sup> *Higdon's Will*, 6 J. J. Marsh. 444; 22 Am. Dec. 84; *Schouler on Executors and Administrators*, sec. 75; *Dickie v. Carter*, 42 Ill. 376; *Leverett v. Carlisle*, 19 Ala. 80.

§ 3176. **Who are Competent or Credible Witnesses.** — The statutes of the several states require "competent" or "credible" witnesses to attest the will,<sup>1</sup> and "under either form of expression persons beneficially interested under the will cannot serve."<sup>2</sup> The term "credible witness" means, in this connection, a witness who was competent at the time of the attestation.<sup>3</sup> A wife, however, is not, in Massachusetts, a competent witness to a will containing a devise to her husband,<sup>4</sup> nor even to her husband's will,<sup>5</sup> though in Iowa a husband may witness a will which contains a devise to his wife.<sup>6</sup> In New Hampshire, inhabitants of towns and corporations, and in Connecticut members of corporations, which are devisees may attest a will.<sup>7</sup> The executor is a competent witness to the will where he has no beneficial interest therein other than the commission on the estate allowed by law for his services. If, however, he is a legatee or devisee, or has a beneficial interest under the will, the rule is different,<sup>8</sup> though the executor or legatee may renounce his legacy and dispose of his interest, and become competent to prove the will.<sup>9</sup>

<sup>1</sup> Stimson's American Statute Law, sec. 2646.

<sup>2</sup> Schouler on Executors and Administrators, sec. 76; 1 Perkins's Williams on Executors, 67.

<sup>3</sup> Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666; Stimson's American Statute Law, sec. 2646; Hawes v. Humphrey, 9 Pick. 350; 20 Am. Dec. 481. See also Haven v. Hilliard, 23 Pick. 10; Taylor v. Taylor, 1 Rich. 531; Workman v. Dominick, 3 Strob. 589; Patten v. Tallman, 27 Me. 17; Hall v. Hall, 18 Ga. 40; Nixon v. Armstrong, 38 Tex. 296; 1 Jarman on Wills, Randolph and Talcott's notes, 225, note 23; 189, note 5; 253.

<sup>4</sup> Sullivan v. Sullivan, 106 Mass. 474; 8 Am. Rep. 356. But *contra*, Winalow v. Kimball, 25 Me. 493; Hawkins v. Hawkins, 54 Iowa, 443.

<sup>5</sup> Pease v. Allis, 110 Mass. 157; 14 Am. Rep. 591. See Stimson's American Statute Law, sec. 2650.

<sup>6</sup> Bates v. Officer, 70 Iowa, 343.

<sup>7</sup> Stimson's American Statute Law, sec. 2647; Eustis v. Parker, 1 N. H. 273. See Haven v. Hilliard, 23 Pick. 9; Warren v. Baxter, 48 Me. 193; Loring v. Park, 7 Gray, 42; Cornwall v. Isham, 1 Day, 35; 2 Am. Dec. 50.

<sup>8</sup> Stimson's American Statute Law, sec. 2647; Milley v. Wiley, 46 Me. 230; Stewart v. Harrison, 56 N. H. 25; 22 Am. Rep. 408; Wyman v. Symmes, 10 Allen, 153; Overton v. Overton, 4 Dev. & B. 197; Richardson v. Richardson, 35 Vt. 238; Bowen v. Goranflo, 73 Pa. St. 357; Meyer v. Fogg, 7 Fla. 292; 68 Am. Dec. 441; Murphy v. Murphy, 24 Mo. 526; Noble v. Burnett, 10 Rich. 505; Panand v. Jones, 1 Cal. 488; Frew v. Clarke, 80 Pa. St. 170. See 1 Jarman on Wills, Randolph and Talcott's notes, 193, 226, and note.

<sup>9</sup> Search's Appeal, 13 Pa. St. 108. But see Morton v. Ingram, 11 Ired. 368; Taylor v. Taylor, 1 Rich. 531; Stimson's American Statute Law, sec. 2649.

So a judge of probate may be a competent witness.<sup>1</sup> And the heir may be competent as a witness, although a devise or bequest to such heir would be void.<sup>2</sup> So creditors may be competent witnesses, although the debt is made by the will a charge on lands of the testator.<sup>3</sup> The rule that one interested is incompetent as a witness is not followed in Maryland.<sup>4</sup> So whether the witness receives more under the will, or more in case of its invalidity, is a determining question in some states.<sup>5</sup> And it is said that, "in states which require competent witnesses, beneficial devises, legacies, and gifts to subscribing witnesses are usually declared void,"<sup>6</sup> and this would make such witness competent.<sup>7</sup>

**ILLUSTRATIONS.**—The statute provided that "all beneficial devises made in any will to a subscribing witness thereto shall be wholly void, unless there are three other competent witnesses to the same." A wife was one of the three subscribing witnesses to a will containing a devise to her husband, and it was contended that the devise to her husband was a "beneficial devise" to the wife, and therefore void, leaving her a competent attesting witness to the rest of the will. *Held*, that the contention could not be maintained; and there not being the required number of competent witnesses required by law, the will was invalid: *Sullivan v. Sullivan*, 106 Mass. 474; 8 Am. Rep. 356. The son of the testator was a subscribing witness to a will, but received only one dollar under its provisions, that being much less than his interest as heir at law. *Held*, that he was a competent witness to prove the will: *Smalley v. Smalley*, 70 Me. 545; 35 Am. Rep. 353.

**§ 3177. How Witnesses should Sign.**—A subscribing witness to a will should write his own name.<sup>8</sup> But where

<sup>1</sup> *Patten v. Tallman*, 27 Me. 17.

<sup>2</sup> *Stimson's American Statute Law*, sec. 2651.

<sup>3</sup> *Stimson's American Statute Law*, sec. 2643.

<sup>4</sup> *Estep v. Morris*, 38 Md. 317.

<sup>5</sup> 1 *Jarman on Wills*, Randolph and Talcott's notes, 189, note 5.

<sup>6</sup> *Schouler on Executors and Administrators*, sec. 76, note 1; 1 *Jarman on Wills*, Randolph and Talcott's notes, 189, note 5; *Stimson's American Statute Law*, sec. 2650.

<sup>7</sup> *Stimson's American Statute Law*, sec. 2650; *Rucker v. Lambdin*, 12 Smedes & M. 230; *Sullivan v. Sullivan*, 106 Mass. 474; 8 Am. Rep. 356.

<sup>8</sup> *Ex parte Leroy*, 3 Bradf. 227. But see *In re Oliver*, 2 Spinks, 57; *In re Sperling*, 33 L. J. Prob. 25; *Adams v. Chaplin*, 1 Hill Eq. 265. Must affix place of residence to name in California, Dakota, Montana, New York, and Utah: *Stimson's American Statute Law*, sec. 2644.

the attesting witness is unable to write, his name may be written for him by another, at his request, in his presence, and in the presence of the testator;<sup>1</sup> or the name may be written by another, the mark of the witness who is unable to write being made by him;<sup>2</sup> and the signing by initials has been held sufficient.<sup>3</sup> The rule, in brief, is, that, "like the testator himself, the witness may sign by mark, by initial, or by fictitious name, though not by seal; his hand may be guided by another, if he cannot write"; but under the English law, and also in some of the states, he may not adopt a signature made previously by himself or another.<sup>4</sup>

**§ 3178. Where Witnesses should Sign.**—In New York it is held that the attestation must be made after the testator's signature.<sup>5</sup> But in Texas the rule does not seem to be the same, since in that state the fact that a witness signs in the attestation clause, instead of after, is not considered important.<sup>6</sup> So in Mississippi, the witnesses are not required to sign in any particular spot or part of the will, the statute only requiring that they attest the will in the testator's presence;<sup>7</sup> and generally it is immaterial where the witnesses sign in the absence of a statute declaring where the signatures shall be placed.<sup>8</sup> But the statutes of Arkansas, California, Dakota, Montana, New York, and Utah provide that witnesses shall sign at the end of the will.<sup>9</sup>

<sup>1</sup> Lord v. Lord, 58 N. H. 7; 42 Am. Rep. 565.

<sup>2</sup> Montgomery v. Perkins, 2 Met. (Ky.) 448; 74 Am. Dec. 419; Jesse v. Parker, 6 Gratt. 57; 52 Am. Dec. 102.

<sup>3</sup> Adams v. Chaplin, 1 Hill Eq. 265.

<sup>4</sup> Schouler on Executors and Administrators, sec. 77; 1 Redfield on Wills, 229, 230; Chase v. Kittredge, 11 Allen, 49; 87 Am. Dec. 687; Sturdivant v. Birchett, 10 Gratt. 67; 2 Greenl. Ev., sec. 677; 1 Jarman on

Wills, Randolph and Talcott's notes, 213, 215.

<sup>5</sup> Jackson v. Jackson, 39 N. Y. 153; Heady's Will, 15 Abb. Pr., N. S., 211.

<sup>6</sup> Franks v. Chapman, 64 Tex. 159.

<sup>7</sup> Murray v. Murphy, 39 Miss. 214.

<sup>8</sup> Schouler on Executors and Administrators, sec. 77; Potts v. Felton, 70 Ind. 166.

<sup>9</sup> Stimson's American Statute Law, sec. 2644.

§ 3179. **Order of Signing.**—In the attestation of a will, the order of signing is immaterial. In this respect it is said that the English law differs from ours, and its decisions are not authority here.<sup>1</sup>

§ 3180. **Request to Witness.**—In Arkansas, California, Dakota, Montana, New York, and Utah the testator must request the witnesses to sign the will.<sup>2</sup> But this requirement is held to be sufficiently complied with when the request is made by the draughtsman in the testator's presence.<sup>3</sup> So a request to a witness to subscribe a will may be made by a third person, provided the testator hears and understands it, and does not dissent.<sup>4</sup> And where such request is a prerequisite, no particular form of words is necessary to be used, nor is it necessary that the request be openly made; mere acquiescence by the testator when another calls in the witnesses is sufficient.<sup>5</sup>

§ 3181. **Attestation as to Sanity.**—The presumption is, as we have seen, that the testator was of sound and disposing mind at the time of the execution of the will.<sup>6</sup> And it is said, in a Missouri case, that "there is nothing in the idea that it should appear from the attestation of a witness to a will that the testator was of sound and disposing mind. The witness proves that fact when sworn to establish the will, but the statute does not require that he should state it in his attestation."<sup>7</sup> But the witnesses must judge of the testator's capacity, since they are present at the time and place of the execution of the will, and are placed there for that purpose, to protect both the testator

<sup>1</sup> Miller v. McNeill, 35 Pa. St. 217; 78 Am. Dec. 333.

<sup>2</sup> See also Rutherford v. Rutherford, 1 Denio, 33; 43 Am. Dec. 644.

<sup>3</sup> Peck v. Cary, 27 N. Y. 9; 84 Am. Dec. 220.

<sup>4</sup> Cheatham v. Hatcher, 30 Gratt. 56; 32 Am. Rep. 650.

<sup>5</sup> Whitenack v. Stryke, 2 N. J. Eq. 8; Nelson v. McGiffert, 3 Barb. Ch.

158; 49 Am. Dec. 170. See Hogan v. Grosvenor, 19 Met. 54; 43 Am. Dec. 414. Request not necessary in Maryland: Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666.

<sup>6</sup> Elkinton v. Brick, 44 N. J. Eq. 154.

<sup>7</sup> Murphy v. Murphy, 24 Mo. 526. But see Withinton v. Withinton, 7 Mo. 589.

and the heir, and prominence is justly given to their testimony on the question of testamentary capacity.<sup>1</sup>

§ 3182. **Attestation at Different Times.**— Unless there is some statute expressly or impliedly to the contrary, there is no reason why the witnesses should not attest at different times or on different days, provided the will is attested in the presence of the testator.<sup>2</sup>

§ 3183. **Attestation in Presence of Testator.**— In nearly all the states the witnesses are required to sign in the presence of the testator.<sup>3</sup> There have been numerous cases where the question has arisen whether the will was signed as the statute requires; and while each case depends on its particular circumstances, yet a general principle governs in the determination of all of them, and that is this: a literal compliance with the words of the statute is never exacted. If, when the signing was done by the witnesses, they were so located in relation to the testator as that the reasonable conclusion could obtain that he must have seen the signing, it is sufficiently and properly attested; and the fact that a possibility exists that the testator saw the witnesses sign has been held to establish *prima facie* an attesting in the presence of the testator.<sup>4</sup> The testator must be so present to witnesses and they to him that he might and probably did see the attestation; and it will not suffice that he

<sup>1</sup> Field's Appeal, 36 Conn. 277, 279.

<sup>2</sup> Green v. Cain, 12 Gratt. 252; Eelbeck v. Granberry, 2 Hayw. (N. C.) 232; 2 Am. Dec. 624; Jauncey v. Thorne, 2 Barb. Ch. 40; 45 Am. Dec. 424.

<sup>3</sup> So in Alabama, Arizona, California, Connecticut, Dakota, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Nevada, North Carolina,

Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin: Stimson's American Statute Law, sec. 2644; Rucker v. Lambdin, 12 Smedes & M. 230; Town of Pawtucket v. Ballou, 15 R. I. 58; 2 Am. St. Rep. 868. But see Abraham v. Wilkins, 17 Ark. 292; In re Will of Cornelius, 14 Ark. 675.

<sup>4</sup> Montgomery v. Perkins, 2 Met. (Ky.) 448; 74 Am. Dec. 419; Dewey v. Dewey, 1 Met. 349; 35 Am. Dec. 387.

might have seen the attestation by changing his situation, or causing it to be changed, or by removing an intervening obstruction.<sup>1</sup> But it is also held that the testator need not actually see the attestation, but that it is necessary that he should be in a situation to do so if he desire it.<sup>2</sup> So if the signing of a will by the witnesses was in such a place that the testator might have seen them doing it if he had chosen, and he was not prevented from seeing it by physical inability, it was "in his presence."<sup>3</sup> The witnesses to a will of a blind testator must sign in his presence so that he may know and verify by his remaining senses that they are actually putting their signatures to the right document.<sup>4</sup> It is held that the acknowledgment in the testator's presence by the witnesses of their signatures affixed without his presence is not sufficient.<sup>5</sup>

**ILLUSTRATIONS.**—A will was signed by the witnesses in a room adjoining that where the testator lay in bed, about nine feet distant, in the line of his vision if he could have looked, and within his hearing, and to his knowledge and understanding. He did not literally see the signing, because he was unable to turn his head, and could only look upward. *Held*, a signing in his presence: *Riggs v. Riggs*, 135 Mass. 238; 46 Am. Rep. 464; *Nock v. Nock*, 10 Gratt. 106. The testator was blind, and the witnesses were near enough for him to have heard their pens scratch. *Held*, sufficient: *Ray v. Hill*, 3 Strob. 297; 49 Am. Dec. 647. The testatrix was told that certain gentlemen, naming them, had come to witness her will, and she bowed her head, and the witnesses subscribed at a table near the foot of the bed where she was lying, and she must have seen them unless she expressly avoided it by some act, such as

<sup>1</sup> *Reed v. Roberts*, 26 Ga. 294; 71 Am. Dec. 210; *Neil v. Neil*, 1 Leigh, 6; *Reynolds v. Reynolds*, 1 Speers, 253; 40 Am. Dec. 599; *Jones v. Tuck*, 3 Jones, 202. See *Riggs v. Riggs*, 135 Mass. 238; 46 Am. Rep. 464; *Meurer's Will*, 44 Wis. 493; 28 Am. Rep. 591.

<sup>2</sup> *Edelen v. Hardey's Lessee*, 7 Har. & J. 61; 16 Am. Dec. 292.

<sup>3</sup> *Maynard v. Vinton*, 59 Mich. 139;

60 Am. Rep. 276, and note 285. That signing out of view of the testator may be valid, see *Ambre v. Weishaar*, 74 Ill. 110; *Sturdivant v. Birchett*, 10 Gratt. 67.

<sup>4</sup> *Ray v. Hill*, 3 Strob. 297; 49 Am. Dec. 647.

<sup>5</sup> *Town of Pawtucket v. Ballou*, 15 R. I. 58; 2 Am. St. Rep. 868. See *Chase v. Kittredge*, 11 Allen, 49; 87 Am. Dec. 687.

closing her eyes or turning away her head. *Held*, a valid attestation: *Baldwin v. Baldwin's Executor*, 81 Va. 405; 59 Am. Rep. 669. The testator, being in ordinary health, signed his will on a piazza, and then surrendered his seat to the witnesses to sign, and stepped into the door of the adjoining room and there remained, but could see the signing if standing in or near the door or walking about the room, or by taking a step or two from the place where the witnesses afterwards found him sitting, and where he could hear all that passed. *Held*, a signing in the testator's presence: *Wright v. Lewis*, 5 Rich. 212; 55 Am. Dec. 714. The signing was in an adjoining room, and the witnesses could be seen through an open door. *Held*, a sufficient attestation: *Spaulding v. Gibbons*, 5 Redf. 316. The attestation was in the same room. *Held*, sufficient: *Howard's Will*, 5 T. B. Mon. 199; 17 Am. Dec. 60. The witnesses were in an adjoining room, where the testator could not see them, but they immediately afterwards acknowledged their signatures. *Held*, a sufficient attestation: *Sturdivant v. Birchett*, 10 Gratt. 67. But in a similar case, *held*, *prima facie* insufficient: *Edelen v. Hardey*, 7 Har. & J 61; 16 Am. Dec. 292; *Boldry v. Parris*, 2 Cush. 433. The signing was in another room, out of the sight of the testator. *Held*, not sufficient: *Machell v. Temple*, 2 Show. 228; *Mandeville v. Parker*, 31 N. J. Eq. 242, and note.

§ 3184. **Signing by Witnesses in Presence of Each Other.**—In South Carolina, Utah, Vermont, and West Virginia the witnesses must sign the will in the presence of each other.<sup>1</sup> In the absence, however, of a statutory provision, such a signing is not necessary. It is sufficient if each witness signs in the presence of the testator.<sup>2</sup>

<sup>1</sup> Stimson's American Statute Law, sec. 2644. See also Conn. Rev. Stats. 1875, 369; Rev. Stats. 1888, sec. 538; Gaylor's Appeal, 43 Conn. 82. In addition to the states last named in the text, Connecticut and Virginia are noted in Stimson's American Statute Law, section 2644, as having a like statutory requirement. But in Connecticut the statute has been changed, by the present revision. So the rule laid down in Gaylor's Appeal, above noted, will apply; and in Virginia the statute of 1887, section 2514, does not require the witnesses to sign in the presence of each other. That wit-

nesses must so sign, see *Roberts's Adm'r v. Welch*, 46 Vt. 164.

<sup>2</sup> *Webb v. Fleming*, 30 Ga. 808; 76 Am. Dec. 675; *Johnson v. Johnson*, 106 Ind. 475; 55 Am. Rep. 762; *Hoffman v. Hoffman*, 26 Ala. 535; *Cravens v. Faulconer*, 28 Mo. 19; *Parramore v. Taylor*, 11 Gratt. 220; *Flinn v. Owen*, 58 Ill. 111. See *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Hoysradt v. Kingman*, 22 N. Y. 372; *Will of Smith*, 52 Wis. 543; 38 Am. Rep. 756; *Hogan v. Grosvenor*, 10 Met. 54; 43 Am. Dec. 414; 2 Greenl. Ev., sec. 676.

**§ 3185. Witnesses should See Testator's Signature. —**  
The subscribing witnesses to a will must see the testator's signature at the time when they attest it. It is not sufficient for him to send for the witnesses, explain that he wanted them to sign his will, and obtain their signatures as attesting witnesses, if the will is so folded that they cannot see whether he has signed it or not.<sup>1</sup>

<sup>1</sup> *Matter of Mackay*, 110 N. Y. 611; 6 Am. St. Rep. 409.

## CHAPTER CLVII.

## PROBATE OF AND CONTESTING WILLS.

- § 3186. Probate of wills — Jurisdiction of probate courts.
- § 3187. When jurisdiction attaches.
- § 3188. When will should be presented for probate.
- § 3189. Where will should be probated.
- § 3190. Who may apply for probate.
- § 3191. What may be probated.
- § 3192. Ante-mortem probate.
- § 3193. Will executed in another state.
- § 3194. Foreign wills.
- § 3195. What proof requisite to establish will.
- § 3196. Burden of proof of execution of will.
- § 3197. How many witnesses required.
- § 3198. Proof of handwriting.
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- § 3200. Other evidence to show execution of will.
- § 3201. Character of evidence required from subscribing witness.
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- § 3203. Evidence to rebut attestation and to contradict affidavit of subscribing witness.
- § 3204. Proponent's declarations inadmissible to defeat probate of will.
- § 3205. Testamentary capacity — Evidence and burden of proof.
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- § 3209. Evidence and burden of proof as to undue influence and fraud.
- § 3210. Sanity and undue influence a question for the jury.
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- § 3212. Declarations of other parties.
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- § 3216. Proof of lost or destroyed will — Probate of same.
- § 3217. Jurisdiction of equity to establish lost will.
- § 3218. Admissibility of wills as evidence — Ancient wills.
- § 3219. Extrinsic evidence to affect will.
- § 3220. Evidence to explain ambiguities.
- § 3221. Evidence to show mistake — Supplying words.
- § 3222. Impeachment or setting aside will.
- § 3223. Who may contest will.

§ 3186. **Probate of Wills — Jurisdiction of Probate Courts.** — What courts have jurisdiction in questions relating to the probate of wills and all matters concerning testate estates is so entirely a matter of statutory regulation that the statutes of the several states on this point must in each case be consulted.<sup>1</sup>

§ 3187. **When Jurisdiction Attaches.** — A probate court acquires jurisdiction to probate a will on the presentation to it of the proper petition, and the publication of due and legal notice of the hearing.<sup>2</sup>

§ 3188. **When Will should be Presented for Probate.** — Although a will ought to be presented for probate within such a reasonable time after the testator's death as decency and the rights of those interested would warrant, yet the rule undoubtedly is, that in the absence of a statutory regulation limiting the time, a will may be admitted to probate at any time after the testator's death;<sup>3</sup> and especially where it is a will of lands.<sup>4</sup>

§ 3189. **Where Will should be Probated.** — The will should be presented to the probate court or court of like jurisdiction where the testator had his domicile at the time of his decease. This general rule is, however, subject to qualifications, dependent upon the locality of personalty and the situation of the decedent's real estate.<sup>5</sup> So it has been held that a will of lands in Maryland must be probated in the courts of that state.<sup>6</sup> But if

<sup>1</sup> Stimson's American Statute Law, sec. 556. See also *Olney v. Angell*, 5 R. I. 198; 73 Am. Dec. 62; *Fortune v. Buck*, 23 Conn. 1.

<sup>2</sup> *In re Will of Warfield*, 22 Cal. 51; 83 Am. Dec. 49. See Schouler on Executors and Administrators, secs. 65 et seq.

<sup>3</sup> *Rebhan v. Mueller*, 114 Ill. 343; 55 Am. Rep. 869; Schouler on Executors and Administrators, sec. 56.

<sup>4</sup> *Haddock v. R. R. Co.*, 146 Mass. 155; 4 Am. St. Rep. 295; *Shumway v. Holbrook*, 1 Pick. 114; 11 Am. Dec. 153.

<sup>5</sup> Schouler on Executors and Administrators, secs. 21-29, 57. See Title Executors and Administrators; Stimson's American Statute Law, sec. 2656.

<sup>6</sup> *Budd v. Brooke*, 3 Gill, 198; 48 Am. Dec. 321.

jurisdiction has once attached, it is not divested by a subsequent division of the county.<sup>1</sup>

**§ 3190. Who may Apply for Probate.**—Wills may be presented for admission to probate by the executor, or a devisee, legatee, or by any one interested, although it would more naturally devolve upon the executor, as he is the one intended to carry out the provisions of the will.<sup>2</sup> But an executor or devisee cannot repropound a testament pronounced against when first offered by the executor otherwise than upon the ground of newly discovered evidence,<sup>3</sup> since the propounder of a will for probate, whether executor, legatee, or devisee, becomes the representative of the will for the purpose of its probate and of all similarly interested.<sup>4</sup>

**§ 3191. What may be Probated.**—Not only the will itself, but all papers of a testamentary character, should be offered for probate, since the court is the judge as to whether the paper is one which is properly executed, and whether it is otherwise a proper paper for probate.<sup>5</sup> So a will may be proved by proof of a codicil when it is written on the same paper as the will, or clearly refers to and identifies the will.<sup>6</sup> And any properly executed paper should be offered for probate, although it may only have the appearance of a will.<sup>7</sup> So a copy may in certain cases be proved as a will;<sup>8</sup> and a memorandum in writing, which is not executed, but was taken down in order to draw a will, and was then read over and approved by

<sup>1</sup> *Lindsay v. McCormack*, 2 A. K. Marsh. 229; 12 Am. Dec. 387.

<sup>2</sup> *Wells v. Wells*, 4 T. B. Mon. 152; 16 Am. Dec. 150; *Redmond v. Collins*, 4 Dev. 430; 27 Am. Dec. 208; *Matter of Griswold*, 15 Abb. Fr. 299; *Foster v. Tyler*, 7 Paige, 48; *Ford v. Ford*, 7 Humph. 92; *Schouler on Executors and Administrators*, sec. 64. But see *Winn v. Bob*, 3 Leigh, 140; 23 Am. Dec. 258.

<sup>3</sup> *Redmond v. Collins*, 4 Dev. 430; 27 Am. Dec. 208.

<sup>4</sup> *Id.*; *Schultz v. Schultz*, 10 Gratt. 358; 60 Am. Dec. 335.

<sup>5</sup> *Fortune v. Buck*, 23 Conn. 1; *Schouler on Executors and Administrators*, sec. 60.

<sup>6</sup> *Duncan v. Duncan*, 23 Ill. 364; 76 Am. Dec. 699.

<sup>7</sup> *Means v. Means*, 5 Strob. 167.

<sup>8</sup> *Dudley v. Wardner*, 41 Vt. 59.

the testator, may be probated.<sup>1</sup> So the contents of a lost or destroyed will may be established before the probate court by suitable proof.<sup>2</sup>

**ILLUSTRATIONS.**—To correct the spelling in his will already executed, the testator had it copied, and undertook to execute the copy, and destroyed the original. The copy being insufficiently attested, *held*, that the original was restored to force, and its contents were sufficiently established by the copy, with evidence of its correctness and evidence of the testator's declarations: *Wilbourn v. Shell*, 59 Miss. 205; 42 Am. Rep. 363.

**§ 3192. Ante-mortem Probate.**—A statute providing for the probate of wills before the death of the testator, leaving him free to alter or revoke it, or escape the effect of any action by removal from the jurisdiction, is void.<sup>3</sup>

**§ 3193. Will Executed in Another State.**—A will may be admitted to probate in Texas which disposes of real estate there, and is executed according to the laws of that state, although it was made in Virginia, where the testatrix had her domicile.<sup>4</sup> And it is held in an early Massachusetts case that an instrument might be admitted to probate in that state which was made in New York by an inhabitant of the former state while he believed himself *in extremis*, and which revoked a former will, and stated that the maker desired his estate settled according to law. The paper was duly executed and attested in accordance

<sup>1</sup> *Rhorer v. Stehman*, 1 Watts, 442.

<sup>2</sup> *McBeth v. McBeth*, 11 Ala. 596; *Apperson v. Cottrell*, 3 Port. 51; 29 Am. Dec. 239. See § 3215, Evidence as to Lost Will, *post*.

<sup>3</sup> *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236; 56 Am. Rep. 378; the court saying: "The case is one where we can get no help from similar precedents, as the statute is new and singular. Judicial proceedings to probate a will while the testator is living are unheard of in this country or in England. . . . The practice which has usually prevailed in civil-law countries, . . . of

having wills executed or declared in solemn form or acknowledged before reputable public officers and a sufficient number of disinterested witnesses to render it unlikely that the testator is not acting with capacity and freedom has been approved by the continued experience of most countries. . . . The broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs."

<sup>4</sup> *Holman v. Hopkins*, 27 Tex. 38.

with the law, and would have been entitled to admission to probate in New York.<sup>1</sup>

**§ 3194. Foreign Wills.** — In case of foreign wills which it may become necessary to probate in a state other than that of the testator's domicile, it is, in general, only requisite for the proponent to produce an authenticated or exemplified copy of the will and its probate in the home jurisdiction, which, upon due notice, hearing, and proof, is filed and recorded, and operates effectually as a probate of the will.<sup>2</sup> And it is held that the probate of a will in the foreign jurisdiction is a prerequisite of recording the same in another state, and that the fact of such probate must appear by the certificate transmitted with the exemplified copy of the will; and that if the surrogate record a will without such certificate, his record is a nullity, and he can make no transcript of such a record which will be competent evidence; and in addition, it is further determined that when the object of making such foreign will a record in another state is in order to use it in making title to lands therein, then the exemplified record must contain the proofs taken on probate in the foreign state, that it may appear therefrom that the will was made and executed in the manner and with the formalities prescribed by the statute for devises of land.<sup>3</sup>

**§ 3195. What Proof Requisite to Establish Will.** — The propounder of a will must be prepared to show affirmatively a compliance with the statutory requisites of a valid will, which requisites have already been sufficiently

<sup>1</sup> Bayley v. Bailey, 5 Cnsh. 245. But see the statutes of California, Missouri, Oregon, Rhode Island, Tennessee, Utah; Stimson's American Statute Law, sec. 2656.

<sup>2</sup> Culbertson v. The Whitbeck Co., 127 U. S. 326; De Sobry v. De Laistre, 2 Har. & J. 191; 3 Am. Dec. 535; Poole v. Jackson, 66 Tex. 380; Elmon-

dorf v. Carmichael, 3 Litt. 472; 14 Am. Dec. 86; Dublin v. Chadbourn, 16 Mass. 433; Sneed v. Ewing, 5 J. J. Marsh. 460; 22 Am. Dec. 41; Schouler on Executors and Administrators, sec. 172.

<sup>3</sup> Lindley v. O'Reilly, 50 N. J. L. 636; 7 Am. St. Rep. 802. See Title Executors and Administrators.

noted in prior sections of this title.<sup>1</sup> The rules of law, however, applicable to the kind and amount of proof necessary to be brought forward by the propounder of the will will be noted in the sections next following.

**§ 3196. Burden of Proof of Execution of Will.**—The burden of proving that a will was duly and legally executed as and for the last will of the testator rests upon the propounder of the will or those claiming under it.<sup>2</sup> But due execution of the will may be inferred from circumstances, and against the positive testimony of some, or even of all, the witnesses.<sup>3</sup>

**§ 3197. How Many Witnesses Required.**—The law does not prescribe the mode of proof of a will, nor require it to be proved as well as attested by a specified number of witnesses.<sup>4</sup> It is advisable that all the subscribing witnesses to a will who are living in the state, and are competent to testify, be had in court to be sworn and examined when the will is sought to be proved and admitted to probate;<sup>5</sup> and this rule especially applies where there is a contest over the will.<sup>6</sup> The rule, however, is substantially complied with, in some of the states, by appending to the will, at the time of its execution, a certificate or attestation, by the witnesses under oath, of the facts to which they would otherwise have sworn at the probate of the will.<sup>7</sup> It is held, also, in numerous cases, that it is not absolutely necessary to produce all the witnesses if it can be shown by the witnesses who are produced that the will was

<sup>1</sup> See also Schouler on Executors and Administrators, sec. 73.

<sup>2</sup> *Hardy v. Merrill*, 56 N. H. 227; 22 Am. Rep. 441; *Reynolds v. Reynolds*, 1 Speers, 253; 40 Am. Dec. 599; *Williams v. Robinson*, 42 Vt. 658; 1 Am. Rep. 359; *Baldwin v. Parker*, 99 Mass. 70; 96 Am. Dec. 697.

<sup>3</sup> *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220.

<sup>4</sup> *Jesse v. Parker*, 6 Gratt. 57; 52 Am. Dec. 102.

<sup>5</sup> *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424; *Evans v. Evans*, 10 Smedes & M. 402.

<sup>6</sup> *Thornton v. Thornton*, 39 Vt. 122; *Rigg v. Wilton*, 13 Ill. 15; 54 Am. Dec. 419.

<sup>7</sup> Such is the practice in Connecticut. See also *Rigg v. Wilton*, 13 Ill. 15; 54 Am. Dec. 419.

legally executed,<sup>1</sup> since proof by one of the attesting witnesses is sufficient if he can testify to a compliance with all the requirements of the statute as to the execution, acknowledgment, and attestation,<sup>2</sup> especially since the certificate of attestation, signed by all the witnesses, affirms the existence of all the facts requisite to a valid will.<sup>3</sup>

**ILLUSTRATIONS.**—One witness to a will devising land testified that, by direction of the testatrix, and in her presence and that of another witness, he signed the testatrix's name, and subscribed his own as a witness; and the other witness testified that he heard the testator acknowledge the will, and that he subscribed it as a witness at her request and in her presence. *Held*, sufficiently proven: *Welch v. Welch*, 2 T. B. Mon. 83; 15 Am. Dec. 126. Only one of the witnesses was called, and he testified to his own signature and the handwriting of another witness, who was dead, but could not recollect any of the facts, and did not remember the testator, and it appeared that the other subscribing witness was living within the jurisdiction of the court. *Held*, that the proof was insufficient: *Jackson v. Le Grange*, 19 Johns. 386; 10 Am. Dec. 237; *Jackson v. Vickory*, 1 Wend. 406; 19 Am. Dec. 522.

§ 3198. **Proof of Handwriting.**—Where the witnesses are all dead, or cannot be had because beyond the jurisdiction of the court, or being present, they deny their signatures or do not remember, proof of the handwriting of the witnesses and of the attestation may be given.<sup>4</sup>

§ 3199. **Presumption of Due Execution from Attestation Clause.**—The attestation clause of a will, although not conclusive evidence, in that it may be contradicted by

<sup>1</sup> *Den v. Milton*, 12 N. J. L. 70; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401; *McKeen v. Frost*, 46 Me. 239.

<sup>2</sup> *Jackson v. Vickory*, 1 Wend. 406; 19 Am. Dec. 522; *McKee v. White*, 50 Pa. St. 354; *Lindsay v. McCormack*, 2 A. K. Marsh. 229; 12 Am. Dec. 387; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567.

<sup>3</sup> *Nelson v. McGiffert*, 3 Barb. Ch. 158; 49 Am. Dec. 170.

<sup>4</sup> *Tynan v. Paschal*, 27 Tex. 286; 84 Am. Dec. 619; *Dean v. Dean's Heirs*, 27 Vt. 746; *Lawrence v. Norton*, 45 Barb. 448; *Pearson v. Wightman*, 1 Mill Const. 336; 12 Am. Dec. 636; *Sampson v. Bradley*, 1 McCord, 74; *Jackson v. Vickory*, 1 Wend. 406; 19 Am. Dec. 522; *Transue v. Brown*, 31 Pa. St. 92.

the positive testimony of the attesting witnesses, is nevertheless a sufficient proof of a compliance with the statute, where, from death, defect of memory, or other good cause, the evidence of witnesses cannot be had.<sup>1</sup>

**§ 3200. Other Evidence to Show Execution of Will.**—Resort may be had to competent extrinsic or secondary evidence, where direct proof of the execution of the will cannot be adduced owing to the nature of the case; but such evidence must be sufficient to establish with reasonable certainty all the facts which must concur in the execution of a valid will.<sup>2</sup>

**§ 3201. Character of Evidence Required from Subscribing Witness.**—The evidence of a subscribing witness need not show that he recollects the time and occasion when he acted as a witness. It is sufficient that he identifies his signature, and feels assured in his own mind that he would not have affixed it without hearing the will acknowledged.<sup>3</sup> He should also be satisfied, from his own knowledge, that the testator knew what he was doing, and that his mind and memory were sound, and that he knew the contents of the will.<sup>4</sup>

**§ 3202. Will may be Admitted to Probate where Court is Satisfied of its Validity.**—A will may be admitted to probate although the witnesses do not agree in their testimony, and although such act of admission is in opposition to their testimony on the evidence. All that is requisite is, that, from all the competent evidence adduced, the court should be satisfied of the sanity of the testator and the due execution of the will.<sup>5</sup> This does not con-

<sup>1</sup> *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567; *Chaffee v. Baptist Missionary Conv.*, 10 Paige, 85; 40 Am. Dec. 225; *In re Hunt*, 42 Hun, 434.

<sup>2</sup> *Tynan v. Paschal*, 27 Tex. 286; 84 Am. Dec. 619; *Cheatham v. Hatcher*, 30 Gratt. 56; 32 Am. Rep. 650; *Montgomery v. Perkins*, 2 Met. (Ky.) 448;

74 Am. Dec. 419; *Lewis v. Lewis*, 11 N. Y. 220; *Kirk v. Carr*, 54 Pa. St. 285.

<sup>3</sup> *Pearson v. Wightman*, 1 Mill Const. 336; 12 Am. Dec. 636.

<sup>4</sup> *Scribner v. Crane*, 2 Paige, 147; 21 Am. Dec. 81.

<sup>5</sup> *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424.

flict with the rule requiring satisfactory proof; and in a will contest, such proof is required, and must be positive testimony, or it must appear from the circumstances.<sup>1</sup> So where all the subscribing witnesses are dead, it may be left to the jury to presume that their subscription was legally made.<sup>2</sup> So in case of infirmity in the recollection of the witnesses, such lack of memory is not necessarily fatal; nor will the court require positive evidence that all the formalities have been complied with, but may rely upon the circumstances, and draw its conclusions therefrom.<sup>3</sup> So a will may be established although there are an equal number of witnesses *pro* and *con*, where the affirmative testimony includes that of the subscribing witnesses,<sup>4</sup> since the law favors the validity of the will and the competency of the testator;<sup>5</sup> and the witness may testify that "the testator either signed the will in his presence or acknowledged his signature to him," and that he could not remember which.<sup>6</sup>

**§ 3203. Evidence to Rebut Attestation and to Contradict Affidavit of Subscribing Witness.**—For the purpose of invalidating the will, it is competent to introduce testimony which contradicts that of the attesting witnesses;<sup>7</sup> and evidence of declarations of a witness made at the time of the execution of the will are admissible to rebut the presumption arising from the attestation clause.<sup>8</sup> So statements made out of court by one of the subscribing witnesses to a will are competent evidence to contradict the statements in an affidavit of the witnesses made at the time of probate as to the due execution of the will.<sup>9</sup>

<sup>1</sup> *Gerrish v. Nason*, 22 Me. 438; 39 Am. Dec. 589.

<sup>2</sup> *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424.

<sup>3</sup> *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424. See *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Remsen v. Brinckerhoff*, 26 Wend. 325; 37 Am. Dec. 251.

<sup>4</sup> *Allison v. Allison*, 7 Dana, 90.

<sup>5</sup> *Zimmerman v. Zimmerman*, 23 Pa. St. 375.

<sup>6</sup> *Brownfield v. Brownfield*, 43 Ill. 147.

<sup>7</sup> *Spencer v. Moore*, 4 Call, 423.

<sup>8</sup> *Colvin v. Warford*, 20 Md. 357.

<sup>9</sup> *Otterson v. Hafford*, 36 N. J. L. 129; 13 Am. Rep. 429.

**§ 3204. Proponent's Declarations Inadmissible to Defeat Probate of Will.**—A proponent of a will cannot by his acts or declarations defeat its probate, to the prejudice of other legatees, notwithstanding he may also be a legatee,<sup>1</sup> or a husband of one of the legatees.<sup>2</sup> But the declarations of an executor, who is also a devisee or legatee, is held to be competent evidence against the will, where such executor propounds the will for probate;<sup>3</sup> and the same ruling has also obtained on an appeal from the probate of a will.<sup>4</sup>

**§ 3205. Testamentary Capacity—Evidence and Burden of Proof.**—The burden of showing testamentary capacity of the testator is said to be upon the proponents to a will,<sup>5</sup> since the subscribing witnesses must swear that they believe the testator was of sound mind and memory before his will can be admitted to probate; if one has no positive knowledge, he must state his opinion, and he should be interrogated as to his belief.<sup>6</sup> And upon the question of the testator's capacity to make a will, the witnesses may detail conversations had in his presence regarding his condition of mind; and the fact that he at such times remained silent is important.<sup>7</sup> The subscribing witnesses should testify to the opinion they formed of the testator's mind at the time of executing the will, since the law places them there for the purpose of determining the testator's mental capacity.<sup>8</sup> So not only is evidence competent as to the testator's mind at the time of the actual execution of the will,<sup>9</sup> but evidence is also admissible as to his mental condition, both before

<sup>1</sup> Taylor v. Kelly, 1 Ala. 59; 68 Am. Dec. 150; Blakey v. Blakey, 33 Ala. 611.

<sup>2</sup> Walker v. Jones, 23 Ala. 448.

<sup>3</sup> Peeples v. Stevens, 8 Rich. 198; 64 Am. Dec. 750.

<sup>4</sup> Robinson v. Hutchinson, 31 Vt. 443.

<sup>5</sup> Williams v. Robinson, 42 Vt. 658; 1 Am. Rep. 359; Schouler on Executors, sec. 79.

<sup>6</sup> Allison v. Allison, 46 Ill. 61; 92 Am. Dec. 237.

<sup>7</sup> Meeker v. Meeker, 74 Iowa, 352; 7 Am. St. Rep. 439; Irish v. Smith, 8 Serg. & R. 573; 11 Am. Dec. 648.

<sup>8</sup> Potts v. House, 6 Ga. 324; 50 Am. Dec. 329.

<sup>9</sup> Grabill v. Barr, 5 Pa. St. 441; 47 Am. Dec. 418; Boofter v. Rogers, 9 Gill, 44; 52 Am. Dec. 680.

and after the execution of the will.<sup>1</sup> This rule, however, should be qualified to this extent, that while great scope may be given to inquiries relating to the testator's mental condition before making his will, since insanity, once shown, is presumed to continue,<sup>2</sup> yet if the inquiry be made as to the testator's sanity after making the will, it seems that, in all reason, it ought to be confined to a period not remote, but so near the time when the will was executed that the natural presumption could arise that the testator did not possess sufficient testamentary capacity to make a valid will.<sup>3</sup>

Some inconsistency naturally seems to exist between the rule above given, necessitating proof of testamentary capacity, and the other rule, that sanity is always presumed until the contrary is clearly proved;<sup>4</sup> and that the burden of proof is upon the party who asserts unsoundness of mind, or seeks to impeach a will,<sup>5</sup> unless a previous state of insanity is proved, in which case the burden is shifted to him who claims under the will.<sup>6</sup> This conflict of authorities might, however, be reconciled if it is considered that the former rule is generally insisted upon in the formal proof of wills before the probate court, in order to enable it the better to pass such judgment as it ought in view of the conclusiveness of the probate record; while the latter rule should obtain in will contests or trials before a jury upon the issue *devisavit vel non*, in which case, due execution of the will being proven, whatever is alleged in derogation of the validity of the will ought to be sustained by the burden of proof; and this is strictly

<sup>1</sup> Terry v. Buffington, 11 Ga. 337; 56 Am. Dec. 423; Irish v. Smith, 8 Serg. & R. 573; 11 Am. Dec. 648. See Runyan v. Price, 15 Ohio St. 1; 86 Am. Dec. 459.

<sup>2</sup> Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666; Swinburne on Wills, pt. 2, sec. 3; O'Donnell v. Rodiger, 76 Ala. 222; 52 Am. Rep. 322; Titlow v. Titlow, 54 Pa. St. 216; 93 Am. Dec. 691.

<sup>3</sup> Terry v. Buffington, 11 Ga. 337;

56 Am. Dec. 423. See Magee v. McNiel, 41 Miss. 17; 90 Am. Dec. 354; Taylor v. Creswell, 45 Md. 422.

<sup>4</sup> Lee v. Lee, 4 McCord, 183; 17 Am. Dec. 722.

<sup>5</sup> Farrell v. Brennan, 32 Mo. 328; 82 Am. Dec. 137; Taylor v. Wilburn, 20 Mo. 306; 64 Am. Dec. 186.

<sup>6</sup> Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666; Titlow v. Titlow, 54 Pa. St. 216; 93 Am. Dec. 691.

in accordance with well-known principles of pleading and evidence, that he who takes the affirmative must prove it, as a general rule.<sup>1</sup> The decisions, however, are far from unanimous, — many of them being directly in opposition to the above rule; and while we do not assume to reconcile them to the extent of stating a positive rule for the determination of all cases, yet we believe that the statement in the text represents the conclusion reached in the best-considered cases. However, we subjoin in the note hereto a brief notice of the more important decisions.<sup>2</sup>

<sup>1</sup> *Mayo v. Jones*, 78 N. C. 402, 403; *Chandler v. Ferris*, 1 Harr. (Del.) 454; *Sloan v. Maxwell*, 3 N. J. Eq. 580; *Brooks v. Barrett*, 7 Pick. 794.

<sup>2</sup> Presumption of sanity exists, which is sufficient, after proof of formal execution of a will, unless rebutted by evidence of insanity; and in civil proceedings the burden is on the party who asserts insanity: *Chrisman v. Chrisman*, 16 Or. 127. "Which side should go forward depends very much upon which side has the affirmative": *Weed's Appeal*, 35 Conn. 455. Upon the question of the testator's capacity, the party seeking to establish the will may be required by the contesting party to put all the attesting witnesses on the stand who are within reach of process; but this right may be waived: *Field's Appeal*, 36 Conn. 277, 279, 280; *Comstock v. Hadlyme Soc.*, 8 Conn. 254; 20 Am. Dec. 100, and note 109. It is "the long-settled practice of courts of probate to require that the witnesses to wills should be examined as to the fact of the sanity of the testator before the will is established. Its object is, that if it appears that there is either doubt or suspicion on the question, that doubt may be removed before the estate is placed in the hands of a man who may prove to have no title to it. This practice is equally binding as the law in such cases upon the supreme court as on the ordinary courts of probate. . . . It is therefore proper to say that the burden of proving the sanity of the testator, and all the other requirements of the law to make a valid will, is upon the party who asserts its validity. This burden remains upon him till the close of the

trial, though he need introduce no proof upon this point until something appears to the contrary": *Perkins v. Perkins*, 39 N. H. 163, 168, 171. After proof of formal execution of a will, insanity is to be proved by him who alleges it, since sanity of the testator is presumed: *Higgins v. Carlton*, 28 Md. 115, 142, 143; 92 Am. Dec. 666. There is no presumption as to sanity; it is a fact to be proven: *Cilley v. Cilley*, 34 Me. 162; *Gerrish v. Nason*, 22 Me. 438; 39 Am. Dec. 589. But see *Barnes v. Barnes*, 66 Me. 286, 299, 300. Burden of proof is on the propounder of a will to show general testamentary capacity; but sanity need not be shown to the extent that it excludes every other hypothesis: *Wetter v. Habersham*, 60 Ga. 193, 194. In a will contest, burden of proof as to sanity is on the plaintiff: *Turner v. Cook*, 36 Ind. 129, 137; *Moore v. Allen*, 5 Ind. 521. "It is well settled that the burden of proving the unsoundness of the mind of the testator is upon the party impeaching the validity of the will for this cause": *In re Will of Coffman*, 12 Iowa, 491, 494. "With regard to the evidence requisite to establish insanity or delusion that will avoid a will, the general rule is, that a party is presumed to be of sound mind, and that it is incumbent on the party impeaching it to establish the incapacity by the clearest and most satisfactory proofs; and if the instrument purport on its face to be a legal act, the burden of proof rests upon the person attempting to invalidate it": *Mullins v. Cottrell*, 41 Miss. 291, 316. The rule is more stringent in cases where partial insanity is relied on: *Mullins v. Cottrell*,

**§ 3206. Non-expert Evidence of Testator's Mental Capacity.**—Upon a question as to the testamentary capacity of a testator, neighbors of the decedent who were well acquainted with him are competent to give opinions as to his sanity, and may testify as to his appearance, as to

41 Miss. 291, 316. Insanity is never presumed, but must be proven by those who attack the will: *Chandler v. Barrett*, 21 La. Ann. 58; 99 Am. Dec. 701. Testamentary capacity is presumed, and those who deny it have the burden of proof: *Elkinton v. Brick*, 44 N. J. Eq. 154, 158. "The question is certainly not without difficulty, and the authorities upon it are very conflicting. It is settled in this commonwealth that on the issue of sanity or testamentary capacity, the burden of proof is upon the party that offers the will for probate, and that the presumption of sanity does not shift the burden upon the opposing party": *Baldwin v. Parker*, 99 Mass. 79; 96 Am. Dec. 697, 702. "The current of American authorities . . . is, that . . . the burden is on the propounder to prove that . . . at the time of the execution [of the will] the testator was of sound mind": *McMechem v. McMechem*, 17 W. Va. 683; 41 Am. Rep. 682, 684. Insanity must be proved, if relied on to defeat a will: *Trumbull v. Gibbons*, 22 N. J. L. 117; 51 Am. Dec. 253. "When the question of capacity is actually controverted, in case of a paper propounded as a will, it devolves upon the proponents to establish capacity by other evidence than is afforded by the common-law presumption in favor of soundness in mind, and the measure of the evidence to establish must exceed that given in opposition": *McGinnis v. Kempsey*, 27 Mich. 363, 373, 374. Formal proof of the execution of the will was made, and *prima facie* proof of the testator's sanity, without going into particulars. Contestants then went fully into their case, to show incapacity of the testator. Proponents introduced evidence in reply, going fully and thoroughly into the question of testamentary capacity. The order of proof was sanctioned by the court: *Kempsey v. McGinnis*, 21 Mich. 123, 147. Sanity is presumed; and insanity

must be proven by clear evidence: *Cotton v. Ulmer*, 45 Ala. 378; 6 Am. Rep. 703; *O'Donnell v. Rodiger*, 76 Ala. 222; 52 Am. Rep. 322. Will contestants hold the affirmative, and have the burden of proof, and are entitled in consequence to conclude the arguments: *Tobin v. Jenkins*, 29 Ark. 151, 153. Sanity is presumed; and party alleging insanity must prove it: *Grabbill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418. "Testamentary capacity is the normal condition of one of full age; and the affirmative is with him who undertakes to call it in question, and this affirmative he must establish, not in a doubtful, but a positive, manner": *Grubbs v. McDonald*, 91 Pa. St. 236, 241. "We think the better rule is that which throws the burden on the proponent to prove . . . the capacity of the person executing it. Such rule is based upon sound reason, and tends to protect the rights of the testator, and all persons that are to be affected by the provisions of the instrument; imposes no unnecessary hardship, and ordinarily scarcely an inconvenience, upon the proponent, and is well supported by authority": *Williams's Executor v. Robinson*, 42 Vt. 658, 667; 1 Am. Rep. 359. Burden of proof in will contest is on the contestants: *Cravens v. Faulconer*, 28 Mo. 19. See further, on this point, *Redfield on Wills*, 28, 30; *Abbott's Trial Evidence*, 113, 114; *Taylor v. Wilburn*, 20 Mo. 306; 64 Am. Dec. 186; *Roe v. Taylor*, 45 Ill. 485; *Jackson v. Van Dusen*, 5 Johns. 144; 4 Am. Dec. 330; *Mullins v. Cottrell*, 41 Miss. 291; *Diekie v. Carter*, 42 Ill. 376; *Panand v. Jones*, 1 Cal. 488; *Copeland v. Copeland*, 82 Ala. 512; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Eau v. Snyder*, 46 Barb. 230; *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402; *Ford v. Ford*, 7 Humph. 92; 1 Jarman on Wills, *Randolph and Talcott's notes*, 104 et seq.; *Schouler on Executors and Administrators*, sec. 79.

whether his mind was weakened, the general state of his health when last seen, and his ability to hold an extended conversation. There must of necessity be expressions of opinions by witnesses in regard to appearance, conversation, and acts of one whose mental capacity is brought in question.<sup>1</sup> The opinion of a witness who did not attest the execution of a will, and who is not specially qualified by scientific knowledge to judge of the soundness or unsoundness of the testator's mind, is not competent evidence as to that fact. In testifying as to matters within his own observation, bearing upon the competency of the testator, he may characterize as rational or irrational the acts and declarations to which he testifies; but his examination must be limited to his own conclusions from the specific facts he discloses.<sup>2</sup> Therefore, such witness cannot be asked his opinion as to the capacity of the testator to make a will. Such inquiry involves a matter of law, and also assumes that the witness knows the degree of capacity requisite therefor.<sup>3</sup> But witnesses may state the appearance, conduct, conversation, and other particular facts from which the state of the testator's mind may be inferred, and may then state their inferences, conclusions, or opinions as the result of such facts.<sup>4</sup>

**§ 3207. Effect of Dispositions in Will as Determining Sanity — Burden of Proof.**—If the testator disinherit some of his children without any apparent cause, it imposes upon those claiming under the will the necessity of giving some reasonable explanation of its unnatural character.<sup>5</sup> And if a will contains dispositions such as would cause insanity to be presumed, although susceptible of being adjusted

<sup>1</sup> See Lawson on Expert and Opinion Evidence, 21; Meeker v. Meeker, 74 Iowa, 352; 7 Am. St. Rep. 489.

<sup>2</sup> Clapp v. Fullerton, 34 N. Y. 190; 90 Am. Dec. 680.

<sup>3</sup> Runyan v. Price, 15 Ohio St. 1; 86 Am. 459; Farrell v. Brennan, 32 Mo. 328; 82 Am. Dec. 137.

<sup>4</sup> Potts v. House, 6 Ga. 324; 50 Am. Dec. 329; Hardy v. Merrill, 56 N. H. 227; 22 Am. Rep. 441.

<sup>5</sup> Gay v. Gillilan, 92 Mo. 250; 1 Am. St. Rep. 712. But see Addington v. Wilson, 5 Ind. 137; 61 Am. Dec. 81.

by peculiar circumstances, it is for the legatee to prove the sanity of the testator, as against the terms of the will.<sup>1</sup> But if the will contains a series of wise and judicious dispositions, it is for those who attack it to prove unsoundness of mind in the testator at its execution,<sup>2</sup> though the unnatural disposition of property by the testator, great inequalities in the disposition of his estate which are unaccountable, apparent injustice to the immediate members of his family, are all facts to be considered in determining the testator's mental capacity, and should be submitted to the jury.<sup>3</sup> But an unequal distribution among the next of kin is not evidence of insanity,<sup>4</sup> though the fact that the testator has bequeathed an article of personal property which he did not own may be properly considered on the question of sanity, but is not entitled to weight as against positive testimony of mental capacity.<sup>5</sup>

§ 3208. **Quantum of Evidence as to Testamentary Capacity.**—As to sanity or testamentary capacity, no particular *quantum* of evidence is necessary on the trial; but on a trial before the jury, it hears the proofs of the parties, and decides the issue, like any other question of fact, according to the weight of the evidence.<sup>6</sup>

§ 3209. **Evidence and Burden of Proof as to Undue Influence and Fraud.**—Convincing evidence of undue influence, fear, or restraint in making a will is necessary to be shown in order to overthrow it on such ground,<sup>7</sup> since the exercise of undue influence cannot be presumed.<sup>8</sup> And the burden of proof is upon him who alleges undue

<sup>1</sup> Chandler v. Barrett, 21 La. Ann. 58; 99 Am. Dec. 701.

<sup>2</sup> Chandler v. Barrett, 21 La. Ann. 58; 99 Am. Dec. 701.

<sup>3</sup> Lamb v. Lamb, 105 Ind. 456; Harrel v. Harrel, 1 Duvall, 203; Gamble v. Gamble, 39 Barb. 373; Kevil v. Kevil, 2 Bush, 614; Dunham's Appeal, 27 Conn. 192.

<sup>4</sup> Coleman v. Robertson, 17 Ala. 84.

<sup>5</sup> Marks v. Bryant, 4 Hen. & M. 91.

<sup>6</sup> Rigg v. Wilton, 13 Ill. 15; 54 Am. Dec. 419. See White v. Helmes, 1 McCord, 430.

<sup>7</sup> Woodward v. James, 3 Strob. 552; 51 Am. Dec. 649.

<sup>8</sup> Baldwin v. Parker, 99 Mass. 79; 93 Am. Dec. 697.

influence, where that is a separate and distinct issue, and it does not shift to the party having the general burden of establishing the will upon the mere introduction in evidence of a single circumstance of suspicion.<sup>1</sup> The condition, character, and conduct of persons around the testator are always important subjects of inquiry in reference to his situation, family, and relations, the extent and nature of his estate, the dispositions of the will, and the devisees under it, in determining whether it was obtained by undue influence and fraud.<sup>2</sup> So evidence of illicit relations between the testator and the woman to whom, with her children, the whole estate is given, is admissible, as is also evidence of the testator's physical and mental condition at the time.<sup>3</sup> And where any part of a will was first suggested by another, it must appear that its adoption by the testator was not the result of fear, mental incapacity, or undue influence.<sup>4</sup> So the existence of confidential relations imposes upon the recipient of a gift the *onus* of establishing its absolute fairness. In the presence of such relations, a court of equity will presume that confidence was placed and influence exerted.<sup>5</sup> But the presumption of undue influence which arises from the existence of confidential relations is one of fact, and not of law, and may therefore be rebutted by any proper evidence that satisfies the jury.<sup>6</sup> So where the testator's incapacity is shown, it may be proven that he was unduly influenced and kept intoxicated by a woman of bad character.<sup>7</sup> But misrepresentation which does not produce the direct effect of influencing a bequest to the party misrepresented will not vitiate a will.<sup>8</sup>

<sup>1</sup> Baldwin v. Parker, 99 Mass. 79; 96 Am. Dec. 697.

<sup>2</sup> Davis v. Calvert, 5 Gill & J. 269; 25 Am. Dec. 282.

<sup>3</sup> Davis v. Calvert, 5 Gill & J. 269; 25 Am. Dec. 282.

<sup>4</sup> Davis v. Calvert, 5 Gill & J. 269; 25 Am. Dec. 282.

<sup>5</sup> Gay v. Gillilan, 92 Mo. 250; 1 Am. St. Rep. 712.

<sup>6</sup> St. Leger's Appeal, 34 Conn. 434; 91 Am. Dec. 735.

<sup>7</sup> Nussear v. Arnold, 13 Serg. & R. 323.

<sup>8</sup> Taylor v. Kelly, 31 Ala. 59; 63 Am. Dec. 150.

Where undue influence is once shown to exist, every gift from the weaker party to the stronger is presumptively tainted by such influence, and the recipient must assume the burden of establishing its fairness and validity.<sup>1</sup> And evidence is admissible of occurrences in the testator's family within a year before the execution of the will, showing the private history of the family and the testator's relations with his wife, and the means employed by her to wean his affections from the step-children, and to obtain benefits for herself; the ground of the contest as to the validity of the will being want of mental capacity in the testator, and undue influence by a second wife.<sup>2</sup> In brief, to establish undue influence sufficient to avoid a will, the circumstances of its execution need not be inconsistent with every other hypothesis. All that is necessary is, that the evidence of the party attacking the will of a person of sound mind on the ground of undue influence shall preponderate over the evidence adduced and the presumption prevailing on behalf of the proponents of the will.<sup>3</sup>

Acts of officious intermeddling with the testator, tending to harass him, and showing a purpose to hurry him into the execution of his will without due deliberation, are evidence of undue influence.<sup>4</sup> So undue influence is shown where it appears that the will was executed afterwards under the control of such influence.<sup>5</sup> But undue influence is not shown by the fact that the testator willed his property to his son, who had great influence with him, and that he gave nothing to his daughter.<sup>6</sup> Nor is the fact of importance on the question of undue influence, that the relatives never heard of the

<sup>1</sup> *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712.

<sup>2</sup> *Reynolds v. Adams*, 90 Ill. 134; 32 Am. Rep. 15.

<sup>3</sup> *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712.

<sup>4</sup> *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268.

<sup>5</sup> *Roberts v. Trawick*, 17 Ala. 55; 52 Am. Dec. 164.

<sup>6</sup> *Woodward v. James*, 3 Stro. 552; 51 Am. Dec. 649.

will until a short time before its admission to probate, although they lived near the testator.<sup>1</sup>

§ 3210. **Sanity and Undue Influence a Question for the Jury.**—Where any influence has been used to induce the execution of a will, the jury should decide whether it was by fair and reasonable means, or by unfair and fraudulent means; and in the former case they should find for the will, in the latter against it.<sup>2</sup> So upon an issue of *devisavit vel non*, the question of the testator's mental capacity is for the jury.<sup>3</sup>

§ 3211. **Declarations of Testator.**—It is held that the declarations of the testator, made at the time of the execution of his will, are part of the *res gestæ*, and are therefore admissible.<sup>4</sup> But the mere declarations of a testator that he has made his will are not of themselves sufficient proof of execution.<sup>5</sup> Declarations of a testator made before and after the execution of a will are held in West Virginia to be inadmissible to set it aside.<sup>6</sup> The conduct and declarations of a testator, made at the time of the execution by him of his will, as well as his statements before and after that time, and those made shortly before his death, are competent on the question of sanity and his capacity to make a will.<sup>7</sup> And great latitude is to be allowed in the admission of such evidence.<sup>8</sup> So the contents of a paper dictated by the testator two years after the execution of

<sup>1</sup> Gilbert v. Gilbert, 22 Ala. 529; 58 Am. Dec. 268.

<sup>2</sup> Eelbeck v. Granberry, 2 Hayw. (N. C.) 232; 2 Am. Dec. 624; Monroe v. Barclay, 17 Ohio St. 302; 93 Am. Dec. 620.

<sup>3</sup> Bell v. Clark, 9 Ired. 239.

<sup>4</sup> Marston v. Marston, 17 N. H. 503; 43 Am. Dec. 611. See notes to Roberts v. Trawick, 52 Am. Dec. 167; Matter of Page, 59 Am. Rep. 399; Waterman v. Whitney, 62 Am. Dec. 80; Jackson v. Kniffen, 3 Am. Dec. 395.

<sup>5</sup> 1 Jarman on Wills, Randolph and Talcott's notes, 245; Tynan v.

Paschal, 27 Tex. 286; 84 Am. Dec. 619; a case of a lost will sought to be probated.

<sup>6</sup> Couch v. Eastham, 27 W. Va. 796; 55 Am. Rep. 346.

<sup>7</sup> Pratte v. Coffman, 33 Mo. 71; Boylan v. Meeker, 28 N. J. L. 274; Colvin v. Warford, 20 Md. 357; Cockeram v. Cockeram, 17 Ill. App. 604; McTaggart v. Thompson, 14 Pa. St. 149; Allen v. Public Adm'r, 1 Bradf. 378; Rule v. Maupin, 84 Mo. 587.

<sup>8</sup> Robinson v. Adams, 62 Mo. 369; 16 Am. Rep. 473.

the will, and which stated the reasons for certain dispositions in the will, are admissible.<sup>1</sup>

The declarations of the testator, made subsequent to the execution of his will, showing that he thought its provisions to be different from what they really were, are admissible in evidence in a will contest where fraud and undue influence are relied on.<sup>2</sup> So the testator's declarations are competent which are made about the time the will was executed, and which show friendly or affectionate feelings for a son or other relative who is excluded by the terms of the will.<sup>3</sup> So the testator's declarations made shortly before the execution of his will are admissible to prove fraud in its execution;<sup>4</sup> so of declarations made after the execution.<sup>5</sup> But this does not apply to declarations made at any time subsequent to the execution; they should be so near as to form part of the *res gestæ*.<sup>6</sup> And where declarations are made by the testator approving the contents of the will and its dispositions, they are admissible in evidence.<sup>7</sup> Declarations of a testatrix tending to show importunity and undue influence, made about the time of executing the will, are admissible in evidence to prove the state and condition of her mind when the will was executed, but not to prove the fact stated, that such undue influence and importunity were exercised.<sup>8</sup>

The cancellation or revocation of a will being in issue, the declarations of the testator are admissible to rebut any presumption which may exist by reason of its loss,<sup>9</sup> or to show that it was actually destroyed.<sup>10</sup> But an implied

<sup>1</sup> Wood v. Sawyer, Phill. (N. C.) Jackson v. Kniffen, 2 Johns. 31; 3 Am. Dec. 390.

<sup>2</sup> Reel v. Reel, 1 Hawks, 248; 9 Am. Dec. 632.

<sup>3</sup> Gilbert v. Gilbert, 22 Ala. 529; 53 Am. Dec. 268.

<sup>4</sup> Roberts v. Trawick, 17 Ala. 55; 52 Am. Dec. 164.

<sup>5</sup> Howell v. Barden, 3 Dev. 442; Hester v. Hester, 4 Dev. 228; Smith v. Fenner, 1 Gall. 170. But see Richardson v. Richardson, 35 Vt. 238;

<sup>6</sup> Smith v. Fenner, 1 Gall. 170.

<sup>7</sup> Patton v. Allison, 7 Humph. 320; See Adair v. Adair, 30 Ga. 102.

<sup>8</sup> Robinson v. Hutchison, 28 Vt. 38; 60 Am. Dec. 298; Comstock v. Ecc. Soc., 8 Conn. 254; 20 Am. Dec. 100.

<sup>9</sup> Tynan v. Paschal, 27 Tex. 286; 84 Am. Dec. 619.

<sup>10</sup> Lawyer v. Smith, 8 Mich. 411; 77 Am. Dec. 460.

revocation cannot be shown by the declarations of the testator, unless there has been a change in his material relations, whereby new moral duties and obligations have been created.<sup>1</sup> So such declarations are inadmissible, unless connected with some act done, or attempted to be done, by the testator to effect a revocation.<sup>2</sup> But the presumption that a will which cannot be found was destroyed *animo revocandi* is not overcome by proof that persons injuriously affected by the will had opportunities to destroy it. The facts and circumstances must be sufficient to establish that the will was actually fraudulently destroyed.<sup>3</sup>

§ 3212. **Declarations of Other Parties.**—The declarations of one charged with the destruction of a will are admissible, when a part of the *res gestæ*, in behalf of those attempting to establish the will.<sup>4</sup> But evidence is inadmissible which shows that one of the devisees had, by various discourses, intimated that he had procured the will to be made, and that it was read to him, and that he had given the reason why his brothers and sisters received so small a portion for themselves.<sup>5</sup> So the declarations of a legatee, made before the will was made, and whose interests under the will are less than those under the intestate laws, are not evidence against the will, though he is a party to the issue.<sup>6</sup>

§ 3213. **Evidence to Show Unfinished Paper a Will.**—It is held, upon an issue as to whether an unfinished paper was intended as a will, that parol evidence that it was so intended is competent.<sup>7</sup>

<sup>1</sup> Jones v. Moseley, 40 Miss. 261; 90 Am. Dec. 327.

<sup>2</sup> Dan v. Brown, 4 Cow. 483; 15 Am. Dec. 395; Hoitt v. Hoitt, 63 N. H. 475, 499; 56 Am. Rep. 530, 537.

<sup>3</sup> Collyer v. Collyer, 110 N. Y. 481; 6 Am. St. Rep. 405.

<sup>4</sup> Batton v. Watson, 13 Ga. 63; 58 Am. Dec. 504.

<sup>5</sup> Miller v. Miller, 3 Serg. & R. 266; 8 Am. Dec. 651.

<sup>6</sup> Titlow v. Titlow, 54 Pa. St. 216; 93 Am. Dec. 691.

<sup>7</sup> Witherspoon v. Witherspoon, 2 McCord, 520.

§ 3214. **Evidence to Show Republication.**—It appears by an Iowa case that where a will is revoked by the subsequent birth of a child, its republication cannot be proved by parol evidence.<sup>1</sup>

§ 3215. **Evidence to Show Testator's Knowledge of Contents of Will.**—Although the fact that the testator had knowledge of the contents of the will may be shown by the testimony of one unimpeachable witness to that fact,<sup>2</sup> still his knowledge of the contents may be shown by circumstances.<sup>3</sup> But the burden of proof rests upon a stranger who writes a will, by the terms of which he is the principal beneficiary, of showing that the testatrix was acquainted with its contents, and had an intelligent consciousness of the proportion of the estate to be taken by him; and the burden of proof in this respect rests upon the contestant, where the will is written by the son of the testatrix, who is the principal beneficiary.<sup>4</sup>

§ 3216. **Proof of Lost or Destroyed Will, and Probate of Same.**—If a testator dies leaving an unrevoked will, which is lost or cannot be found after his death, parol evidence is competent to prove its contents, and as thus proved it may be admitted to probate.<sup>5</sup> But parol evidence of the contents of a will is not admissible unless it is first shown that diligent and unavailing search has been made for the original in the place where it was most likely to be found.<sup>6</sup> So in the absence of the *corpus* of the will, and of all evidence of its having been seen, evidence is inadmissible of declarations of the deceased that he had

<sup>1</sup> *Carey v. Baughn*, 36 Iowa, 540; 14 Am. Rep. 534.

<sup>2</sup> *Cox v. Cox*, 4 Sneed, 81.

<sup>3</sup> *Montague v. Allan's Executors*, 78 Va. 592; 49 Am. Rep. 384.

<sup>4</sup> *Blume v. Hartman*, 115 Pa. St. 32; 2 Am. St. Rep. 525.

<sup>5</sup> *Tynan v. Paschal*, 27 Tex. 286; 84 Am. Dec. 619; *Foster's Appeal*, 87 Pa. St. 67; 30 Am. Dec. 340; *Reeves v. Booth*, 2 Mill Const. 334; 12 Am. Dec.

679; *Apperson v. Cottrell*, 3 Port. 51; 29 Am. Dec. 239; *Jackson v. Betts*, 9 Cow. 208. See *Harris v. Harris*, 36 Barb. 88; *Voorhees v. Voorhees*, 39 N. Y. 463; 100 Am. Dec. 458; *Rhodes v. Vinson*, 9 Gill, 169; 52 Am. Dec. 635. See note to *Tynan v. Paschal*, 84 Am. Dec. 628.

<sup>6</sup> *Dan v. Brown*, 4 Cow. 483; 15 Am. Dec. 395.

made a will, and had disposed of his estate in a certain way.<sup>1</sup> One who seeks to establish a lost or destroyed will assumes the burden of overcoming by adequate proof the presumption that it has been destroyed *animo revocandi*.<sup>2</sup> And the proof must be very clear and strong, although in cases of conflict of evidence the jury must decide.<sup>3</sup> But the fact of the loss or destruction may be proved by circumstantial as well as by positive evidence.<sup>4</sup> And proof of the contents may be sufficiently shown by the testimony of one witness.<sup>5</sup> So in order that effect may be given to the testamentary dispositions, where a will is lost, it must be proven as if it were produced before the court.<sup>6</sup> Therefore its execution must be proven by all the subscribing witnesses, if in life and within the jurisdiction of the court, with the same formality as on proof of the will were the paper itself actually propounded for probate.<sup>7</sup> But it is decided that the whole of a lost will need not be proved, but that so much as is proven will be admitted to probate.<sup>8</sup> And in a suit to establish a lost will, the deposition of an heir at law who is also a devisee under the will is admissible in evidence.<sup>9</sup>

**§ 3217. Jurisdiction of Courts of Equity to Establish Lost Will.** — A lost, suppressed, or destroyed will may in certain states be set up where there has been accident or fraud.<sup>10</sup> But equity cannot set up a will regularly probated in a county court until such probate is set aside, no

<sup>1</sup> *Clark v. Morton*, 5 Rawle, 235; 23 Am. Dec. 667.

<sup>2</sup> *Collyer v. Collyer*, 110 N. Y. 481; 6 Am. St. Rep. 405.

<sup>3</sup> *Kitchens v. Kitchens*, 39 Ga. 168; 99 Am. Dec. 453; *Rhodes v. Vinson*, 9 Gill, 166; 52 Am. Dec. 685.

<sup>4</sup> *Schultz v. Schultz*, 35 N. Y. 653; 91 Am. Dec. 88.

<sup>5</sup> *Matter of Page*, 118 Ill. 576; 59 Am. Rep. 395; *Dickey v. Malechi*, 6 Mo. 177; 34 Am. Dec. 130. But see *Tynan v. Paschal*, 27 Tex. 286; 84 Am. Dec. 619.

<sup>6</sup> *Tynan v. Paschal*, 27 Tex. 286; 84 Am. Dec. 619.

<sup>7</sup> *Kitchens v. Kitchens*, 39 Ga. 168; 99 Am. Dec. 453.

<sup>8</sup> *Dickey v. Malechi*, 6 Mo. 177; 34 Am. Dec. 130. But see *Rhodes v. Vinson*, 9 Gill, 169; 52 Am. Dec. 685.

<sup>9</sup> *Dickey v. Malechi*, 6 Mo. 177; 34 Am. Dec. 130.

<sup>10</sup> *Townsend v. Townsend*, 4 Cold. 70; 94 Am. Dec. 185; *Buchanan v. Matlock*, 8 Humph. 390; 47 Am. Dec. 622. But see *Morningstar v. Selby*, 15 Ohio, 345; 45 Am. Dec. 579.

matter how long the will in question may have been lost, suppressed, or fraudulently concealed.<sup>1</sup>

**§ 3218. Admissibility of Wills as Evidence—Ancient Wills.**—It is determined in Massachusetts that before the probate of a will it is not admissible as evidence of title to land, and that one claiming under it cannot prove that it was fraudulently destroyed, and give secondary evidence of its contents.<sup>2</sup> But after the lapse of thirty years it is held that wills stand on the same basis as other ancient documents, so far as their admissibility in evidence without proof of their execution is concerned.<sup>3</sup>

**§ 3219. Extrinsic Evidence to Affect Will.**—In regard to parol evidence, the general rule is, that such evidence cannot be admitted to contradict, add to, or explain the contents of a written will, even though the consequences may be the total or partial failure of the testator's intended disposition.<sup>4</sup> So parol evidence is not admissible to show the intention of the testator in making his will, since a construction of the will not warranted by its express terms might thereby be obtained;<sup>5</sup> nor is such evidence of the testator's intention admissible to show that a given legacy was meant as a satisfaction of an existing debt, where no presumption of satisfaction is created by the provisions of the will;<sup>6</sup> nor can a word or a phrase in a testament be diverted from its appropriate subject by extrinsic evidence showing that the testator commonly or on that particular occasion used the disputed word in a sense peculiar to himself, or even in a

<sup>1</sup> *Townsend v. Townsend*, 4 Cold. Blanshan, 3 Johns. 292; 3 Am. Dec. 70; 94 Am. Dec. 185. See *Harris v. Tibereau*, 52 Ga. 153; 21 Am. Rep. 242.

<sup>2</sup> *Shumway v. Holbrook*, 1 Pick. 114; 11 Am. Dec. 153.

<sup>3</sup> *Northrop v. Wright*, 7 Hill, 476; *Shaller v. Brand*, 6 Binn. 435; 6 Am. Dec. 482; *Jackson v. Luquere*, 5 Cow. 221; *Jackson v. Van Dusen*, 5 Johns. 144; 4 Am. Dec. 330; *Jackson v.*

<sup>4</sup> *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec. 499; *Cleveland v. Havens*, 13 N. J. Eq. 101; 78 Am. Dec. 90.

<sup>5</sup> *Avery v. Chappel*, 6 Conn. 270; 16 Am. Dec. 53; *Assay v. Hoover*, 5 Pa. St. 21; 45 Am. Dec. 713; *Jones v. McKee*, 3 Pa. St. 496; 45 Am. Dec. 661.

<sup>6</sup> *Cloud v. Clinkinbeard*, 8 B. Mon. 397; 48 Am. Dec. 397.

popular sense, as distinguished from its strict and primary import;<sup>1</sup> and the rule that parol evidence is inadmissible to change or add to the terms of a will applies equally to bequests as to devises,<sup>2</sup> and covers, also, declarations of the testator.<sup>3</sup> The rule is, however, subject to qualifications; as, in cases of ambiguity, supplying words, and the like (noted in the following sections). So where there are circumstances *dehors* the will to indicate that the words of the will were used in a different sense from that which their ordinary legal signification imports, then all the circumstances may be resorted to to assist the construction;<sup>4</sup> and any evidence is admissible which in its nature and effect simply explains what the testator has written.<sup>5</sup> So where the testator, under the belief that his mistress's children were his offspring, provides for them in his will, evidence is admissible that the testator was by reason of age and infirmity incapable of begetting children;<sup>6</sup> and parol evidence is competent to show that a devise of land absolutely was accompanied by a secret trust in favor of one other than the devisee.<sup>7</sup> So it is competent to show by parol evidence the extent of a privilege previously enjoyed by its devisee to give effect to a devise;<sup>8</sup> and parol evidence *aliunde* the will is admissible in Maine for the purpose of showing that certain of the testator's children who did not receive anything under the will were intentionally omitted.<sup>9</sup> So in Massachusetts, such evidence has been held admissible to show that the testator intentionally omitted a grandchild from his will.<sup>10</sup>

<sup>1</sup> Yundt's Appeal, 13 Pa. St. 575; 53 Am. Dec. 496.

<sup>2</sup> Barnes v. Simms, 5 Ired. Eq. 392; 49 Am. Dec. 435.

<sup>3</sup> Magee v. McNiel, 41 Miss. 17; 90 Am. Dec. 354.

<sup>4</sup> Hoopes's Appeal, 60 Pa. St. 220; 100 Am. Dec. 562; Ehrenberg's Succession, 21 La. Ann. 280; 99 Am. Dec. 729.

<sup>5</sup> Warner v. Miltenberger, 21 Md. 264; 83 Am. Dec. 573.

<sup>6</sup> Davis v. Calvert, 5 Gill & J. 269; 25 Am. Dec. 282.

<sup>7</sup> Jones v. McKee, 3 Pa. St. 496; 45 Am. Dec. 661.

<sup>8</sup> Maack v. Nason, 21 Vt. 115; 52 Am. Dec. 41.

<sup>9</sup> Whittemore v. Russell, 80 Me. 297; 6 Am. St. Rep. 200.

<sup>10</sup> Wilson v. Fosket, 6 Met. 400; 39 Am. Dec. 736. But see Estate of Garrand, 35 Cal. 336; Chace v. Chace, 6 R. I. 407; 78 Am. Dec. 446; Bradley v. Bradley, 24 Mo. 311.

ILLUSTRATIONS.—A was bequeathed a “lot” of land by a will. In an action of ejectment for its recovery, it was claimed that the word “lot,” as used by the testator, embraced a large parcel of ground, and was not intended to refer to an ordinary town-lot. *Held*, that extrinsic evidence, coupled with testimony derived from other parts of the will, was competent evidence to show such fact: *Warner v. Miltenberger*, 21 Md. 264; 83 Am. Dec. 573.

§ 3220. **Evidence to Explain Ambiguities.**—Latent ambiguities ascribable to something either omitted or inserted may be explained by extrinsic evidence,<sup>1</sup> although it is held that this cannot be done by testimony of the one who drew the will.<sup>2</sup> But the rule as to latent ambiguities is declared not to be applicable to patent ambiguities which leave the testator’s intention doubtful.<sup>3</sup> To remove latent ambiguities, the acts and declarations of a testator in respect to the thing given are admissible; so, also, the relative amount of advancements and the differences in value of portions of land devised to children are proper subjects for consideration.<sup>4</sup> And parol evidence is admissible to show who was intended by a bequest made to one by a wrong christian name,<sup>5</sup> even though there were persons of both names;<sup>6</sup> or to show the legatee, where the description in the will applies to several.<sup>7</sup>

§ 3221. **Evidence to Show Mistake—Supplying Words.**  
—Although courts of equity have power in certain cases to correct mistakes in wills, where they clearly appear on its face, or are made to appear by construction,<sup>8</sup> and may

<sup>1</sup> *Avery v. Chappel*, 6 Conn. 270; 16 Am. Dec. 53; *Breckenridge v. Duncan*, 2 A. K. Marsh. 50; 12 Am. Dec. 359; *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec. 499.

<sup>2</sup> *McAllister v. Tate*, 11 Rich. 509; 73 Am. Dec. 119.

<sup>3</sup> *Breckenridge v. Duncan*, 2 A. K. Marsh. 50; 12 Am. Dec. 359.

<sup>4</sup> *Brownfield v. Brownfield*, 12 Pa. St. 136; 51 Am. Dec. 590. See *Zeiter v. Zeiter*, 4 Watts, 212; 28 Am. Dec. 698.

<sup>5</sup> *Connolly v. Pardon*, 1 Paige, 291; 19 Am. Dec. 433. But see *Barnes v. Simms*, 5 Ired. Eq. 392; 49 Am. Dec. 435.

<sup>6</sup> *Powell v. Biddle*, 2 Dall. 70; 1 Am. Dec. 263.

<sup>7</sup> *Clarke v. Cotton*, 2 Dev. Eq. 301; 24 Am. Dec. 279. See, on these last three points, *Story’s Eq. Jur.*, secs. 179–181.

<sup>8</sup> *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec. 499; *Story’s Eq. Jur.*, secs. 179–181. But see *Goode v. Goode*, 22 Mo. 518; 66 Am. Dec. 630.

supply omissions apparent on the face of the paper,<sup>1</sup> yet parol evidence is inadmissible to relieve against a mistake in a will which does not amount to a latent ambiguity.<sup>2</sup> Therefore a will cannot be corrected by evidence of mistake so as to strike out the name of a legatee and insert that of another inadvertently omitted by the draughtsman or copyist;<sup>3</sup> nor is parol evidence admissible to show that certain legacies intended to have been given to certain persons were omitted by the scrivener;<sup>4</sup> nor is such evidence admissible, though offered by the person who drew the will, and whose character was unimpeachable, to show a mistake in that the testator intended to dispose of the property in a different manner than appeared on the face of the will;<sup>5</sup> nor is evidence admissible *dehors* the will, that it was made under a mistake as to the supposed death of the son of the testatrix, whose name was omitted therefrom;<sup>6</sup> nor will equity on parol proofs relieve against a mistake in a will by making it conform to instructions claimed to have been given the scrivener.<sup>7</sup> And parol evidence is inadmissible to show that in drawing a will the scrivener, through ignorance, inserted words that varied the meaning of the instrument, unless there be a latent ambiguity, a resulting trust, or fraud;<sup>8</sup> nor can an omission in a will of real estate, alleged to have been made by the draughtsman, be supplied by parol.<sup>9</sup>

ILLUSTRATIONS. — By a will, land in "section thirty-two" was devised to E., and land in "section thirty-one" was devised to J. *Held*, that parol evidence was inadmissible to show that

<sup>1</sup> *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec. 499.

<sup>2</sup> *Story's Eq. Jur.*, secs. 179-181.

<sup>3</sup> *Yates v. Cole*, 1 Jones Eq. 110; 59 Am. Dec. 602.

<sup>4</sup> *Comstock v. Hadlyme Ecc. Soc.*, 8 Conn. 254; 20 Am. Dec. 100.

<sup>5</sup> *Rothmahler v. Myers*, 4 Desaus. Eq. 215; 6 Am. Dec. 613.

<sup>6</sup> *Gifford v. Dyer*, 2 R. I. 99; 57 Am. Dec. 708.

<sup>7</sup> *Avery v. Chappel*, 6 Conn. 270; 16 Am. Dec. 53.

<sup>8</sup> *Iddings v. Iddings*, 7 Serg. & R. 111; 10 Am. Dec. 450.

<sup>9</sup> *Andress v. Weller*, 3 N. J. Eq. 604. "Parol evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing the will": 1 Jarman on Wills, Randolph and Talcott's notes, 717, and note 5. See statutes of Georgia; also of California, Dakota, Montana, and Utah: Stimson's American Statute Law, secs. 2800-2802.

the draughtsman of the will made a mistake, or that "section thirty-two" should be section thirty-three and "section thirty-one" should be section thirty-two: *Kurtz v. Hibner*, 50 Ill. 514; 8 Am. Rep. 665. There was a devise of the "west half of the northeast quarter of section twenty-three," in T. township. *Held*, that parol evidence was inadmissible to show that the testator owned the east half of the southwest quarter of section twenty-three, and no other land, and that the draughtsman of the will had erred in putting in one description for the other: *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; 14 Am. Rep. 538. A testator gave to his wife one third of all his personal property, and the use of any land she might need for life; and to a daughter one hundred acres of land; and then, after some minor bequests, gave "the rest of my estate personal" to his four sons and the children of a daughter; then, in a codicil, he recited that he had disposed of his "estate real and personal" and had "bequeathed two thirds of said estate" to said sons and grandchildren, and revoked the share left to a certain son. *Held*, that the court could not supply the words "real and" before "personal," in the will, and that the testator died intestate as to all his real estate except the one hundred acres: *Graham v. Graham*, 23 W. Va. 36; 48 Am. Rep. 364. A devise was of "sixty acres, se 25, toon 7, and forty acres, se 24, toon 6, Jasper County." *Held*, to refer to sections and townships, and that parol evidence was competent to show the township and range of the lands: *Chambers v. Watson*, 60 Iowa, 339; 48 Am. Rep. 70. The words were, "fifteen hundred." *Held*, that the word "dollars" might be supplied: *Snyder v. Warbasse*, 11 N. J. Eq. 463. The will contained the following clause: "I give and bequeath to my beloved wife for and during her widowhood the farm which I now occupy, together with the whole of the crops of every description which may be thereon at the time of my death," and after her remarriage or death, the same was to go by devise over to another. *Held*, that parol evidence was inadmissible to show that the testator intended to devise the whole of his real estate, which included a farm of ninety acres held under a lease of seven years from the testator, or to show that he gave such instructions to the scrivener, there being a mistake and no latent ambiguity: *Jackson v. Sill*, 11 Johns. 201; 6 Am. Dec. 363.

**§ 3222. Impeachment or Setting Aside Will.**—Alleged misrepresentations are no ground for setting aside a will, unless they are proved to be false;<sup>1</sup> nor can a will be set aside by the court because of its disapprobation

<sup>1</sup> *Smith v. De Bose*, 78 Ga. 413; 6 Am. St. Rep. 260.

of the motives that actuated the testator, or of the disposition that he makes of his property, unless there is, not merely in the motives, but in the actual disposition, something which is against good morals or public policy;<sup>1</sup> nor may a will be avoided because its dispositions are imprudent and unaccountable;<sup>2</sup> nor is secrecy in its execution any ground for impeaching a will;<sup>3</sup> nor is it any ground for setting aside a will that the testatrix had no knowledge of the fact that the man to whom she left her property, and with whom she had been unlawfully living as his wife, was the lawful husband of another woman living at the time.<sup>4</sup> There is no such thing as a voidable will.<sup>5</sup> But a will void in part may, notwithstanding, be good as to the residue.<sup>6</sup> A petition to set aside a will should contain all the grounds necessary to effect that purpose.<sup>7</sup>

§ 3223. **Who may Contest Will.**—The parties in interest may contest the validity of a will;<sup>8</sup> and third parties, in certain cases, as where a will is opposed to their title, may contest the probate of a will and show that it was never executed;<sup>9</sup> and a legatee under a will may contest the probate of a codicil which revokes his legacy, and this, although he was not notified to appear.<sup>10</sup> But one who receives a legacy or beneficial interest under a will is thereby estopped from contesting the validity of the will without repaying the amount of the legacy or bringing the money into court.<sup>11</sup>

<sup>1</sup> Trumbull v. Gibbons, 22 N. J. L. 117; 51 Am. Dec. 253.

<sup>2</sup> Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666.

<sup>3</sup> Coffin v. Coffin, 23 N. Y. 9; 80 Am. Dec. 235.

<sup>4</sup> In re Donnelly, 68 Iowa, 126.

<sup>5</sup> McGee v. Porter, 14 Mo. 611; 55 Am. Dec. 129.

<sup>6</sup> Kane v. Gott, 24 Wend. 641; 35 Am. Dec. 641. See Taylor v. Kelley, 31 Ala. 59; 68 Am. Dec. 150.

<sup>7</sup> Vickery v. Hobbs, 21 Tex. 570; 73 Am. Dec. 238. See also, as to jurisdiction in will contests and practice,

Duncan v. Duncan, 23 Ill. 364; 76 Am. Dec. 699; Walker v. Walker, 14 Ohio St. 157; 82 Am. Dec. 474.

<sup>8</sup> Duncan v. Duncan, 23 Ill. 364; 76 Am. Dec. 699.

<sup>9</sup> Succession of Clark, 11 La. Ann. 124.

<sup>10</sup> Walsh v. Ryan, 1 Bradf. 438.

<sup>11</sup> Hott v. Price, 54 N. H. 398; 20 Am. Rep. 138; Smith v. Guild, 34 Me. 443; Smith v. Smith, 14 Gray, 532; Hyde v. Baldwin, 17 Pick. 303; Smart v. Easely, 5 J. J. Marsh. 214; Preston v. Jones, 9 Pa. St. 456; Van Duyne v. Van Duyne, 14 N. J. Eq. 49.

## CHAPTER CLVIII.

## CONSTRUCTION OF THE INSTRUMENT.

- § 3224. Construction — How far testator's intention controls.
- § 3225. Use of introductory words to ascertain intention.
- § 3226. Technical words — How far governed by testator's intention.
- § 3227. Whole will is to be construed together.
- § 3228. Later provisions control.
- § 3229. General intent prevails over particular intent.
- § 3230. Transposition of words.
- § 3231. Surplusage and rejection of words.
- § 3232. Per stirpes or per capita.
- § 3233. Devise with power of appointment.
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- § 3235. Legacy may be a personal charge.
- § 3236. Gift of personal property for a lifetime with gift over.
- § 3237. Statutory rules concerning devises and legacies.
- § 3238. Special instances of wills held to be valid and void.
- § 3239. What constitutes a sufficient finding as to validity of will.
- § 3240. Estate when segregated.
- § 3241. Conditions in wills.
- § 3242. Illegal and impossible conditions.
- § 3243. Conditions against contesting will.
- § 3244. Bequest for support and maintenance.
- § 3245. Perpetuities.

**§ 3224. Construction—How Far Testator's Intention Controls.** — The statutes of several of the states make special provision for construing wills where ambiguous.<sup>1</sup> But the rule is that the intention of the testator as expressed in his will must govern, when not inconsistent with the rules of law.<sup>2</sup> The intention must be collected from the whole will itself, and no part is to be rejected which can be given

<sup>1</sup> See Stimson's American Statute Law, secs. 2800-2803, 2808.

<sup>2</sup> Colton v. Colton, 127 U. S. 300, 309, 310; Boisseau v. Aldridges, 5 Leigh, 222; 27 Am. Dec. 590; Covenhoven v. Shuler, 2 Paige, 122; 21 Am. Dec. 73; Morton v. Barrett, 22 Me. 257; 39 Am. Dec. 575; Montgomery v. Milliken, 5 Smedes & M. 151; 43 Am. Dec. 507; Armorer v. Case, 9 La. Ann.

288; 61 Am. Dec. 209; Baker v. Riley, 16 Ind. 479; Tappan v. Deblois, 45 Me. 122; Hall v. Chaffee, 14 N. H. 215; Wynne v. Wynne, 23 Miss. 251; 57 Am. Dec. 139. See statutes of California, Dakota, Georgia, Louisiana, Missouri, Montana, Oregon, Washington, Utah: Stimson's American Statute Law, secs. 2800-2803.

an operation consistent with the testator's general intent.<sup>1</sup> And this intention should prevail, though it require some departure from the literal construction of one of the clauses of the will.<sup>2</sup> This intention is, however, limited by the following rules: 1. The disposition intended to be made must not conflict with the rules of law; 2. The intention must be collected from the will itself, but this may be aided by evidence of the relative situation of the parties and the circumstances of the testator; 3. The intention is not to prevail against fixed rules of construction; 4. The general intention must prevail over a particular intention; 5. Of two clauses which are repugnant, the latter must prevail unless they can be reconciled.<sup>3</sup> But courts cannot give effect to a will contrary to its plain terms upon a mere conjecture as to the intention.<sup>4</sup> And it is held that the testator's intention is not generally taken into account in determining the existence of a specific legacy at the time of his death.<sup>5</sup>

**§ 3225. Use of Introductory Words to Ascertain Intention.**—Introductory words in a will may be considered, in order to ascertain the testator's intention. So a fee may pass when aided by such clause.<sup>6</sup> But the intro-

<sup>1</sup> *Covenhoven v. Shuler*, 2 Paige, 122; 21 Am. Dec. 73; *Myers v. Myers*, 2 McCord, 214; 16 Am. Dec. 648; *Turbett v. Turbett*, 3 Yeates, 187; 2 Am. Dec. 369; *Kean v. Hoffecker*, 2 Harr. (Del.) 103; 29 Am. Dec. 336; *Stoner's Appeal*, 2 Pa. St. 428; 45 Am. Dec. 608; *Baskin's Appeal*, 3 Pa. St. 304; 45 Am. Dec. 641.

<sup>2</sup> *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575.

<sup>3</sup> *Kennon v. McRoberts*, 1 Wash. 96; 1 Am. Dec. 428; *Heisse v. Markland*, 2 Rawle, 274; 21 Am. Dec. 445; *Covenhoven v. Shuler*, 2 Paige, 122; 21 Am. Dec. 73; *Chase v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277; *Schultz v. Schultz*, 10 Gratt. 358; 60 Am. Dec. 335; *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 544; *Eatherly v. Eatherly*, 1 Cold. 461; 78 Am. Dec.

499; *German v. German*, 27 Pa. St. 116; 67 Am. Dec. 451; *Pennoyer v. Sheldon*, 4 Blatchf. 316; *Walker v. Walker*, 17 Ala. 396; *Pace v. Bonner*, 27 Ala. 307; *Robert v. West*, 15 Ga. 122; *Hunt v. Johnson*, 11 B. Mon. 342; *Brattle Square Church v. Grant*, 3 Gray, 142; 63 Am. Dec. 725; *Fraser v. Boone*, 1 Hill Ch. 360; 27 Am. Dec. 422. When and in what cases the law overrules the intention: See *Ruston v. Ruston*, 2 Dall. 243; 2 Yeates, 60; 1 Am. Dec. 283.

<sup>4</sup> *Wright v. Hicks*, 12 Ga. 155; 56 Am. Dec. 451. See *Theall v. Theall*, 7 La. 226; 26 Am. Dec. 501.

<sup>5</sup> *Blackstone v. Blackstone*, 3 Watts, 335; 27 Am. Dec. 359.

<sup>6</sup> *Schrivver v. Marger*, 19 Pa. St. 87; 57 Am. Dec. 634.

ductory clause cannot enlarge a devisee's estate when, from other parts of the will, there is a clear intention to give him an estate-tail.<sup>1</sup>

**§ 3226. Technical Words—How Far Governed by Testator's Intention.**—Although the testator's intention will not be defeated, because he has failed to clothe his ideas in technical words,<sup>2</sup> yet if he use technical terms, they should be established by reference to the science or art to which they are peculiar;<sup>3</sup> and if technical words, or words of settled legal construction, are used in a will, they must, as a general rule, be intended by the court to have been understood by the testator in their proper meaning. This rule, however, must yield to the testator's intention manifest from the whole will, nor will the rule apply if it becomes necessary that the technical word used be given a different construction in order to give sense to the will,<sup>4</sup> since, if the context of a will shows the testator to have used such word or words in a certain sense, the court will so construe them in preference to the meaning given by lexicographers, or even that given in adjudged cases.<sup>5</sup>

<sup>1</sup> *Burkart v. Bucher*, 2 Binn. 455; 4 Am. Dec. 457.

<sup>2</sup> *Bell County v. Alexander*, 22 Tex. 350; 73 Am. Dec. 268.

<sup>3</sup> *Ward v. Stow*, 2 Dev. Eq. 509; 27 Am. Dec. 233.

<sup>4</sup> *Kean v. Hoeffcker*, 2 Harr. (Del.) 103; 29 Am. Dec. 336; *Scott v. Nelson*, 3 Port. 452; 29 Am. Dec. 266. See statutes of California, Montana, Utah: *Stimson's American Statute Law*, sec. 2802.

<sup>5</sup> *Carnagy v. Woodcock*, 2 Munt. 234; 5 Am. Dec. 470. As a general rule, technical words used by the testator will be given a technical meaning, in the absence of an intent to the contrary apparent in the will: *Evans v. Godbold*, 6 Rich. Eq. 26. "ACCORDING TO LAW" refers to the manner of taking, rather than the mode of ascertaining the person who shall take: *McIntyre v. Ramsey*, 23 Pa. St. 317. "AND" may be construed "or," when rendered necessary by the apparent intention of

the testator collected from the whole will: *East v. Garrett*, 84 Va. 523, 547; *Sayward v. Sayward*, 7 Greenl. 210; 22 Am. Dec. 191. "And" will also be construed to mean "or" where a testatrix devises property to her niece, with a limitation over in case she should "die unmarried and without issue," the intention of the testatrix being apparent from the face of the will: *Janney v. Sprigg*, 7 Gill, 197; 48 Am. Dec. 557. See also *Ely v. Ely*, 20 N. J. Eq. 44; *Courter v. Stagg*, 27 N. J. Eq. 305; *Doe v. Rawding*, 2 Barn. & Ald. 452; *In re Merrick*, L. R. 1 Eq. Cas. 551; *In re Kirkbridge Trusts*, L. R. 2 Eq. Cas. 400; *Reid v. Braithwaite*, L. R. 11 Eq. Cas. 515. See note to *Janney v. Sprigg*, 48 Am. Dec. 565. "AT HIS DECEASE." Where there is a devise subject to a life interest, to take effect at the decease of the life encumbrancer, the words "at his decease" refer to the time of payment or possession, and such words "do not postpone the

## § 3227. Whole Will is to be Construed Together.—

moment when the gift should operate: *Lombard v. Willis*, 147 Mass. 13, 14. "BANK STOCK." A bequest of "bank stock" is to be construed as describing the testator's deposits in various savings banks, where he has no shares of stock of any bank, nor any other property in banking associations: *Tomlinson v. Bury*, 145 Mass. 346; 1 Am. St. Rep. 464. These words will also pass other stock than actual bank stock: *Clark v. Atkin*, 90 N. C. 629; 47 Am. Rep. 538. "CHILDREN." The term "children," in a will, does not, as a rule, include grandchildren or issue generally, but it may be extended to include them, where it is necessary to accomplish the testator's intention and give effect to the will, or where it is evident that the testator intended the word should be so construed; and it may in either case extend to great-grandchildren: *Castner's Appeal*, 88 Pa. St. 478; *Mowatt v. Carow*, 7 Paige, 328; 32 Am. Dec. 641; *Scott v. Nelson*, 3 Port. 328, 452; 29 Am. Dec. 266; *Ewing v. Handley*, 4 Litt. 346; 14 Am. Dec. 140; *Brokaw v. Peterson*, 15 N. J. Eq. 194; *Churchill v. Churchill*, 2 Met. (Ky.) 466. See cases cited in *Lawson's Concordance*, "Child" and "Children"; *Armistead v. Dangerfield*, 3 Munf. 20; 5 Am. Dec. 501; *Phillip's Devises v. Beall*, 9 Dana, 1; 33 Am. Dec. 518. But grandchildren cannot take under a bequest to "children," where there are children of the testator living, and there is nothing to manifest an intent that the grandchildren should take: *Dickinson v. Lee*, 4 Watts, 82; 28 Am. Dec. 684; *Presley v. Davis*, 7 Rich. Eq. 105; 62 Am. Dec. 396. And it is held that a direction in a will to distribute among the testator's children and grandchildren does not include great-grandchildren: *Cummings v. Plummer*, 94 Ind. 403; 48 Am. Rep. 167. The word "children" imports legitimate children, in a devise, and can be explained or enlarged so as to include illegitimate children only by clear expression or necessary implication on the face of the will: *Shearman v. Angel*, 1 Bail. Eq. 351; 23 Am. Dec. 166. But if the intention is manifest that the testator, by the word "children," intended to

include natural children, they may take: *Heater v. Van Anken*, 14 N. J. Eq. 159. So if such illegitimate child is fully legitimized by statute, it may take under a bequest to "children": *Shelton v. Wright*, 25 Ga. 636. "Children" is a technical word, and should be construed in all cases as a word of purchase, unless the intention gathered from the will necessitates that it be construed as a word of limitation: *Kay v. Connor*, 8 Humph. 624; 49 Am. Dec. 690; *Carr v. Estill*, 16 B. Mon. 309; 63 Am. Dec. 548; *Coursey v. Davis*, 46 Pa. St. 25; 84 Am. Dec. 519. And a devise to the "children" of the testator's son comprehends only the children living at the testator's death: *Shotts v. Poe*, 47 Md. 513; 28 Am. Rep. 485. So "children" means all the children, as much as if they had been named: *Lombard v. Willis*, 147 Mass. 13, 14. And a bequest to "all the children" of a person named, equally, "when they shall severally attain" a certain age, inures to all children born before the first child attains that age: *Hubbard v. Lloyd*, 6 Cush. 522; 53 Am. Dec. 55. But "children" does not include adopted children: *Schafer v. Eneu*, 54 Pa. St. 304. And see statutes of Massachusetts and Minnesota: *Stimson's American Statute Law*, sec. 6648. "DYING WITHOUT CHILDREN." These words are to be construed as referring to children living at the time of the devisee's death: *Holmes v. Williams*, 1 Root, 335; 1 Am. Dec. 49. "DEBTS." A bank deposit is not "debts," and cannot, in the absence of a demand and refusal by the bank, be collected and invested for a legatee's benefit under a will providing for such collection and investment of debts: *Adams v. Jones*, 6 Jones Eq. 221. See further, as to "debts," in a will, *Martin v. Gage*, 9 N. Y. 398. "DEVISE," "BEQUEST," and "LEGACY" are words applicable alike to real or personal property, as shall best effectuate the testator's intention as gathered from the will: *Ladd v. Harvey*, 21 N. H. 514; *Schouler on Executors and Administrators*, sec. 4; 1 Jarman on Wills, *Randolph and Talcott's notes*, 145, note. "Bequest": See *White v. Lake*, L. R. 6 Eq. Cas.

"No rule is better settled than that the whole will is to

138. "Devise": See *McCorkle v. Sherill*, 6 Ind. 173; *Dickerman v. Abraham*, 21 Barb. 551. "Legacy": See *Holmes v. Mitchell*, 2 Murph. 228; 5 Am. Dec. 527; *Williams v. McComb*, 3 Ired. Eq. 450. "DESCENDANTS." The word "descendants," used in a will, ought not, as a rule, to extend beyond lineal heirs, but this rule of construction must yield to the testator's intent clearly expressed: *Baker v. Baker*, 8 Gray, 101; *Barstow v. Goodwin*, 2 Bradf. 413. See further, as to "descendants," in a will, *Ralph v. Carrick*, L. R. 11 Ch. Div. 873; L. R. 5 Ch. Div. 989; *Crosby v. Clark*, 1 Amb. 396; *Armstrong v. Moran*, 1 Bradf. 314. When "descendants" is a word of purchase, see *Stimson's American Statute Law*, sec. 2824; *Hamlin v. Osgood*, 1 Redf. 409. "DISTRIBUTED." The word "distributed" is synonymous with "divided," as applied to personal property, when used in a clause in a will of realty and personalty, which reads: "To be distributed when required, at mature age or majority, in equal parts": *Chighizola v. Le Baron's Ex'r*, 21 Ala. 406. "DOWER." Under a devise by a testator to his wife of "her full and reasonable dower in all his estate," the term "dower" was construed to mean the widow's right in the real estate, and it was limited to that alone: *Brackett v. Leighton*, 7 Greenl. 383. See further, as to "dower," in a will, *Adamson v. Ayres*, 5 N. J. Eq. 349. "ESTATE." This word includes every kind of property. In a will it passes the fee without words of inheritance; and unless tied down by particular expressions, it carries everything; but it may, however, be descriptive of the subject of the property, rather than the *quantum* of interest: *Hammond v. Merrill*, 8 Gill & J. 436; *Turbett v. Turbett*, 3 Yeates, 187; 2 Am. Dec. 369; *Godfrey v. Humphrey*, 18 Pick. 537; 29 Am. Dec. 621; *Jackson v. Merrill*, 6 Johns. 185; 5 Am. Dec. 213; *Jackson v. Delancey*, 13 Johns. 536; 7 Am. Dec. 403; *Hart v. White*, 26 Vt. 260; *Thornton v. Mulquinne*, 12 Iowa, 549; 79 Am. Dec. 548; *Bell v. Scammon*, 15 N. H. 381; 41 Am. Dec. 706. See "Estate," *Lawson's Concordance*. And a de-

vises of the remainder of the testator's "estate" operates as a devise of the realty: *Palmer v. Dougherty*, 33 Me. 502; 54 Am. Dec. 636. But a bequest of the "remainder of my personal estate not hereinbefore nor hereinafter specified, etc., excepting what is herein reserved and bequeathed," carries the principal of a sum which in a previous part of the will is directed to be put at interest for the benefit of the testator's widow for life, where such principal is not otherwise disposed of directly or by implication, and the whole tenor of the will indicates that the testator's intention was to bequeath his entire estate: *Nyce's Estate*, 5 Watts & S. 254; 40 Am. Dec. 498. The word "estate" is not, however, a word of art, but of interpretation, and its meaning is affected by other clauses and dispositions in a will: *Zimmerman v. Anders*, 6 Watts & S. 218; 40 Am. Dec. 552. So a charge by the testator in his will of debts on his "estate" will operate to charge the lands with such debts: *Archer v. Deneale*, 1 Pet. 585. But the words "his estate" will not be held to have been intended to include property not equitably that of the testator: *Crost-waight v. Hutchinson*, 2 Bibb, 407; 5 Am. Dec. 619. So a legacy "to be raised out of my estate" is chargeable upon lands devised by the will, especially where the personalty, which is inconsiderable, is given to the wife: *Bray v. Lamb*, 2 Dev. Eq. 372; 25 Am. Dec. 718. And a residuary devise of "all his estate, whether real or personal," will pass a mortgage held by the testator at the time of making his will: *Ballard v. Carter*, 5 Pick. 112; 16 Am. Dec. 377. The word "estate" has a broader signification than the word "property"; the former includes choses in action, while the latter does not: *Pippin v. Ellison*, 12 Ired. 61; 55 Am. Dec. 403. "FAMILY." The word "family" is one of a class of words specially noted in the statutes of some of the states which may operate as words of donation, and not of limitation: *Stimson's American Statute Law*, sec. 2824. See also, as to the construction of the word "family," *Hall v. Stephens*, 65 Mo. 671; 27 Am.

be taken together, and is to be so construed as to give

Rep. 302; Hollingsworth v. Hollingsworth, 65 Ala. 321; Smith v. Wildman, 37 Conn. 384; Bates v. Denson, 128 Mass. 334; Bowditch v. Andrew, 8 Allen, 339; Lawson's Concordance, word "Family." "GOODS OR MOVABLES." The words "goods or movables" may include bonds, unless there is something in the context of the whole will to restrain the construction: Jackson v. Robinson, 1 Yeates, 101; 1 Am. Dec. 293. "GRANDCHILDREN." The word grandchildren, in a residuary clause of "all my estate, real and personal, to be equally divided between my grandchildren," may include a posthumous grandchild *en ventre sa mere* at the time of the testator's death: Smart v. King, Meigs, 149; 33 Am. Dec. 137. But it is held, however, that, under a devise of several parcels of land to "my dear grandchildren, to them and their heirs forever, to be equally divided between them, only those grandchildren can take who are in being at the testator's death: Lookerman v. McBlair, 6 Gill, 177; 46 Am. Dec. 664. As to "grandchildren," see also "Children," *ante*; Hamilton v. Lewis, 13 Mo. 185; Lawson's Concordance, word "Grandchildren." Though a bequest to such grandchildren as are living at the testator's death will include one born within nine months after the testator's decease: Hall v. Hancock, 15 Pick. 255; 26 Am. Dec. 598. "HEIRS," "LAWFUL HEIRS," "NEAREST HEIRS," "HEIRS OF BODY," "LINEAL HEIRS," "HEIRS IN FEE-SIMPLE" and "DYING WITHOUT HEIRS." The word "heirs" is, in construing a will, to be given that meaning which its legal acceptation implies, if possible, but this rule must, in all cases, yield to the intention of the testator as expressed by the will: Love v. Buchanan, 40 Miss. 758; Williamson v. Williamson, 18 B. Mon. 329; Den v. Zabriskie, 15 N. J. L. 404; Bailey v. Patterson, 3 Rich. Eq. 159. So "heirs" may mean legal representatives, and so make a legacy vested where it would otherwise be contingent: Reed v. Buckley, 5 Watts & S. 517; 40 Am. Dec. 531. So, also, it may indicate those who would be entitled only under the statute of distributions: McCabe v. Spruil, 1 Dev. Eq. 189; Freeman v. Knight, 2 Ired. Eq. 72; Corbitt v. Corbitt, 1 Jones Eq. 114; Brothers v. Cartwright, 2 Jones Eq. 113; 64 Am. Dec. 563. So "heirs," "heirs of the body," and "lawful heirs" may be construed to mean children, when necessary to effectuate the testator's intent: Craig v. Ambrose, 80 Ga. 134; Shepherd v. Nabors, 6 Ala. 631; Moon v. Henderson, 4 Desaus. Eq. 459; Harris v. Philpot, 5 Ired. Eq. 324; Ramsay v. Joyce, 1 Mo-Mull. Eq. 236; 37 Am. Dec. 551; King v. Beck, 15 Ohio, 559; Eby v. Eby, 5 Pa. St. 461; Knight v. Knight, 3 Jones Eq. 167. So the words "if I die without heir" may be construed as if it had read "if I die without child": Harper v. Wilson, 2 A. K. Marsh. 465; Moon v. Henderson, 4 Desaus. 459. And the words "dying without heirs" may be held to mean dying without issue, as in case of a limitation over, the issue being those living at the death of the first taker: Budd v. State, 22 Md. 48. It is held that the word "heirs" is a word of purchase wherever a devise of an estate to "heirs" is not preceded by any prior estate of freehold devised to their ancestors, which may be expanded into an estate of inheritance by the estate left the "heirs": Ward v. Stow, 2 Dev. Eq. 509; 27 Am. Dec. 238. See *post*, Rule in Shelley's Case. It is also held that the word "heirs" is not a word of purchase, and that it carries the land, not only to the immediate heir, but to all those who descend from that devisee: Roach v. Martin, 1 Harr. (Del.) 548; 27 Am. Dec. 746. "Heirs," when word of purchase: See Stimson's American Statute Law, sec. 2824. "Heirs,"—the rule in Shelley's Case not abolished: Powell v. Brandon, 24 Miss. 343. When the words "heirs in fee-simple forever" are words of limitation, and not of purchase: Stewart v. Kenower, 7 Watts & S. 288. Though when terms of limitation in a will can be fairly interpreted to mean "heirs" or "heirs of the body," an estate of inheritance will be presumed to have been intended by the testator: Dodson v. Ball, 60 Pa. St. 492; 100 Am. Dec. 586. But a bequest of

effect, if possible, to the whole"; but this rule may be

personality to a woman, and the "heirs of her body lawfully begotten," vests the entire interest in the first taker: *Duncan v. Martin*, 7 Yerg. 519; 27 Am. Dec. 525. The husband is not the "heir" of the wife, within the ordinary meaning of a will: *Ivin's Appeal*, 106 Pa. St. 176; 51 Am. Rep. 516; *Wilkins v. Ordway*, 59 N. H. 378; 47 Am. Rep. 215. Nor is the widow the "heir" of her husband: *Dodge's Appeal*, 106 Pa. St. 216; 51 Am. Rep. 519. See *Tillman v. Davis*, 95 N. Y. 17; 47 Am. Rep. 1. Nor do the words "lawful heirs" (in re *Ses- sion's Estate*, Mich., 1888), nor the words "nearest and lawful heirs" (*Reinders v. Koppleman*, 94 Mo. 339), nor the words "heirs at law," any of them, include an adopted child: *Wyeth v. Stone*, 144 Mass. 441. So a devise to M.'s "heirs" conveys no property, unless M. dies before the testator; for the rule, *Nemo est hæres viventis*, applies: *Clark v. Mosely*, 1 Rich. Eq. 396; 44 Am. Dec. 229. But it is held, however, that although the above maxim is the rule, yet it is also decided that if the ancestor is spoken of in the will as living, or is recognized as living by a legacy being given to him, or otherwise, the devise is good, and the children or other heirs apparent of the ancestor may take by purchase, if such appears to have been the testator's intent: *Heard v. Horton*, 1 Denio, 165; 43 Am. Dec. 659. See also *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575. As to "heirs," "heirs of body," "lineal heirs," and "lawful heirs," see *Georgia Code*, sec. 2249; *Craig v. Ambrose*, 80 Ga. 134; *Loring v. Thorndike*, 5 Allen, 257. As to "heirs," "dying without heirs," see *Stimson's American Statute Law*, secs. 1414, 1415. As to "heirs," "heirs at law," "heirs male," "heirs male of his body," "legal heirs," and "heirs of her body," see *Lawson's Concordance*, word "Heirs." "HOMESTEAD." It is held in Wisconsin that the term "homestead" manifestly means, when used in a will, the house and all the grounds in which the testator lived: *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117. "Homestead," in a will: See *Fearing v. Swift*, 97

Mass. 415; *Backus v. Chapman*, 111 Mass. 386; *Hopkins v. Grimes*, 14 Iowa, 73. "HOUSEHOLD GOODS." By a bequest of "all my household goods and furniture, except my plate and watch," everything about the houses that had been usually held and enjoyed therewith, and that would tend to the comfort of the householder, will pass: *Carnagy v. Woodcock*, 2 Muni. 234; 5 Am. Dec. 470. See *Lutz v. Lutz*, 2 Blackf. 72. See also, as to "household," *Stubbs v. Stubbs*, 1 Hurl. & C. 258; *Dayton v. Tillon*, 1 Robt. 21. "IN CASE." The words "in case," when used in a will, create a condition as clearly as where the words "if," "upon," and the like, are used: *Robert's Appeal*, 59 Pa. St. 70; 98 Am. Dec. 312. "ISSUE." It is said that the word "issue," in a will, is primarily a word of limitation: *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399. See *Sims v. Conger*, 39 Miss. 231; 77 Am. Dec. 671. As to when "issue" is a word of purchase, see *Stimson's American Statute Law*, sec. 2824. The term "issue," in a clause, "such issue shall represent and take the parent's share," refers to children alone, and means descendants taking by way of representation, and does not include grandchildren and great-grandchildren descendants of part of the "children": *Dexter v. Inches*, 147 Mass. 324. So the word "issue" does not include an adopted child: *Jenkins v. Jenkins*, 64 N. H. 407. As to "issue," in a will, see *Lawson's Concordance*, word "Issue." "DYING WITHOUT ISSUE." "DIE WITHOUT ISSUE." The words "dying without issue" has been made a matter of special enactment in some of the states; and unless a different intent otherwise appears, they are to be construed, whether used with regard to real or personal estate, as referring to a dying without children living at the time of the devisee's death: *Holmes v. Williams*, 1 Root, 335; 1 Am. Dec. 49; *Stimson's American Statute Law*, sec. 1415. And it is determined that the addition of the words "born, or to be born," to the description of those who are to take, will not be sufficient to

further added to, in that the intention of the testator is to

form an exception to the rule: *Heise v. Markland*, 2 Rawle, 274; 21 Am. Dec. 445. The words "die without issue of his body lawfully begotten" must be construed to mean a definite failure of issue, and will support a limitation over, if other words in the will do not prevent this result: *Combs v. Combs*, 67 Md. 11; 1 Am. St. Rep. 359; *De Haas v. Bunn*, 2 Pa. St. 335; 44 Am. Dec. 201. But it is held that a devise over, if the first taker "should die without issue at his decease," is good as an executory devise, as it does not import an indefinite failure of issue: *Heard v. Horton*, 1 Denio, 165; 43 Am. Dec. 659. See note in 55 Am. Rep. 774. "LEAVING NO ISSUE," "WITHOUT LAWFUL ISSUE." In the absence of an intent to the contrary apparent in the will, the words "leaving no issue" should be interpreted as referring to issue living at the death: *Robert v. West*, 15 Ga. 122. And the words "without lawful issue" will be so construed, especially in case of a limitation over, if the legatee die without such issue, and the limitation will then, under such construction, take effect on the death of the party: *Spruill v. Moore*, 5 Ired. Eq. 284; 49 Am. Dec. 428. As to "issue male," "issue of her body," "issue of my body," "lawful issue," etc., see *Lawson's Concordance*, word "Issue." "LANDS." Under the common-law doctrine, the word "lands," as used in a will, was not co-extensive with that of tenements and hereditaments; it included the surface, and everything below or above it, as a rule yet it did not, by force of the word itself, include incorporeal hereditaments: 2 *Jarman on Wills*, *Randolph* and *Talcott's* notes, 381 et seq. This doctrine, however, in its limited application, became changed in England by statutory enactment in 1833, whereby the word "lands" was extended so as to include manors, advowsons, rectories, messuages, lands, tenements, tithes, rents, and hereditaments, etc.: 3 & 4 Wm. IV., c. 74, 105, 106; *Moore*, 359, pl. 49. In the American states there are comparatively few cases where the exact definition of "lands," used in a will, has arisen, so far as the

determination of the particular question under consideration is concerned. However, it is a well-known doctrine, as we shall hereafter show, that the testator's intention furnishes, especially in case of doubt, the decisive rule of construction of a will, and necessarily of the words and terms, technical or otherwise, used in a will; and in connection with the interpretation of the word "lands," we would add that the character and kind of estate left by the testator is an important factor in determining what the testator meant by using the word "lands." Therefore it has been decided that the word "lands" will be construed as synonymous with "real estate," and "unless restrained by something else, it is sufficient to carry a future or contingent, as well as a present, freehold estate in lands": *Pond v. Bergh*, 10 Paige, 140; 156. It was also decided in this case that the testator's intention should govern in construing the meaning of word "lands." So a devise of "all my lands" in a particular county, although there is no other denomination of the subject-matter, passes the testator's right to rents under perpetual leases on lands in such county: *Hunter v. Hunter*, 17 Barb. 25, 28, 86. But it is also held in New York, in an early case, that the word "lands" cannot "be held to apply to and include lands leased . . . in fee-simple in respect to which the testator had no estate, and in regard to which he had no interest, except upon the conditions on which the lands were held": *Herrington v. Budd*, 5 Denio, 321. Nor does a right of re-entry for condition broken pass by a devise of "lands": *Herrington v. Budd*, 5 Denio, 321. Though the word "land," in the absence of words of limitation, if such appears to be the testator's intent, will convey an estate in fee-simple: *Bell County v. Alexander*, 22 Tex. 350; 73 Am. Dec. 268. Though where a "tract of land" is described in a devise as lying in a particular county, and as having been bought of a certain named person, it may be shown by parol evidence what land was bought, and of how many tracts or parcels it was composed: *McCorry v. King*, 3 Humph. 267; 39 Am. Dec. 165.

be deduced from the whole instrument, "and a comparison

"LEAVE" will be construed to mean "have," when necessary to enable a gift to take effect which is made to such children as a certain person may "leave": *Du Bois v. Ray*, 35 N. Y. 162. See further, as to "leave," in a will, *King v. Savage*, 121 Mass. 303. "Leave" no child: See *Wright v. Baury*, 7 Cush. 108. Leaving issue: See *In re Smith*, L. R. 7 Ch. Div. 667. Leaving no issue living: See *Wallington v. Taylor*, 1 N. J. Eq. 141; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Trehanne v. Layton*, L. R. 10 Q. B. 459; *In re Brown*, L. R. 16 Eq. Cas. 239. Without leaving any child: See *White v. Hill*, L. R. 4 Eq. Cas. 265; *Bryden v. Willett*, L. R. 7 Eq. Cas. 473. "LEGACY." This word is often used in a will in relation to real as well as personal property, and its construction should be governed by the intention of the testator. Popularly, the word is applied to land as well as to money, and courts should construe words according to their meaning in common parlance: *Holmes v. Mitchell*, 2 Murphy, 228; 5 Am. Dec. 527. In a Georgia case the word "legacy," in a subsequent clause in a will, was construed as covering all of several bequests in a former item, where the testator, in a single item, gave his wife a sum of money, various articles of personal property, and a life estate in certain realty, with the privilege of taking a sum of money in lieu of the life estate, and in a subsequent item declared that the "legacy" given to his wife was in lieu of dower: *Clayton v. Akin*, 38 Ga. 320; 95 Am. Dec. 393. See *Burwell v. Cawood*, 2 How. 560. See also "Devise," *ante*. "MATURITY." The word "maturity," used in a will, may be interpreted to mean "puberty": *Lowry v. Muldrow*, 6 Call, 55. It may also be construed to mean "lawful age": *Carpenter v. Bouldin*, 48 Md. 122. See also, as to meaning of "maturity," in a will, *Condict v. King*, 13 N. J. Eq. 375; *Carpenter v. Bouldin*, 48 Md. 122. "MAY DIE POSSESSED OF OR ENTITLED TO." Where a devise is to one, with a limitation over of so much estate as he "may die possessed of or entitled to, both real and personal," the remainder

over will be construed to be of the estate remaining undisposed of at the death of the first devisee: *Flinn v. Davis*, 18 Ala. 132. "MONEYS," as used in a will, may be construed to mean "personalty": *Smith v. Davis*, 1 Grant Cas. 158. And it may include bank stock, notes, and bonds: *Fulker-ton v. Chitty*, 4 Jones Eq. 244. Or real and personal property: *In re Miller*, 48 Cal. 165; 17 Am. Rep. 422. But where there is nothing in the will to show that the word "moneys" was intended to be used in any other than its ordinary sense, it will not be construed so as to include bonds, mortgages, or other choses in action: *Mann v. Mann*, 14 Johns. 1; 7 Am. Dec. 416. "MORE OR LESS." The omission of the words "more or less" is immaterial in describing a tract of land, since its description by a specific number of acres is the same, in a will, as the description of a tract containing so many acres more or less: *Williams v. Lane*, 2 Car. Law Repos. 266; 6 Am. Dec. 561. As to "more or less," in a will, see *Bishop v. Morgan*, 82 Ill. 351; 25 Am. Rep. 327. "MOVABLES." Promissory notes do not pass by a bequest in the will of the holder thereof of her "in-door movables": *Penniman v. French*, 17 Pick. 404; 28 Am. Dec. 309. "Movable property": See *Strong v. White*, 19 Conn. 238; *Enohin v. Wylie*, 10 H. L. Cas. 1; *Wood v. George*, 6 Dana, 343; *Whitehurst v. Harker*, 2 Ired. Eq. 292. "MY PLANTATION." A devise of "my plantation" passes a fee: *Pey-ton v. Smith*, 4 McCord, 476; 17 Am. Dec. 768. "NEXT OF KIN." Where there is nothing in the context to show a different intent, the words "next of kin" must be construed in their ordinary meaning of relatives in blood: *Keteltas v. Keteltas*, 72 N. Y. 312; 28 Am. Rep. 156; and it does not therefore include the widow: *Id.* Nor is the husband the next of kin of the wife, within the ordinary meaning of a will: *Ivins's Appeal*, 106 Pa. St. 176; 51 Am. Rep. 516; *Wikins v. Ordway*, 59 N. H. 378; 47 Am. Rep. 215. When "next" or "nearest of kin" are words of purchase, see *Stimson's American Statute Law*, sec. 2824. It is said,

of its various parts in the light of the situation and cir-

however, that "next of kin" is not confined to the whole-blood, but extends also to the half-blood: Williams on Executors, 1208; 2 Jarman on Wills, Randolph and Talcott's notes, 643, and note. See further, as to "next of kin," in a will, *Harden v. Larrabee*, 113 Mass. 430; *Redmond v. Burroughs*, 63 N. C. 242; *Murdock v. Ward*, 67 N. Y. 387; *Steel v. Kurtz*, 28 Ohio, 192; *Delancey v. McCormick*, 28 Hun, 574; *Lawson's Concordance*, words "Next of kin." "NIECE," or "NIECES," means, in a will, the daughter or daughters of a brother or sister, and will not be extended so as to include nephews' wives or widows. In this respect they conform, like other words, to their ordinary meaning, unless the testator's intention is that they should bear different interpretation: *Goddard v. Amory*, 147 Mass. 71, 74. For other cases of construction of these words, see *In re Blower*, L. R. 6 Ch. 351; *Sherratt v. Mountford*, L. R. 8 Ch. 929; *Wells v. Wells*, L. R. 18 Eq. Cas. 504. "Or." The word "or" will be construed "and," whenever necessary to effect the purposes of the will, evidenced by the intent of testator: *Kindig v. Smith*, 39 Ill. 300; *Munroe v. Holmes*, 1 Brev. 319; *Holcomb v. Lake*, 25 N. J. L. 605; *Witsell v. Mitchell*, 3 Rich. 289; *Jackson v. Blanshan*, 6 Johns. 54; 5 Am. Dec. 188; *Janney v. Sprigg*, 7 Gill, 197; 48 Am. Dec. 557; *Robertson v. Johnson*, 24 Ga. 102; *Carpenter v. Heard*, 14 Pick. 449. See also cases cited under "Or," *Lawson's Concordance*. "ORNAMENTS" includes jewelry worn for personal decoration, when not otherwise specifically bequeathed: *Estate of Traylor*, 75 Cal. 189. "PERSONAL ESTATE." A bequest of "all my personal estate" means the balance of personal estate after the payment therefrom of the testator's debts and other legal charges: *Cooch v. Cooch*, 5 Houst. 540; 1 Am. St. Rep. 161. See *Jones v. Robinson*, L. R. 3 C. P. D. 345. "PERSONAL GOODS AND CHATTELS." The words "all my personal goods and chattels," when used in a will, should be restricted by particular words in other parts of the will: *Peas-*

*lee v. Fletcher's Estate*, 60 Vt. 188; 6 Am. St. Rep. 103. "PERSONAL REPRESENTATIVES." In a will which provides that after the determination of certain life interests given to the testator's sons the estate should "be distributed or go to his personal representatives, who would be entitled to his personal estate according to law," the words "personal representatives" will be construed to mean "next of kin": *Davies v. Davies*, 55 Conn. 319. When the words "personal representatives," "legal representatives," and "representatives" are words of purchase, see *Stimson's American Statute Law*, sec. 2824. "PROPERTY." The term "property" does not embrace stock in a railroad company: *Adams v. Jones*, 6 Jones Eq. 221. Nor do choses in action pass to the wife by a bequest of "all my property to my wife," and after her death "to be sold," etc.: *Pippin v. Ellison*, 12 Ired. 61; 55 Am. Dec. 403. But all the property received by a testator from his wife by reason of his marriage, whether received at that exact time or subsequently, passes under the words "I give to my wife all the property I got with her": *Jessup v. Jessup*, 1 Busb. Eq. 179. Though the words "all my property" may pass all the testator's real estate owned at his decease: *Wynne's Lessee v. Wynne*, 2 Swan, 405; 58 Am. Dec. 66. But a bequest of all "personal property" is governed by the intention of the testator and the character of the property, and the evident purpose for which it was given: *Spark's Appeal*, 89 Pa. St. 148; 33 Am. Rep. 740. See further, as to the construction of "property," in a will, *Spencer v. Higgins*, 22 Conn. 529; *Morris v. Henderson*, 37 Miss. 492; *Laing v. Barbour*, 119 Mass. 523; *Brown v. Brown*, 41 N. Y. 507; *Monroe v. Jones*, 8 R. I. 526; *Lawson's Concordance*, word "Property." "RELATION." A wife is not a relation of her husband, within a statute saving from lapse a devise to a "child or other relation" of the testator's who dies before the testator: *Cleaver v. Cleaver*, 39 Wis. 96; 20 Am. Rep. 30. "Relations": See *Lawson's Concordance*, word "Relations"; 2

cumstances which surrounded the testator when the instrument was framed."<sup>1</sup>

§ 3228. **Later Provisions Control.**—It is an equally well-settled rule of law that if clauses in a will are repugnant to each other, and cannot be reconciled by the rules of construction, then effect must be given to the later provisions, since they control in such case.<sup>2</sup>

Jarman on Wills, Randolph and Talcott's notes, 660 et seq. "Relatives": See *Hagardine v. Fulta*, 27 Mo. 423; *Drew v. Wakefield*, 54 Me. 291; *Hibbert v. Hibbert*, L. R. 15 Eq. Cas. 373; *Eagles v. Le Breton*, L. R. 15 Eq. Cas. 149. "Nearest relatives": See *Ennis v. Peutz*, 3 Bradf. 382. "SONS AND DAUGHTERS." These words have been held to include grandchildren: *Archer v. Smith*, 2 Desaus. Eq. 123. "Sons and daughters": See also *Jamison v. Hay*, 46 Mo. 546. "SUPPORT OF FAMILY." These words will be construed, when used in a will, to include the education and maintenance of children and the widow's support: *Addison v. Bowie*, 2 Bland, 606. As to the words "support," "support and education," "comfortable support and maintenance," "personal support and comfort," see the word "Support," in *Lawson's Concordance*. "SURVIVING" and "SURVIVORS." The word "surviving" refers the period of survivorship to the testator's decease: *Stone v. Lewis*, 84 Va. 474. So in case the devise is of certain property to the testator's widow for life, and after her death, then to the children of the testator, to be divided among them, or among the survivors, should any of said children die without issue, the word "survivors" will be construed to refer to issue living at the decease of the widow: *Williamson v. Chamberlain*, 10 N. J. Eq. 373. And it is held that the term "survivors," in a will, restricts "dying without issue" to lives in being and twenty-one years thereafter, where a benefit to persons in life not transmissible to heirs and representatives is plainly intended: *Prealey v. Davis*, 7 Rich. Eq. 105; 62 Am. Dec. 396. That is, words of survivorship in a will relate to the period of division or enjoyment, where the period of enjoyment is postponed by

interposing a life estate or other particular interest, or where a future period is by the will fixed for a division: *Prealey v. Davis*, 7 Rich. Eq. 105; 62 Am. Dec. 396. The word "survivors" may be construed to mean personal representatives, where a testator unfamiliar with the use of legal terms makes a bequest to brothers and sisters by name or their survivors: *Stoner Barr's Appeal*, 2 Pa. St. 428; 45 Am. Dec. 608. As to "survive," "surviving," and "survivor," in will, see those words in *Lawson's Concordance*. See also *Lowry v. O'Bryan*, 4 Rich. Eq. 262; 57 Am. Dec. 727; *Miles v. Fisher*, 10 Ohio, 1; 36 Am. Dec. 61. "WEARING APPAREL," when used in a will, does not include the testator's watch, which he was accustomed to carry upon his person: *Gooch v. Gooch*, 33 Me. 535. "WORLDLY GOODS." The words, "all my worldly goods," followed by a general clause, in which certain realty was mentioned, but which did not specifically describe other realty of the testator, which was omitted from the clause of the will in question, will not pass such other real estate: *Farish v. Cook*, 98 Mo. 212; 47 Am. Rep. 107.

<sup>1</sup> *Colton v. Colton*, 127 U. S. 300. *Smith v. Bell*, 6 Pet. 68; *Pue v. Pue*, 1 Md. Ch. 382; *Lebeau v. Trudeau*, 10 La. An. 164; *Mutter's Estate*, 38 Pa. St. 314; *Lucas v. Duffield*, 5 Gratt. 456; *McEachin v. McRae*, 5 Jones, 19. See statutes of California, Dakota, Montana, and Utah: *Stimson's American Statute Law*, sec. 2802. See *ante*, §§ 3224-3226.

<sup>2</sup> *Bradstreet v. Clarke*, 12 Wend. 602; *Iglehart v. Kirwan*, 10 Md. 559; *Orr v. Moses*, 52 Me. 287; *Stickle's Appeal*, 29 Pa. St. 234. See statutes of California, Dakota, Montana, and Utah: *Stimson's American Statute Law*, sec. 2802. See *ante*, §§ 3224-3226.

### § 3229. General Intent Prevails over Particular Intent.

— In construing a will it is a general rule that the testator's particular intent as shown by a single provision standing by itself must yield to the general leading intent as manifested in the whole instrument.<sup>1</sup> But general words in a will following after and coupled with words of limited signification are restricted to the same class of things as the former, except where such general words are in a residuary clause.<sup>2</sup>

§ 3230. Transposition of Words.— Where it is necessary, in order to effectuate the testator's manifest intention, that words should be transposed, the court has power so to do.<sup>3</sup> But words will not be transposed where the intent of the testator is clearly expressed in the will, and the will may be given effect without such transposition of words.<sup>4</sup>

§ 3231. Surplusage and Rejection of Words.— In construing a will, words which are so unintelligible, obscure, and absurd, that they have no place in, and can give no effect to, the testator's manifest legal intention, may be considered as surplusage, and rejected.<sup>5</sup>

§ 3232. *Per Stirpes* or *Per Capita*.— The *per stirpes* rule belongs properly to the statutes of distribution;<sup>6</sup> and in nearly all the states provisions are made under such statutes determining in what cases the *per stirpes* and *per capita* rules respectively apply.<sup>7</sup> But the application of such rule must, in either case, be controlled by the gen-

<sup>1</sup> *Phelps v. Bates*, 54 Conn. 11; 1 Am. St. Rep. 92.

<sup>2</sup> *Peaslee v. Fletcher's Estate*, 60 Vt. 188; 6 Am. St. Rep. 103. See *ante*, §§ 3224-3226.

<sup>3</sup> *Baker v. Pender*, 5 Jones, 351; *Linstead v. Green*, 2 Md. 82; *O'Neill v. Boozer*, 4 Rich. Eq. 22. See statutes of Georgia; 2 Jarman on Wills, Randolph and Talcott's notes, 75, and note.

<sup>4</sup> *Mooberry v. Marge*, 2 Munt. 453.

<sup>5</sup> *East v. Garrett*, 84 Va. 523; *Bartlet v. King*, 12 Mass. 537; 7 Am. Dec. 99; *Wright v. Denn*, 10 Wheat. 204; *Needham v. Ide*, 5 Pick. 510.

<sup>6</sup> *Risk's Appeal*, 52 Pa. St. 269; 91 Am. Dec. 156.

<sup>7</sup> *Stimson's American Statute Law*, secs. 3101, 3102 b, 3103, 3137, 3138.

eral intention of the testator;<sup>1</sup> though a *per capita* construction is not to be forced upon a devise because the devisees, had they taken under the statute, would have taken *per stirpes*.<sup>2</sup> In determining whether, in construing wills, persons shall take *per stirpes* or *per capita*, the rule is, that persons described as a class take as if each individual composing the class had been called by his proper name, and that each takes a share with the other persons named, among whom the division is to be made. There is, however, this exception to the rule, that if there be anything in the will indicating that the testator intended that the persons described in the class should take as a unit, then the division should be *per stirpes*, and not *per capita*;<sup>3</sup> though, under a devise to a class of persons, where, by reason of the legal incapacity of the others, but one person of the class can take, he takes all the estate which the devise, by its terms, gives to the whole class.<sup>4</sup> Under the earlier statutes in Tennessee the nephews and nieces of a deceased person take *per stirpes*, and not *per capita*.<sup>5</sup> So persons taking as "heirs of the body," under a bequest, take *per stirpes*, unless the instrument under which they take points out a different mode of distribution.<sup>6</sup> But it is decided in North Carolina that where a bequest is made to the heirs simply, they take in the proportions prescribed by the statute of distributions. If the testator directs that the property be equally divided among the heirs, the division must be *per capita*;<sup>7</sup> and a devise and legacy to "heirs" of different persons must be divided among the persons answering the class description *per capita*, not *per stirpes*, where the word "heirs" is used in the will as one of description

<sup>1</sup> Risk's Appeal, 52 Pa. St. 269; 91 Am. Dec. 156.

<sup>2</sup> Id.

<sup>3</sup> Roper v. Roper, 5 Jones Eq. 16; 75 Am. Dec. 427.

<sup>4</sup> Downing v. Marshall, 23 N. Y. 366; 80 Am. Dec. 290.

<sup>5</sup> Lewis v. Claiborne, 5 Yerg. 369; 26 Am. Dec. 270.

<sup>6</sup> Templeton v. Walker, 3 Rich. Eq. 543; 55 Am. Dec. 646.

<sup>7</sup> Templeton v. Walker, 3 Rich. Eq. 543; 55 Am. Dec. 646.

and purchase.<sup>1</sup> So the words "equally to be divided," in a devise to kindred, will cause the division to be *per capita*,<sup>2</sup> even though the devise is to kindred in different degrees of relationship;<sup>3</sup> and where a testator bequeaths a residue of personalty, to be equally divided among certain persons named in the will, and the children of his deceased children, and the children of his son then living, all the legatees take *per capita*, and not *per stirpes*.<sup>4</sup> So where the division of property devised is to kin of different degrees of relationship, it is to be *per capita*, if the devisees are individually named; and it is enough to put the rule into operation that, though in the devise there is no mention of the names of the devisees, there is in it a specific reference to another part of the will in which such names are set out.<sup>5</sup> So in case of a bequest of personal property to the testator's wife, "and at her decease to be divided between her and my poor relations equally," the bequest is to be construed as if the word "poor" were not used, and after the wife's death the estate is to be divided *per capita* between the brothers and sisters of the testator living at his death, and the children of such brothers and sisters as were dead, and the mother of the wife,—the father not being alive. The brothers and sisters of the wife do not take.<sup>6</sup>

ILLUSTRATIONS.—A will provided as follows: "The residue of my estate I give to the following named persons, to be divided equally among them, my sisters R. and S., the grandchildren of my deceased brother W., and the grandchildren of my deceased sisters D. and M., meaning by this to include all the grandchildren living at time of my decease." *Held*, that the grandchildren took *per stirpes*, and not *per capita*: *Raymond v. Hillhouse*, 45 Conn. 467; 29 Am. Rep. 688. The devise was of

<sup>1</sup> *Ward v. Stow*, 2 Dev. Eq. 509; 27 Am. Dec. 238.

<sup>2</sup> *Kean v. Hoffercker*, 2 Harr. (Del.) 103; 29 Am. Dec. 336.

<sup>3</sup> *Kean v. Hoffercker*, 2 Harr. (Del.) 103; 29 Am. Dec. 336.

<sup>4</sup> *Bryant v. Scott*, 1 Dev. & B. Eq. 155; 28 Am. Dec. 590.

<sup>5</sup> *Kean v. Hoffercker*, 2 Harr. (Del.) 103; 29 Am. Dec. 336.

<sup>6</sup> *McNeilledge v. Galbraith*, 8 Serg. & R. 43; 11 Am. Dec. 572. See also, as to *per stirpes* or *per capita*, 2 Jarman on Wills, Randolph and Talcott's notes, 619, 634-636, 643, 646, 652, 754, 756, 762, and notes.

the "balance" of the testator's estate, "to be given to the families of A and B's children in equal proportion." *Held*, that A and B's children took *per stirpes*, and that the devise be divided between the families, one half to each: *Walker v. Griffin*, 11 Wheat. 375. The devise was "unto my daughters, to be equally divided between them, share and share alike, and to be to them for and during their natural life, and after their death, then to be to their and each of their children, and to be divided between them, share and share alike." *Held*, that the devise must be so construed as to give to each daughter a life estate, with remainder to their children as tenants in common, and that the children took *per stirpes*, and not *per capita*: *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285. A testator, after making certain specific bequests and devises to his children and grandchildren, directed the remainder of his movable estate to be divided equally among his surviving children and "the heirs" of a deceased son. *Held*, that the children of the deceased took *per stirpes*: *Roome v. Counter*, 6 N. J. L. 111; 10 Am. Dec. 390. A testator bequeathed his property in the following terms: To his "deceased son" J.'s children, personal property; to his deceased son W.'s children, personal property; to his "daughter" M., and to each of his other four children, naming them, certain personal property; and finally, all the rest of the estate not disposed of to be divided equally among the above-mentioned heirs. *Held*, that, under the last clause, the legatees took *per stirpes*, and not *per capita*: *Collier v. Collier*, 3 Rich. Eq. 555; 55 Am. Dec. 653. A testator directed that a portion of his estate be divided equally between his three "beloved children," G., J., and C., and then directed that the residue of the estate, consisting of realty, be divided, or the proceeds thereof be divided, after giving twelve hundred dollars to G., equally "between my beloved children G. and J., and the children of my beloved daughter" C., who was married and living. *Held*, that the children of C. took *per stirpes*: *Risk's Appeal*, 52 Pa. St. 269; 91 Am. Dec. 156. A devise was to the children of A and B, or to A and the children of B. *Held*, that they took *per capita*: *Cole v. Creyon*, 1 Hill Ch. 311; 2 Am. Dec. 208. The provision in the will was for distribution to the testator's "heirs at law, share and share alike." *Held*, that the distribution must be *per capita*, and not *per stirpes*: *Allen v. Allen*, 13 S. C. 512; 86 Am. Rep. 716. The devise was of the residue of the testator's estate "to be equally divided between my son A and my three grandsons," who were named. *Held*, that the grandsons took *per capita* equally with A: *Martin v. Gould*, 2 Dev. Eq. 305. The devise was to the children of A and B, "to be equally divided between them." *Held*, that such children took *per capita*: *Ex parte Leith*, 1 Hill Ch. 152.

§ 3233. **Devise with Power of Appointment.** — The testator's children will take in equal shares property which has been bequeathed to his wife with a discretionary power of appointment, where she fails to exercise the appointment or makes an invalid one.<sup>1</sup>

§ 3234. **Bequest of a Debt — Annuity.** — Where there is a bequest of a debt due from the legatee to the testator, such bequest is subject to the testator's debts, and the legatee shares in the residuary fund.<sup>2</sup> A provision in a will for the payment of "five hundred dollars per year for ten years to" B., in equal quarterly installments, is an annuity contingent on B.'s life, and not a legacy of five thousand dollars payable in installments.<sup>3</sup>

§ 3235. **Legacy may be a Personal Charge.** — A legacy will be a personal charge upon the testator's wife, and determine with the death of the legatee, under a will wherein the testator provides for his wife and makes her a residuary legatee, and adds that it is his "will and desire" that she should pay his nephew two hundred dollars annually, commencing at a specified date, until he came of age, "for the purpose of educating him," and the nephew dies in two years from that date, but before his majority.<sup>4</sup>

§ 3236. **Gift of Personal Property for Lifetime, with a Gift Over.** — Whether a gift of personal property for a lifetime, with a gift over, is absolute or otherwise depends upon the nature of the property, as to its being perishable, or merely of articles which may depreciate by using, and also upon other circumstances. Where the use of money is given, the gift is of the interest only, and security must be given, or a trustee appointed, of whom a bond would be

<sup>1</sup> *Cruse v. McKee*, 2 Head, 1; 73 Am. Dec. 186.

<sup>2</sup> *Bates v. Barry*, 125 Mass. 83; 28 Am. Rep. 207.

<sup>3</sup> *Cole v. Covington*, 86 N. C. 295; 41 Am. Rep. 458.

<sup>4</sup> *Anderson v. Hammond*, 2 Lea, 281; 31 Am. Rep. 612.

required. These rules may be changed, according to circumstances, as a court of equity may deem proper.<sup>1</sup>

**§ 3237. Statutory Rules concerning Devises and Legacies.**—Statutes have been enacted in several states that a devise shall be construed to pass a fee, unless the intention of the testator to the contrary is clearly manifest on the face of the will;<sup>2</sup> and in other states, in certain cases, such devise will include a leasehold interest, as well as a freehold estate,<sup>3</sup> while in some states it is provided that where the devise or bequest is clearly and distinctly expressed, it cannot be made to yield to other expressions in the will which are inaccurate or equivocal, not extended by inference or argument deduced from the context.<sup>4</sup>

**§ 3238. Special Instances of Wills Held to be Valid and Void.**—In addition to what has been noted as to the requisites and validity of wills under the several heads herein to which such topics more properly belong, we shall note in this section several instances in which wills have been respectively held valid and void. It is not a ground of suspicion that one having confidential relations with another prepares and directs the execution of a will giving him a considerable benefit;<sup>5</sup> nor that it was drawn by a confidential friend whose wife was a beneficiary;<sup>6</sup> nor because one of the subscribing witnesses married the testatrix;<sup>7</sup> nor because the draughtsman takes largely under the will;<sup>8</sup> nor does a mere mistake by the scrivener

<sup>1</sup> *Whittemore v. Russell*, 80 Me. 297; 6 Am. St. Rep. 200.

<sup>2</sup> See statutes of Alabama, Arizona, California, Dakota, Delaware, Idaho, Kansas, Maine, Massachusetts, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Washington, Wisconsin, Wyoming: Stimson's American Statute Law, secs. 1474, 2808.

<sup>3</sup> See statutes of Kentucky, Virginia, and West Virginia: Stimson's American Statute Law, sec. 2808 c.

<sup>4</sup> See statutes of California, Dakota, Montana, and Utah: Stimson's American Statute Law, sec. 2803.

<sup>5</sup> *Yardley v. Cuthbertson*, 108 Pa. St. 395; 56 Am. Rep. 218.

<sup>6</sup> *Montague v. Allan's Executors*, 78 Va. 592; 49 Am. Rep. 384.

<sup>7</sup> *Fellows v. Allen*, 60 N. H. 439, 440.

<sup>8</sup> *Cheatham v. Hatcher*, 30 Gratt. 56; 32 Am. Rep. 650; *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Stirling v. Stirling*, 64 Md. 138.

in drawing the will invalidate it, when such mistake does not amount to a fraud, or does not materially change the testator's disposition of his estate;<sup>1</sup> nor does the acquirement of influence through illicit intercourse with a woman taking under the will in itself vitiate the will.<sup>2</sup> So it was determined that a will was valid, and it was refused to be set aside, under the following circumstances: A testator having several children made a will giving all his estate to his wife, except a dollar to each child; this was because there was a large judgment against one of his sons, which the father did not wish his estate to pay; the son had in fact compromised the judgment, but failed to inform his father; he had also urged the making of a will, but there was no proof that he induced, or that the concealment induced, the making of the will in this form.<sup>3</sup> A will made by a person who is unable to originate an idea spontaneously, or of his own volition and power to express a wish, and who is actuated in his entire actions by others with whom he comes in contact, and whose only mode of communication is by adopting or rejecting the suggestions of others, is void;<sup>4</sup> and a will of personal property not executed in conformity to the law of the testator's domicile at the time of his death will not be operative in regard to personal property in a foreign country, although executed according to the laws of that country.<sup>5</sup> The will of a convicted felon, whereby he disposes of all his reversionary interest in his property, is good in Kentucky, although under the common law the property of a felon was, after conviction, forfeited to the state.<sup>6</sup>

**§ 3239. What is a Sufficient Finding as to Validity of Will.**— Upon a will contest brought before the jury upon

<sup>1</sup> Whitlock v. Wardlow, 7 Rich. 453.

<sup>2</sup> Sunderland v. Hood, 84 Mo. 293.

<sup>3</sup> Allmon v. Pigg, 82 Ill. 149; 25 Am. Rep. 303.

<sup>4</sup> Delafield v. Parish, 25 N. Y. 9.

<sup>5</sup> Desesbats v. Berquier, 1 Binn. 336; 2 Am. Dec. 448.

<sup>6</sup> Rankin v. Rankin, 6 T. B. Mon. 531; 17 Am. Dec. 161. See note to Avery v. Everett, 6 Am. St. Rep. 379; and see *ante*, § 3111, note.

appeal from the probate court, a verdict by the jury that they find the "issue in favor of the appellees" is a sufficient finding of the validity of the will, where to the reasons of appeal filed by the appellants the appellees answered that "they were severally untrue, and if true, insufficient." <sup>1</sup>

§ 3240. **Estate when Segregated.**—Where a bequest is made of a specific sum of money, to take effect upon the happening of a certain contingency,—as the death of the testator's son before a certain age, leaving heirs,—if such event happens, such sum should be at once regarded as segregated from the estate, and held in trust for said heirs until such time as they can take absolutely under said will, notwithstanding the will in other parts directs the payment of all the net annual income of the estate to certain beneficiaries named therein.<sup>2</sup> So where, from time to time, under the provisions of a will, portions of the *corpus* of the estate were to vest in fee in the son, from the moment he becomes the owner of such fee that portion becomes segregated from the estate and relieved from every provision of the will, especially where a part of it relates to the paying out to beneficiaries of the net annual income of the estate; and so much of the estate as the widow elects to take in lieu of dower becomes segregated in like manner.<sup>3</sup>

§ 3241. **Conditions in Wills.**—A restriction in a will inconsistent with the general power of disposal is void and inoperative.<sup>4</sup> So a condition annexed to a devise that it shall not be "subject to conveyance or attachment is void."<sup>5</sup> But a condition in a devise of a life interest,

<sup>1</sup> *St. Leger's Appeal*, 34 Conn. 434; 91 Am. Dec. 735.

<sup>2</sup> *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117.

<sup>3</sup> *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117.

<sup>4</sup> *Smith v. Starr*, 3 Whart. 62; 31 Am. Dec. 498.

<sup>5</sup> *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241.

that it shall cease on judgment against the devisee being recovered in a creditor's suit instituted to reach it, and that the executors shall thereafter apply the income to the support of the devisee's family, is not repugnant to the estate devised, nor contrary to public policy, and is valid.<sup>1</sup> A devise of an estate to the sons of the testator, "they jointly and severally paying" to his daughter a certain sum within a specified time, is strictly conditional upon the payment of the money within the time limited.<sup>2</sup>

**§ 3242. Illegal and Impossible Conditions in a Will.** — Conditions which are illegal and impossible, or against public policy, are void by statute in two states.<sup>3</sup>

**§ 3243. Conditions against Contesting Will.** — A condition in a will excluding from a share in the estate any heir or testator who "goes to law to break his will" is valid, both as to real and personal property. Upon a breach of such a condition, the legacy forfeited will pass to the general residuary legatee.<sup>4</sup> It is held, however, in South Carolina, that a condition that a legatee shall not dispute or contest a will, on penalty of forfeiting his estate, is void, and cannot result in such forfeiture, unless the testator provides that the legacy shall go to another person on breach of the condition.<sup>5</sup>

**§ 3244. Bequest for Support and Maintenance.** — Where a legacy is given charged with the maintenance of the testator's children, so far as it is needed for that purpose, if it is accepted, it must be so applied so far as

<sup>1</sup> *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113.

<sup>2</sup> *Wheeler v. Walker*, 2 Conn. 196; 7 Am. Dec. 264. See *Birdsall v. Hewlett*, 1 Paige, 32; 19 Am. Dec. 392; *Sayward v. Sayward*, 19 N. J. L. 210; 22 Am. Dec. 191. As to conditions generally, see *ante*, Title Contracts — Deeds — Real Property.

<sup>3</sup> See Title Contracts — Real Prop-

erty; *Stimson's American Statute Law*, sec. 2825. As to conditions in restraint of marriage or alienation, see *ante*, Title Contracts — Real Property.

<sup>4</sup> *Bradford v. Bradford*, 19 Ohio St. 546; 2 Am. Rep. 419.

<sup>5</sup> *Mallet v. Smith*, 6 Rich. Eq. 12; 60 Am. Dec. 107. See 2 Jarman on Wills, Randolph and Talcott's notes, 582.

necessary.<sup>1</sup> What is a "reasonable and competent support," as provided for in a will, does not mean merely the food and clothing necessary to sustain life, but a support in the place and manner in which a party has been accustomed to live;<sup>2</sup> and "a comfortable living through life" for the testator's wife, provided for her in the will, subjects the whole estate to an equitable charge, which, if wrongfully withheld, may be enforced in a court of chancery.<sup>3</sup> So a bequest by the testator of all his property, and the income of the same, to his widow, "to be used and disposed of by her, for her convenience and comfort during life," authorizes her to dispose of such property whenever her comfort and convenience may require it.<sup>4</sup>

§ 3245. **Perpetuities.** — Perpetuities are unconstitutional in many states, while in others they are expressly forbidden by their constitutions, with certain exceptions; under the statutes of several states a suspension of the absolute power of alienation by will is limited to certain definitely stated periods, as to lives in being, and twenty-one years thereafter, or to the duration of two lives in being, or to three lives in being and a certain limited time thereafter, or to any number of lives in being, when the estate is created; and in other states these provisions are extended to chattels real, or to the ownership of a term, as well as to estates of freehold.<sup>5</sup> The rule is universal that a suspension of the power of alienation must necessarily terminate, under any and all circumstances, within the period prescribed by the statute, or the disposition will be void.<sup>6</sup> An attempt in a will to create a future estate in land, whereby the same is liable to be tied up

<sup>1</sup> Wood v. Wood, 5 Paige, 596; 28 Am. Dec. 451.

<sup>2</sup> Ellerbe v. Ellerbe, 1 Speers Eq. 328; 40 Am. Dec. 623.

<sup>3</sup> Rogers v. Cawood, 1 Swan, 142; 55 Am. Dec. 729.

<sup>4</sup> Scott v. Perkins, 28 Me. 22; 48 Am. Dec. 470.

<sup>5</sup> Stimson's American Statute Law, secs. 402, 1341, 1440-1442. See 1 Jarman on Wills, Randolph and Talcott's notes, 502, and note, et seq.

<sup>6</sup> Ford v. Ford, 70 Wis. 19; 5 Am. St. Rep. 117.

from thirty to forty-eight years after the testator's death, constitutes, under the Wisconsin statute, such an unlawful suspension of the power of alienation as to make such disposition void. Such land, therefore, descends to the heirs, subject to the widow's rights therein.<sup>1</sup>

<sup>1</sup> Ford v. Ford, 70 Wis. 19; 5 Am. St. Rep. 117.

## CHAPTER CLIX.

## THE ESTATE, AND HEREIN OF LEGACIES AND DEVISES.

- § 3246. Who may take under will.
- § 3247. Devise or bequest to heir who would otherwise inherit.
- § 3248. Omission of children in will.
- § 3249. Disinherison of children.
- § 3250. Posthumous children — Children en ventre sa mere.
- § 3251. Omission of widow in will.
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- § 3253. Election or renunciation by devisee or legatee.
- § 3254. Election by widow between benefits conferred by will and her share in community property.
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- § 3261. General legacies.
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- § 3263. Residuary legacies, and estate under the residuary clause — Rights of residuary devisees and legatees.
- § 3264. Cumulative legacies.
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- § 3266. Legacies when a charge on land — Subrogation to the rights of creditors.
- § 3267. Encumbrances on estate are charge upon property.
- § 3268. Distinction between terms "vested" and "contingent," as applied to legacies.
- § 3269. Law favors vesting of legacies.
- § 3270. When legacy is vested, and when contingent — General rules.
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- § 3274. Ademption and abatement of legacies.
- § 3275. Lapsed legacies and devises.
- § 3276. Time when division of the property should be made.
- § 3277. Estates given by will.

§ 3246. Who may Take under Will. — Any person legally capable of taking property may take under a will,

and this includes corporations.<sup>1</sup> In California, however, certain corporations seem to be excluded from taking under a will.<sup>2</sup> But the devise must be to a corporation, and not to a body of individuals unincorporated. Therefore a devise to an officiating priest and his successors, not being a corporation sole, is against the policy of the law, and void;<sup>3</sup> and a devise to the yearly meeting of Quakers and to their successors is void, because the association is not a corporation, and the members are not so designated as to take as individuals.<sup>4</sup>

**§ 3247. Devise or Bequest to Heir Who would Otherwise Inherit.**—A devise or bequest to the heir who would inherit does not invalidate the will, by the statutes of a majority of the states, but the devise or bequest itself is of no validity, except in a few states, though it would seem to limit the share which the heir would otherwise take as such.<sup>5</sup>

**§ 3248. Omission of Children in Will.**—A mere omission to provide for children living at the execution of the will does not operate to divest them of their legal share, under the statutes of several of the states. This provision is a qualified one, however,—in many states dependent upon whether the omission was intentional, or by accident and mistake.<sup>6</sup> And the fact that the testator fails to

<sup>1</sup> Deering's Cal. Civ. Code, sec. 1275. And see statutes of Alabama, Dakota, Indiana, Louisiana, Montana, New York, and Utah: Stimson's American Statute Law, sec. 2610.

<sup>2</sup> Deering's Civ. Code, sec. 1275. But see Civ. Code, sec. 1313; Estate of Robinson, 63 Cal. 620; Estate of Buhner, 59 Cal. 131.

<sup>3</sup> McGirr v. Aaron, 1 Penr. & W. 49; 21 Am. Dec. 361.

<sup>4</sup> Greene v. Dennis, 6 Conn. 293; 16 Am. Dec. 58. As to a devise to a corporation to be formed, see Tappan's Appeal, 52 Conn. 412. As to devise to the United States, see In re Fox, 52 N.

Y. 530; 11 Am. Rep. 751; Dickson v. United States, 125 Mass. 311; 28 Am. Rep. 230.

<sup>5</sup> See statutes of Arizona, Arkansas, California, Colorado, Dakota, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, Ohio, Oregon, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. But examine statutes of Connecticut, New Jersey, and Vermont.

<sup>6</sup> Stimson's American Statute Law, sec. 2842, supplement, sec. 2842.

provide for one of his children in his will will not prevent its being approved, though it does not appear that the omission was intentional.<sup>1</sup>

§ 3249. **Disinherison of Children.**— In Georgia, the statute permits the testator full power of disposition, to the extent that he may will his entire estate to strangers, even to the exclusion of his wife and children, when not inconsistent with the law.<sup>2</sup> But by the statutes of some states a testator is prohibited from devising away his entire estate from his children.<sup>3</sup> The question of omission of children is not, however, governed solely by the express terms of the will. It is a question of intent, which may be aided by extrinsic evidence, and it may be shown that the testator intended to omit children who are apparently unnoticed in the will.<sup>4</sup>

§ 3250. **Posthumous Children—En Ventre sa Mere.**— Posthumous children take in several states like other children born after the will is made.<sup>5</sup> In some states special provision is made by statute that a child *en ventre sa mere* takes the same as if born.<sup>6</sup> But in Pennsylvania it has been held that where a testator devised a portion of his estate to his children living at the time of his death, a child *en ventre sa mere* could not take.<sup>7</sup>

ILLUSTRATIONS.— A testator in 1849 devised real estate to his daughter "A and her children." A then had a child, which died in December, 1850. She had another, born November 20, 1851, which died when three days old. Subsequently she had other children. The testator started on a journey in January, 1850. In November, 1851, on information of his death, the will was admitted to probate, but the date of his death was never

<sup>1</sup> Doane v. Lake, 32 Me. 268; 52 Am. Dec. 654.

<sup>2</sup> Stimson's American Statute Law, sec. 2610.

<sup>3</sup> Stimson's American Statute Law, sec. 2632.

<sup>4</sup> Lorieux v. Keller, 5 Iowa, 196; 68 Am. Dec. 696.

<sup>5</sup> Stimson's American Statute Law, secs. 2844, 3136, supplement, sec. 2844.

<sup>6</sup> Stimson's American Statute Law, sec. 2622.

<sup>7</sup> McKnight v. Read, 1 Whart. 213.

ascertained. *Held*, that it might be inferred that he died while the second child was *en ventre sa mere*, and that A and that child took as tenants in common, to the exclusion of the subsequently born children, and that on the death of the second child its share passed to its parents: *Biggs v. McCarty*, 86 Ind. 352; 44 Am. Rep. 320.

§ 3251. **Omission of Widow in Will.**—The omission of the widow in the will invalidates the will in many states, where the will antedates the marriage; while the will in such case is valid in some states, but does not operate to divest the widow of her legal share in her husband's estate; while in others the widow may rely upon and take her dower in the estate.<sup>1</sup>

§ 3252. **Illegitimate Children.**—There is no rule of law which prohibits an unmarried man from making provision by will for his illegitimate children;<sup>2</sup> and the descendants or heirs of either the husband or wife may, under the California statute, dispute the legitimacy of a child.<sup>3</sup> But a devise to a natural daughter of the testator, and to her illegitimate children by a deceased friend of the testator, is not illegal, nor is it made so by any illicit intercourse between said daughter and one of the testator's executors, where there is no proof to charge the testator with knowledge of such intercourse, or to show that he in any way encouraged it, and where his will makes no provision for the carrying on of such intercourse or for the maintenance of any offspring that might result therefrom.<sup>4</sup>

§ 3253. **Election or Renunciation by Devisee or Legatee.**—The doctrine of election is founded on the apparent intent of the testator that the legatee shall surrender some right in exchange for the legacy, and therefore election

<sup>1</sup> Stimson's American Statute Law, sec. 2840.

<sup>2</sup> Dunlap v. Robinson, 28 Ala. 100.

<sup>3</sup> Deering's Cal. Civ. Code, sec. 195.

<sup>4</sup> Smith v. Du Bose, 78 Ga. 413; 6 Am. St. Rep. 260. See further, as to illegitimate children, Stimson's American Statute Law, sec. 2615.

cannot arise where the legatee had no interest or right in the thing devised at the time of the execution of the will.<sup>1</sup> Two things are said to be essential to originate the doctrine of election; one is, that the testator shall give property of his own; the other is, that he shall profess to give also the property of his legatee or devisee.<sup>2</sup> The doctrine may arise by implication. So the application by a widow for letters testamentary amounts to an acceptance of the will.<sup>3</sup> And the voluntary execution of a will by a legatee is held to be conclusive of his rights;<sup>4</sup> but the principle of election by implication in equity depends upon the circumstance that the same instrument which conveys certain property to one legatee or devisee transfers certain other property to another legatee or devisee, and that the former beneficiary availing himself of the instrument in one particular must not defeat its operation in another.<sup>5</sup> An election may be made by application to a court of equity, or by other acts or declarations clearly indicating an intent to do so.<sup>6</sup> But one cannot accept and reject under the same instrument, but is bound by his election.<sup>7</sup> So where one has elected to take a beneficial interest under the will, and has received the same, he cannot afterwards set up a claim of his own which would defeat the operation of the will.<sup>8</sup> And a legatee who claims under a will that devises away property of which he is the owner can have the benefit of his legacy only upon renouncing in favor of the devisee his right to the property devised.<sup>9</sup> But a legatee is not required to elect either to give effect to a void clause in the

<sup>1</sup> Long v. Wier, 2 Rich. Eq. 283; 46 Am. Dec. 51.

<sup>2</sup> McQueen v. McQueen, 2 Jones Eq. 16; 62 Am. Dec. 205.

<sup>3</sup> Morgan v. Dodge, 44 N. H. 255; 82 Am. Dec. 213.

<sup>4</sup> Armorer v. Case, 9 La. Ann. 288; 61 Am. Dec. 209. But see Bryan v. Hyre, 1 Rob. (Va.) 94; 39 Am. Dec. 246.

<sup>5</sup> Tongue v. Nutwell, 17 Md. 212; 79 Am. Dec. 649.

<sup>6</sup> Sledd's Executor v. Carey, 11 B. Mon. 181; 52 Am. Dec. 570.

<sup>7</sup> Upshaw v. Upshaw, 2 Hen. & M. 380; 3 Am. Dec. 632. See Lewis v. Lewis, 13 Pa. St. 79; 53 Am. Dec. 443; McGinnis v. McGinnis, 1 Ga. 496; Ratliff v. Baldwin, 29 Ind. 16; 92 Am. Dec. 330.

<sup>8</sup> Weeks v. Patten, 18 Me. 42; 36 Am. Dec. 696.

<sup>9</sup> Kinnaird v. Williams, 8 Leigh, 400; 31 Am. Dec. 658; Gore v. Stevens, 1 Dana, 201; 25 Am. Dec. 141. See Upshaw v. Upshaw, 2 Hen. & M. 380; 3 Am. Dec. 632.

will or to renounce all legacies in his favor.<sup>1</sup> And another principle, which applies equally as if property of the legatee is given, requires that no person claiming under an instrument shall be allowed to defeat any of its provisions;<sup>2</sup> nor can a person claim an interest under a will without giving effect to all its provisions as far as possible.<sup>3</sup> And the doctrine of election applies as well against the testator's heirs as against other persons.<sup>4</sup> The election by the heir to take as heir, and his consequent waiver of a life estate given to him by the will, does not in any manner affect the estates of the remaindermen, and they will take in the same manner as if the heir had elected to take his life estate under the will.<sup>5</sup>

ILLUSTRATIONS.—A testator bequeathed property, which is owned by A, to B, and bequeathed five hundred dollars to A. *Held*, that A would be put to his election which he would take, as he could not take both: *McGinnis v. McGinnis*, 1 Ga. 496. After a provision in his will by the testator directing how his property may be divided among all his children, he provides that certain property, which part of said children (brothers and sisters of the half-blood) were expected to receive from their maternal grandfather, should be divided among all the others in the same proportion as his own property. He then provides that his estate is not to be distributed for two years, before the expiration of which, but after the testator's death, the grandfather dies, leaving to the children the expected property. *Held*, that to such a disposition the equitable doctrine of election applied: *McQueen v. McQueen*, 2 Jones Eq. 16; 62 Am. Dec. 205.

§ 3254. Election by Widow between Benefits Conferred by Will and her Share in Community Property.—If a will, after certain specific legacies, concludes that the testator desires that the remainder of his property, both

<sup>1</sup> *Mallet v. Smith*, 6 Rich. Eq. 12; 60 Am. Dec. 107.

<sup>2</sup> *Beall v. Schley*, 2 Gill, 181; 41 Am. Dec. 415.

<sup>3</sup> *Gore v. Stevens*, 1 Dana, 201; 25 Am. Dec. 141.

<sup>4</sup> *Beall v. Schley*, 2 Gill, 181; 41 Am. Dec. 415.

<sup>5</sup> *Beall v. Schley*, 2 Gill, 181; 41 Am. Dec. 415. As to election to take

land instead of money, or money instead of land, see *Baker v. Copenbarger*, 15 Ill. 103; 58 Am. Dec. 600; *Sledd's Executor v. Carey*, 11 B. Mon. 181; 52 Am. Dec. 570; *Fish v. Cushman*, 6 Cush. 20; 52 Am. Dec. 761; *Smith v. Starr*, 3 Whart. 62; 31 Am. Dec. 498; *Burr v. Sim*, 1 Whart. 252; 29 Am. Dec. 43.

real and personal, should be divided equally between his wife and certain relatives, the right of the wife, in addition to her half of the community property, is to one half of her husband's half.<sup>1</sup> But where C died seised of a large landed estate in community with his wife, and by his will made a number of special devises and bequests, and to his wife devised some thousand acres of land, part of his head right, for and during her natural life, with the proviso that the land so devised should be to her in lieu of any claim she might have to any portion of the land at his death, it was decided to be a proper case for election, and one in which the wife would not be allowed to take under the will and also to claim her community rights.<sup>2</sup>

**§ 3255. Election by Widow between Testamentary Provision and Dower—Gift in Lieu or Satisfaction of Dower.**—A widow's acceptance of a testamentary provision conditioned to be in lieu of dower bars her from participating in lapsed legacies under the will.<sup>3</sup> The Kansas statute in relation to probating wills, and the election of the widow to take thereunder, specifically points out the course to be pursued when she has not consented, in writing, to the will, and a substantial compliance therewith is necessary to make such election binding.<sup>4</sup> Where the husband by will devises real estate to his wife, which she accepts, it must be taken in lieu of dower out of the lands of which he died seised, unless by his will he otherwise declared.<sup>5</sup> A pecuniary legacy to the testator's widow, accepted by her, must be paid not only in preference to general legacies, but, if the abatement of those proves insufficient, in preference, first to

<sup>1</sup> Theall v. Theall, 7 La. 226; 26 Am. Dec. 501, and note 503.

<sup>2</sup> Wells v. Petree, 39 Tex. 426.

<sup>3</sup> Matter of Accounting of Benson, 96 N. Y. 499; 48 Am. Rep. 646.

<sup>4</sup> James v. Dunstan, 38 Kan. 289; 5 Am. St. Rep. 741.

<sup>5</sup> Kaes v. Gross, 92 Mo. 647; 1 Am. St. Rep. 767.

specific bequests, and second, to specific devises.<sup>1</sup> Where a testamentary gift is made by a husband to his wife in satisfaction of her waiver of dower in his estate, the gift has a preference over all unpreferred legacies; but the general rule does not prevail if the will clearly disclose that the testator intended that such gift should not have a preference over other bequests.<sup>2</sup>

**§ 3256. Gift to Wife — Out of What Funds Paid.** — If an annuity for life is made to the widow in lieu of her waiver of dower, and such gift is unconditional and absolute, but the testator overestimates the sources of supply upon which its payment depends, the full annuity must be paid her as long as the estate lasts; and the source indicated failing, others must supply the deficiency.<sup>3</sup>

**§ 3257. When Gift or Devise to Widow is Absolute.** — It is a question of much importance whether a bequest or devise to a wife of the use of property, with a power to dispose of the same, vests in her a life estate merely, or is an absolute gift. The determination of this question, however, depends, as in all cases of construction of wills, upon the intent of the party and the character of the property, or whether there be a limitation over, or whether such gift is coupled with a power to sell.<sup>4</sup> So a bequest to the wife of the use and improvement of personal property during her widowhood is an absolute gift of the property, where there is no limitation over by way of remainder.<sup>5</sup> If a testator bequeaths stock to his wife to be disposed of by her, with its increase, to the whole or any one of her children, as she may think proper, at her

<sup>1</sup> *Borden v. Jenks*, 140 Mass. 562; 54 Am. Rep. 507.

<sup>2</sup> *Moore v. Alden*, 80 Me. 307; 6 Am. St. Rep. 203. As to election between testamentary provision and dower, see also *Church v. Bull*, 2 Denio, 430; 43 Am. Dec. 754; *Matter of Accounting of Benson*, 96 N. Y. 499; 48 Am. Rep. 646; *Melinit's Ap-*

*peal*, 17 Pa. St. 449; 55 Am. Dec. 573; *Worthen v. Pearson*, 33 Ga. 385; 81 Am. Dec. 213.

<sup>3</sup> *Moore v. Alden*, 80 Me. 301; 6 Am. St. Rep. 203.

<sup>4</sup> *Alston v. Lea*, 6 Jones Eq. 27.

<sup>5</sup> *Smith v. Gates*, 2 Root, 532; 1 Am. Dec. 89. See *Harrison v. Harrison*, 2 Gratt. 1; 44 Am. Dec. 365.

decease, the wife takes an estate for life, with absolute power of disposition, which is a power coupled with an interest.<sup>1</sup>

ILLUSTRATIONS. — A testator devised all his real and personal property to his widow, so long as she lived, for her maintenance, adding, "she shall have her choice to sell it or not, as she believes best for her"; and in another clause of the will provided that "with the third part of his estate she could do and bequeath to whom she pleases." *Held*, that her interest in her deceased husband's estate was the freehold of the whole estate during life, and one third thereof absolutely: *Musselman's Estate*, 39 Pa. St. 469. A testator devised the whole of his estate to his wife during her life, and afterwards to be equally divided between whoever the wife should think proper to make her heir or heirs, and the testator's brother. The wife died without making any appointment. *Held*, that she took a fee-simple in the moiety, which descended after her death to her heir at law: *Shermer v. Shermer*, 1 Wash. (Va.) 266; 1 Am. Dec. 460. A will contained the following clause: "I give, bequeath, and devise all the rest and residue and remainder of my estate, both real and personal, to my son E. and my daughter C., to be divided between them, share and share alike, subject, nevertheless, to the dower and thirds of my wife." *Held*, that the widow took no interest in the personal property: *O'Hara v. Dever*, 2 Abb. Pr., N. S., 418. A testator gave and bequeathed all his property to his wife, "only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good." *Held*, that the gift to the wife was absolute: *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572. A husband devised and bequeathed as follows: "I give and bequeath to my beloved wife, D. A., after the payment of my just debts, all my property, real, personal, and perishable, to be hers in fee-simple, so that she can have the right to give it to our six children as she may think best." *Held*, under the terms of the will, that the testator's widow had the power to sell, at her discretion, any one part of the property for the payment of the debts of the testator, so as to release another part from such debts: *Alston v. Lea*, 6 Jones Eq. 27. A testator gave to his wife the "residue and remainder of his estate not bequeathed," and then proceeded to give to another what was left after paying her funeral expenses. *Held*, that an intention to give her an estate for life was manifest: *Zimmerman v. Anders*, 6 Watts & S. 218; 40 Am. Dec. 552. A testator, by will, devised to his wife personal property and land during her widowhood, and

<sup>1</sup> *Cruise v. McKee*, 2 Head, 1; 73 Am. Dec. 186.

thereafter directed his executors to sell, the proceeds to be divided among all his children, or their heirs or assigns, in equal shares; also, that the balance or residue of his estate, after sale of his real and personal estate, should be divided equally among his children, excepting one daughter, who was to have only the interest of one share during life. *Held*, that she took under the will an absolute and not a life estate in one share, which her administrator, after her death, was entitled to recover: *Silknitter's Appeal*, 45 Pa. St. 365; 84 Am. Dec. 494.

**§ 3258. What may be Willed.**—Under the statutes in most of the states, all kinds of property whatsoever, capable of passing by descent, or which would otherwise go to the heirs or personal representatives, may be disposed of by will; and this extends by express provision in many states to estates or interests in reversion or remainder, and even to lands to which the testator has only a right of entry, and of which he has been disseised, and to contingent and executory interests; and in some states to money due under a life insurance policy, to estates in severalty, tenancies in common, and joint tenancies, and even to homesteads, and estates for years and *pur autre vie*.<sup>1</sup> In California every estate and interest in real and personal property may pass by will, and this includes future interests; the general provision is subject, however, to certain provisions relative to community property.<sup>2</sup> And in Ohio a future contingent interest in real estate in the nature of a contingent remainder or executory devise is transmissible by devise.<sup>3</sup>

**§ 3259. Description of Property Willed.**—Certainty in description is sufficient to sustain a bequest.<sup>4</sup> But the description of the subject of a bequest, if false in part, may be made sufficiently certain to identify it by refer-

<sup>1</sup> Stimson's American Statute Law, sec. 2630. As to exceptions to the general rule, see Stimson's American Statute Law, sec. 2631.

<sup>2</sup> Deering's Civ. Code, secs. 699, 1274, 1401, 1402. In regard to community property in general, see stat-

utes of Arizona, California, Idaho, Louisiana, Nevada, Texas, and Washington.

<sup>3</sup> Thompson v. Hoop, 6 Ohio St. 480.

<sup>4</sup> McCall v. McCall, 4 Rich. Eq. 447; 57 Am. Dec. 733.

ence to extrinsic circumstances.<sup>1</sup> So where the name and description in a devise answer in the same degree to each of two objects, the intention is a pure question of fact, and does not depend in any degree on legal direction.<sup>2</sup> By a devise of a tract of land in fee-simple, together with all the crops thereon, whether gathered or growing, at the time of the testator's death, not only the crops of the year in which the testator died, but those of the preceding year remaining on the land, and those brought there from other plantations, will pass.<sup>3</sup> But a devise of a "beach for drift-wood and timber," where the testator owned the upland adjoining the beach, is limited by that line of the shore, inward from the sea, to which sea-weed and drift-wood are usually carried in ordinary seasons, by the highest winter floods, and which is usually marked on the land by the line of such sea-drift; and it will not include lands occasionally covered by sea-water by reason of extraordinary inundations.<sup>4</sup> In determining what description will pass realty, it is held that a devise of one room in a house is a devise of real estate;<sup>5</sup> and that a devise of the net profits of land is a devise of the land itself for such time as the profits are devised.<sup>6</sup> So in devising real estate, absolute certainty of description is not required as to metes and bounds, or as to exact location; therefore a devise of his plantation may include two separate tracts of the testator's land half a mile distant from each other, but which were usually cultivated as one farm.<sup>7</sup> But a devise of "all my landed estate," followed by a description of several tracts of land, will not pass a lot not described.<sup>8</sup>

<sup>1</sup> *McCall v. McCall*, 4 Rich. Eq. 447; 57 Am. Dec. 733.

<sup>2</sup> *Brownfield v. Brownfield*, 12 Pa. St. 136; 51 Am. Dec. 590.

<sup>3</sup> *Carnagy v. Woodcock*, 2 Munf. 234; 5 Am. Dec. 470.

<sup>4</sup> *Brown v. Lakeman*, 17 Pick. 444; 28 Am. Dec. 314.

<sup>5</sup> *White v. White*, 16 N. J. L. 202; 31 Am. Dec. 232.

<sup>6</sup> *Earl v. Rowe*, 35 Ma. 414; 58 Am. Dec. 714.

<sup>7</sup> *Bradshaw v. Ellis*, 2 Dev. & B. Eq. 20; 32 Am. Dec. 686.

<sup>8</sup> *Myers v. Myers*, 2 McCord's Ch. 214; 16 Am. Dec. 648.

**§ 3260. When Will Passes After-acquired Property. —**

It was formerly held, and it would seem that the same rule would now obtain in the absence of any statutory provision to the contrary, that real estate acquired subsequent to the execution of the will is not affected thereby.<sup>1</sup> So it is decided that such lands do not pass by a residuary devise,<sup>2</sup> although the testator declares in a codicil his intention to pass by his will all the real estate he may thereafter purchase;<sup>3</sup> nor will a devise of land generally, in a will, include land subsequently acquired by purchase.<sup>4</sup> And in brief, it is held in numerous cases that a will cannot dispose of real estate acquired after the date of its execution, however clearly expressed the intention of the testator, unless there is a republication of the will.<sup>5</sup> This rule, however, has been qualified in some of the decisions to the extent that such after-acquired land will pass without republication if there be words sufficient to cover it;<sup>6</sup> or if the testator's intent that it should pass appears from the language of the will;<sup>7</sup> and a clause in a will intended to pass after-acquired real estate raises a case of election, and requires the heirs either to renounce the benefits conferred by the will or else their right in such after-acquired estate in favor of the intended devisee.<sup>8</sup> The same rules govern equitable as well as legal estates, so far as the power to pass after-acquired lands by will is concerned.<sup>9</sup> The statutes are conflicting in their pro-

<sup>1</sup> *Ballard v. Carter*, 5 Pick. 112; 16 Am. Dec. 377.

<sup>2</sup> *Bruen v. Bragaw*, 4 N. J. Eq. 261; 38 Am. Dec. 519.

<sup>3</sup> *Girard v. Philadelphia*, 4 Rawle, 323; 26 Am. Dec. 145.

<sup>4</sup> *Johnston v. Hunly*, Tayl. 305; 1 Am. Dec. 590; *Meador v. Sorsby*, 2 Ala. 712; 36 Am. Dec. 432.

<sup>5</sup> *Beall v. Schley*, 2 Gill, 181; 41 Am. Dec. 415; *Landrum v. Hatcher*, 11 Rich. 54; 70 Am. Dec. 737; *Blaisdell v. Hight*, 69 Me. 306; 31 Am. Rep. 278; *Jackson v. Holloway*, 7 Johns. 394; *Luce v. Dimock*, 1 Root, 82;

*Jackson v. Potter*, 9 Johns. 312; *Grimke v. Grimke*, 1 Desaus. Eq. 366; *Parker v. Cole*, 2 J. J. Marsh. 503. But see *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475.

<sup>6</sup> *Dennis v. Dennis*, 5 Rich. 468.

<sup>7</sup> *Wynne v. Wynne*, 23 Miss. 251; 57 Am. Dec. 139; *Allen v. Harrison*, 3 Call, 289; *Raines v. Barker*, 13 Gratt. 128; 67 Am. Dec. 762.

<sup>8</sup> *Beall v. Schley*, 2 Gill, 181; 41 Am. Dec. 415.

<sup>9</sup> *Meador v. Sorsby*, 2 Ala. 712; 36 Am. Dec. 432.

visions on this point, since in many states a will includes after-acquired property, unless it appears therefrom that the testator intended that it should not pass.<sup>1</sup> In other states, however, the intention that property so subsequently acquired should pass must appear upon the will; otherwise, it does not pass; and some states require such intention to manifestly, expressly, or clearly appear in the will.<sup>2</sup> It would seem, however, that the common-law principle, which is, as we have shown, enacted in statutory form in many states,<sup>3</sup> to the effect that a will speaks from the testator's death, ought to govern in all this class of cases, whether there are statutory provisions or not, and therefore that all property owned by the testator at the time of his decease ought to pass by his will, under either a general or residuary clause.<sup>4</sup>

**§ 3261. General Legacies.**—A general legacy is one so given as not to amount to a bequest of a particular thing, or money, distinguished from all others of the same kind.<sup>5</sup>

**§ 3262. Specific Legacies.**—Specific legacies are such only as designate a particular thing or things by a particular description;<sup>6</sup> or in other words, they are bequests of a specific part of the testator's personal estate distinguished from the other parts of the same kind.<sup>7</sup> Such legacies are to be preferred to general or pecuniary legacies;<sup>8</sup> and when of a definite sum of money, are entitled to be satisfied in preference to all others.<sup>9</sup> A bequest of all a man's

<sup>1</sup> See statutes of California, Connecticut, Dakota, Idaho, Georgia, Montana, New Jersey, Pennsylvania, Tennessee, Utah, Virginia, and examine statutes of Maryland and South Carolina.

<sup>2</sup> Stimson's American Statute Law, sec. 2809, supplement, sec. 2809.

<sup>3</sup> See *ante*, § 3155, At What Time Will Takes Effect.

<sup>4</sup> See *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475.

<sup>5</sup> *Chase v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277.

<sup>6</sup> *Cooch v. Cooch*, 5 Houst. 540; 1 Am. St. Rep. 161.

<sup>7</sup> *Chase v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277.

<sup>8</sup> *Gallego v. Attorney-General*, 3 Leigh, 450; 24 Am. Dec. 654.

<sup>9</sup> *Duke of Richmond v. Milne*, 17 La. 312; 36 Am. Dec. 613.

personal property is not a specific legacy;<sup>1</sup> but a bequest of moneys to be received from a decree in chancery is a specific legacy.<sup>2</sup>

ILLUSTRATIONS. — A legacy was of "all the mill stock and bank stock remaining in my name after the decease of my said wife." *Held*, a specific legacy: *Tomlinson v. Bury*, 145 Mass. 346; 1 Am. St. Rep. 464.

§ 3263. **Residuary Legacies, and Estate under the Residuary Clause — Rights of Residuary Devisees and Legatees.** — One purpose of the residuary clause is to dispose of such things as may have been forgotten or overlooked, or which may be unknown.<sup>3</sup> So a bequest of the residue comprehends all the personalty not otherwise disposed of by the will, whether it fall in by the lapse of a legacy or from some particular gift being illegal and void, unless a contrary intention of the testator clearly appears from the will;<sup>4</sup> and it includes void bequests;<sup>5</sup> for a legacy void for uncertainty will sink into the residuum.<sup>6</sup> But where a will provides that a certain definite portion of the net annual income of an estate shall be paid to certain beneficiaries, among whom is the widow, and she relinquishes her rights to her portion of such income, the share of the others is not thereby increased.<sup>7</sup> Although a residuary bequest generally operates upon all the estate of which the testator is possessed at the time of his death,<sup>8</sup> and must include the residue from all sources,<sup>9</sup> yet if the balance mentioned be confined to what is left of a particular fund, it is a special bequest only.<sup>10</sup> But the words "not otherwise disposed of in this will" do not

<sup>1</sup> *Cooch v. Cooch*, 5 Houst. 540; 1 Am. St. Rep. 161.

<sup>2</sup> *Chase v. Lockerman*, 11 Gill & J. 185; 35 Am. Dec. 277.

<sup>3</sup> *Ireland v. Foust*, 3 Jones Eq. 498.

<sup>4</sup> *Sorrey v. Bright*, 1 Dev. & B. Eq. 113; 28 Am. Dec. 584.

<sup>5</sup> *Barton v. King*, 41 Miss. 288.

<sup>6</sup> *Clarke v. Cotton*, 2 Dev. Eq. 301; 24 Am. Dec. 279.

<sup>7</sup> *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117.

<sup>8</sup> *Donohoo v. Lea*, 1 Swan, 119; 55 Am. Dec. 725.

<sup>9</sup> *Mahorner v. Hooe*, 9 Smedes & M. 247; 48 Am. Dec. 706.

<sup>10</sup> *Mahorner v. Hooe*, 9 Smedes & M. 247; 48 Am. Dec. 706.

have the effect of restricting a devise to a particular residue. These words do not express any other intention than that which is necessarily implied in every residuary bequest, and they must be construed with reference to the well-established rule that a residuary bequest of personal estate carries not only everything not disposed of, but everything that, in the event, turns out not to be disposed of.<sup>1</sup> Lands devised specifically to the wife and children do not come within the operation of a residuary clause in a will providing that certain tracts of land shall pass to the executor, in trust, to be sold, and the proceeds divided between the wife and children, and directing the executor "to keep my estate together, and not to hand over any of the devises or legacies" until the happening of a certain event. As to the lands specifically devised, the words "not to hand over" have no application whatever.<sup>2</sup> So where a residuary fund is given by will to the children, *nominatim*, by the testator, or where it is given to a certain number of the children to be divided equally between them, if one of them die before the testator, his or her share will lapse, but will not fall into the residue for the benefit of the others. Such lapsed residuary share must be distributed among the next of kin of the testator.<sup>3</sup> And if, under a disposition of the residuum of personal estate by will into two parts, the first disposition be invalid, the sum which it was the purpose thereby to dispose of does not go to the legatee of the other part, but to the next of kin of the decedent.<sup>4</sup> So a statute that every devise of all the testator's real estate shall pass all the real estate he may be entitled to devise at his death does not apply to a residuary clause in a will, where particular pieces of property are devised to particular devisees, but only to cases where

<sup>1</sup> *Cunningham v. Cunningham*, 18 B. Mon. 19; 68 Am. Dec. 718. See <sup>2</sup> *Winston v. Webb*, Phill. Eq. 1; 93 Am. Dec. 599.  
*Perry v. High*, 3 Head, 349.

<sup>3</sup> *Patton v. Patton*, Winst. Eq. 20; 80 Am. Dec. 269.  
<sup>4</sup> *Beekman v. Bonsor*, 23 N. Y. 298; 86 Am. Dec. 443.

the will purports to devise all the property equally or in proportions to the devisees named in it.<sup>1</sup> But where, by a residuary clause of a will, the testator directs all the residue of his estate, both real and personal, to be divided into eight equal shares or parts, and then to be distributed among certain devisees, it is fairly to be inferred that the testator designed that the entire residue of his real and personal estate should be sold by his executors, and the proceeds be equally divided among the eight residuary legatees.<sup>2</sup> So all reversionary and contingent interests in the property of the testator remaining undisposed of should pass under a residuary clause.<sup>3</sup> So a mortgage, owned by the testator at the time of making his will, passes under a residuary devise of "all his estate, whether real or personal."<sup>4</sup> And the surplus income from the testator's crops passes to a residuary legatee after the payment of the testator's debts and an annuity with which they are charged, although the will directs that after the death of the annuitant the *corpus* be sold and the proceeds divided among other legatees.<sup>5</sup> So where the testator bequeaths one third of his personal estate to his wife, and the other two thirds to residuary legatees, and the bequest to the wife lapses by her death before the death of the testator, the personal property bequeathed to the wife becomes a part of the residuum, and passes to the residuary legatees.<sup>6</sup> If personal property be not given specifically, but generally, or as the residue of personal estate, it must be converted into money, the interest only to be enjoyed by the tenant for life, and the principal reserved for the remainderman, and this rule prevails, unless there be in the will an indication of a contrary intention.<sup>7</sup>

<sup>1</sup> *Bowen v. Johnson*, 6 Ind. 110; 61 Am. Dec. 110.

<sup>2</sup> *Vanness v. Jacobus*, 17 N.J. Eq. 153.

<sup>3</sup> *Craig v. Craig*, 3 Barb. Ch. 76; *Read v. Payne*, 3 Call, 225; 2 Am. Dec. 550.

<sup>4</sup> *Ballard v. Carter*, 5 Pick. 112; 16 Am. Dec. 377.

<sup>5</sup> *Drayton v. Ross*, 7 Rich. Eq. 328; 64 Am. Dec. 731.

<sup>6</sup> *Cunningham v. Cunningham*, 18 B. Mon. 19; 68 Am. Dec. 718.

<sup>7</sup> *Rowe's Executor v. White*, 16 N. J. Eq. 411; 84 Am. Dec. 169. See *Healey v. Toppan*, 45 N. H. 243; 86 Am. Dec. 159.

§ 3264. **Cumulative Legacies.**—Where the same sum of money is given twice to the same legatee in the same writing, he can take only one of the sums bequeathed; the latter sum is presumed to be a substitution of the former; and it is incumbent on the legatee to rebut this presumption, and show a contrary intention. But where the two bequests are in different instruments, as by will in the one case and by codicil in the other, the presumption is in favor of the legatee taking both sums.<sup>1</sup> But the presumption in either case, whether against the cumulation or in favor of it, is liable to be controlled or repelled by internal evidence and the circumstances of the case.<sup>2</sup>

§ 3265. **When Legacy is Charge upon Land.**—A devise by a testator of all the residue of his estate, real and personal, after bequests of legacies, implies a charge upon the land devised for the payment of the sums bequeathed.<sup>3</sup> So when a testator blends real with personal estate in one fund, the legacies given are a charge upon the land.<sup>4</sup> And a particular legacy is a charge upon the real estate, if the heir be admitted before it is discharged.<sup>5</sup> But an express charge in favor of some of the legatees does not affect a charge which arises by implication in favor of all the legatees, from the fact that the testator has blended his realty and personalty into one fund.<sup>6</sup> As a general rule, however, real estate is not chargeable with the payment of pecuniary legacies, unless the intention of the testator so to charge it is expressly declared or may be fairly deduced from the language of the will. Where it is manifested from the whole will that it was the design of the testator that the legacies should be paid at all events,

<sup>1</sup> *Dewitt v. Yates*, 10 Johns. 156; 6 Am. Dec. 326.

<sup>2</sup> *Dewitt v. Yates*, 10 Johns. 156; 6 Am. Dec. 326. See further, as to cumulative legacies, *Wilson v. O'Leary*, L. R. 7 Ch. 448.

<sup>3</sup> *Becker v. Kehr*, 49 Pa. St. 223; *Gallagher's Appeal*, 48 Pa. St. 121.

<sup>4</sup> *McLanahan v. Wyant*, 1 Penr. & W. 96; 21 Am. Dec. 363.

<sup>5</sup> *Duke of Richmond v. Milne*, 17 La. 312; 36 Am. Dec. 613.

<sup>6</sup> *McLanahan v. Wyant*, 1 Penr. & W. 96; 21 Am. Dec. 363.

the implication is, that the residuary legatee or devisee shall only have the remainder after the satisfaction of the previous dispositions. A will whereby the testator, after making several bequests, without creating an express trust to pay them, blends the realty and personalty together as one fund, in the residuary clause, manifests an intention to charge a bequest of money on the land.<sup>1</sup> And a bequest of the residue of all the testator's real and personal estate is evidence of an intention to make the pecuniary legacies a charge on the real estate, and slight indications of that intent in other parts of the will are sufficient to make them a charge. The words, "not herein otherwise disposed of," added to the residuary clause, together with the fact that the personal property was insufficient to pay debts, is sufficient evidence of this intention.<sup>2</sup> So where an estate is charged with an annuity, it is charged upon the whole estate not specifically devised or bequeathed.<sup>3</sup> And legacies charged upon the issue of lands devised stand upon the same footing as land, when called to contribute to the payment of debts; and in such case the legatees and devisees of the land must contribute ratably according to value.<sup>4</sup> And a devisee accepting land charged with a legacy makes himself personally and absolutely liable for its payment;<sup>5</sup> and the devisee's liability does not prevent the legacy's continuing as a charge upon the land.<sup>6</sup>

<sup>1</sup> *Knotts v. Bailey*, 54 Miss. 235; 28 Am. Rep. 348; *Montgomery v. McElroy*, 3 Watts & S. 370; 38 Am. Dec. 771.

<sup>2</sup> *Dey v. Dey*, 19 N. J. Eq. 137. See *Thayer v. Finnegan*, 134 Mass. 62; 45 Am. Rep. 285.

<sup>3</sup> *Trent v. Trent*, *Gilmer*, 174; 9 Am. Dec. 594.

<sup>4</sup> *McC Campbell v. McC Campbell*, 5 Litt. 92; 15 Am. Dec. 48.

<sup>5</sup> *Glen v. Fisher*, 6 Johns. Ch. 33; 10 Am. Dec. 310.

<sup>6</sup> *Birdsall v. Hewlett*, 1 Paige, 32; 19 Am. Dec. 392. But see *McLanahan v. Wyant*, 1 Penr. & W. 96, 21 Am. Dec. 363, where it is held that a purchaser of land at a sheriff's sale

takes it discharged of the legacy. A legacy charged on land devised is payable out of the proceeds of a sale thereof on execution against the devisee, although the sale may be made expressly subject to an intermediate mortgage; but the legatee may have the sale set aside if it does not produce enough to pay the legacy: *Tower's Appropriation*, 9 Watts & S. 103; 42 Am. Dec. 319. Where a testator expressly charges the payment of certain specified debts upon the whole of his property, and sets apart a fund for the satisfaction of his general creditors, the latter may require the specified debts to be discharged out of the general estate so as to obtain payment

**ILLUSTRATIONS.**—A will devised land to A, and provided that B shall "have her support out of the land." *Held*, that the legacy was not a charge on the land: *Gray v. West*, 93 N. C. 442; 53 Am. Rep. 462. Where the words of a will were, "I direct the payment of all my just debts," *held*, that a charge was created on the whole estate for the payment of the testator's debts: *Trent v. Trent*, Gilmer, 174; 9 Am. Dec. 594. A testator devised one third of a certain realty to each of three daughters, but directed that in case one of them had no heir of her body at her death, her share should go to her sisters, they paying her "in lieu thereof" a certain sum of money. *Held*, that the legacy was not a charge on the land: *Montgomery v. McElroy*, 3 Watts & S. 370; 38 Am. Dec. 771. The only expression in a will tending to manifest an intention that the real estate should be chargeable with the legacies was the following clause, occurring immediately after the appointment of the executors, viz., "investing them with all power necessary to execute that ample trust." *Held*, that such expression was not sufficient to charge the legacies on the land: *Leigh v. Savidge*, 14 N. J. Eq. 124. A devise was of all the testator's realty and personalty, the devisee "paying the legacies hereinafter mentioned." *Held*, that the land was charged with the legacy: *Tower's Appropriation*, 9 Watts & S. 103; 42 Am. Dec. 319. A testatrix appointed her eldest son executor, and gave him all her property, he to pay her debts and the school and college expenses of her younger son, making no other provision for the younger son. Her personal property amounted to twenty dollars, and her real estate to one thousand five hundred dollars. *Held*, that the legacy was a charge on the real estate: *Thayer v. Finnegan*, 134 Mass. 62; 45 Am. Rep. 285.

**§ 3266. Legacies, when a Charge on Land—Subrogation to the Rights of Creditors.**—A legatee whose

themselves out of the particular fund: *Trent v. Trent*, Gilmer, 174; 9 Am. Dec. 594. Legacies chargeable upon lands given in remainder after a life estate, the remainder being upon a certain condition, cannot, upon the happening of the condition during the life of the first devisee, be recovered in equity; for such remainderman is not obliged to pay such legacies, though vested, until the lands have come into his possession: *Spence v. Robins*, 6 Gill & J. 507; 26 Am. Dec. 587. A legacy of money secured upon real estate is not a heritable bond, within the mean-

ing of that term as understood under the laws of Scotland: *Duke of Richmond v. Milne*, 17 La. 312; 36 Am. Dec. 613. Charging the estate with the payment of money in the hands of the devisees does not prevent its limitation over by way of executory devise: *Jackson v. Staats*, 11 Johns. 337; 6 Am. Dec. 376. The costs of a suit to recover a legacy charged on lands in the hands of the devisee, where payment is refused, become also a charge on the land: *Birdsall v. Hewlett*, 1 Paige, 32; 19 Am. Dec. 392.

legacy has been absorbed in payment of the debts of the testator may have it out of undivided realty by subrogation to the rights of creditors.<sup>1</sup> So if the creditors of a decedent seize and apply to the satisfaction of their claims any personal property which has been specifically bequeathed, the legatee is, in a court of equity, entitled to stand in the place of such creditors, and to subject the lands descended to the payment of his legacy.<sup>2</sup>

**§ 3267. Encumbrances on Estate are Charge upon Property.**—Encumbrances placed upon the estate subsequent to the execution of the will only operate as a charge upon such property, and the estate passes subject thereto.<sup>3</sup>

**§ 3268. Distinction between Terms "Vested" and "Contingent," as Applied to Legacies.**—It has been said that perhaps no question can arise in the course of legal inquiries more doubtful in its nature, or less referable to fixed and certain rules and principles, than whether the words of a devise or bequest constitute a vested or contingent interest;<sup>4</sup> and the apparent conflict among the numerous authorities upon the subject as to when a legacy is vested and when contingent would seem to be really due to the ever-varying language of testamentary instruments as affecting intention.<sup>5</sup> The leading inquiry upon which the question of vesting or not vesting turns is, whether the gift is immediate, and the time of payment or of enjoyment only postponed; or is future and contingent, depending upon the beneficiary arriving of

<sup>1</sup> *Hope v. Wilkinson*, 14 Lea, 21; 52 Am. Rep. 149.

<sup>2</sup> *Trumbo v. Sorrencoy*, 3 T. B. Mon. 284; 16 Am. Dec. 103. See *Robards v. Wortham*, 2 Dev. Eq. 173; 22 Am. Dec. 738; *Chase v. Loockerman*, 11 Gill & J. 185; 35 Am. Dec. 277.

<sup>3</sup> See statutes of Alabama, Arkansas, California, Dakota, Idaho, Indiana, Kansas, Missouri, Montana, New

York, Nevada, Ohio, Oregon, Utah, and Washington. As to bonds, contracts, agreements, etc., affecting property devised or bequeathed, see statutes referred to in *Stimson's American Statute Law*, sec. 2810 c.

<sup>4</sup> *Parker, C. J.*, in *Shattuck v. Stedman*, 2 Pick. 469.

<sup>5</sup> *Jennings v. Barry*, 5 Demarest, 531, 535.

age, or surviving some other person, or the like.<sup>1</sup> And the general rule, frequently stated in the authorities, is, that if futurity is annexed to the substance of the gift, the vesting is suspended; but when the gift is absolute, and the time of payment only is postponed, the gift is not suspended, but vests at once.<sup>2</sup> This rule, though it amounts practically to saying that if the gift is future it is not present, has nevertheless been useful in drawing sharply the distinction between a gift presently given and its deferred payment.<sup>3</sup> Briefly, a legacy is to be taken as contingent or vested, just as the contingency, if any, is annexed to the gift or to the payment of it.<sup>4</sup> The point which determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift as a condition precedent.<sup>5</sup> It is held that legacies payable at a future time certain to arrive, and not subject to conditions precedent, are vested. On the other hand, legacies only payable on an event which may never happen, and hence subject to a condition precedent, are contingent.<sup>6</sup> It is held in New Jersey that whether a legacy is vested or contingent depends upon the event, and not upon the time. If the event is uncertain, the legacy is contingent, though the time is fixed; and if certain, the legacy is vested, although the time is uncertain.<sup>7</sup> According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent, unless it be annexed to the substance of the gift; or, as it is sometimes said, unless it be

<sup>1</sup> *Everitt v. Everitt*, 29 N. Y. 39.

<sup>2</sup> *Van Wyck v. Bloodgood*, 1 Bradf. 154; *Ex parte Turk*, 1 Bradf. 110; *Scofield v. Orcutt*, 120 Ill. 362; *Warner v. Durant*, 76 N. Y. 133, 136; *Colt v. Hubbard*, 33 Conn. 281.

<sup>3</sup> *Smith v. Edwards*, 88 N. Y. 92, 103.

<sup>4</sup> *Pennock v. Eagles*, 102 Pa. St. 290; *Major v. Major*, 32 Gratt. 819; *Reed's Appeal*, 118 Pa. St. 215; 4 Am. St. Rep. 538.

<sup>5</sup> *McClure's Appeal*, 72 Pa. St. 414.

<sup>6</sup> *Scott v. West*, 63 Wis. 529, 566.

See *Taylor v. Mosher*, 29 Md. 443; *Dale v. White*, 33 Conn. 294; *Patterson v. Hawthorn*, 12 Serg. & R. 112; *Reed v. Buckley*, 5 Watts & S. 517; 40 Am. Dec. 531, and note 534; *Thomas v. Anderson*, 21 N. J. Eq. 22.

<sup>7</sup> *Beatty v. Montgomery*, 21 N. J. Eq. 324. See also *Clayton v. Somers*, 27 N. J. Eq. 230; *Green v. Barron*, 10 Hare, 459; *Edwards v. Edwards*, 15 Beav. 357; *Whitton v. Field*, 9 Beav. 368.

upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened.<sup>1</sup> Thus where the legacy is given, payable or to be paid when the legatee attains the age of twenty-one years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed; but when the time is annexed, not to the payment only, but to the gift itself,—as when the legacy is given to the legatee at twenty-one, or “if” or “when” he attains the age of twenty-one,—the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent; and if the condition be not fulfilled, the legacy never vests.<sup>2</sup> This rule was adopted by the English jurists from the civil law at a comparatively early period, and it has been frequently applied by the courts, both in England and in this country, as will appear from an examination of the cases already cited.<sup>3</sup>

**§ 3269. Law Favors Vesting of Legacies.**—The doctrine that the law favors the vesting of estates is firmly established by authority,<sup>4</sup> and wills should, if possible, be construed in favor of vesting estates.<sup>5</sup> If there are clear words of gift of a vested interest to parties, the court will not permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened in which

<sup>1</sup> *Loder v. Hatfield*, 71 N. Y. 92, 98; *Van Wyck v. Bloodgood*, 1 Bradf. 154. But see *Anderson v. Felton*, 1 Ired. Eq. 55.

<sup>2</sup> *Gifford v. Thorne*, 9 N. J. Eq. 702; *Clayton v. Somers*, 27 N. J. Eq. 230. And see *Patterson v. Ellis*, 11 Wend. 260; *Hanson v. Graham*, 6 Ves. 239; *Snow v. Snow*, 49 Me. 159; *Colt v. Hubbard*, 33 Conn. 281; *Nixon v. Robbins*, 24 Ala. 663; *Watkins v. Quarrels*, 23 Ark. 351; *Allen v. Whitaker*, 34 Ga. 6.

<sup>3</sup> See also *Colt v. Hubbard*, 33 Conn. 285; *Read v. Buckley*, 5 Watts & S. 517; 40 Am. Dec. 531; *Lock v. Lamb*,

L. R. 4 Eq. 372; *Bruse v. Charlton*, 13 Sim. 65, 68; *Phelps v. Phelps*, 28 Barb. 121; *Brown v. Brown*, 44 N. H. 281.

<sup>4</sup> See *Moore v. Lyons*, 25 Wend. 119, 142; *Harris v. Carpenter*, 109 Ind. 540; *Byrnes v. Stilwell*, 103 N. Y. 453; 57 Am. Rep. 760; *Crossman v. Crossman*, 6 Denio, 148; *Scotfield v. Olcott*, 120 Ill. 362; *McCall's Appeal*, 86 Pa. St. 254. See *Stimson's American Statute Law*, sec. 2815.

<sup>5</sup> *Towns v. Williams*, 41 Mich. 552; *Embury v. Sheldon*, 68 N. Y. 227; *Byrd v. Byrd*, 40 Pa. St. 182; *Myer v. Eisler*, 29 Md. 28.

it is declared that the interest shall not arise;<sup>1</sup> and the principle is maintained that when conditional words are used in a will, which, if unexplained, would prevent the vesting of a legacy, such words will not be allowed to defeat the intention of the testator that the legacy should vest immediately, when it is apparent from the other portions of the will that it should so vest.<sup>2</sup> So the gift of a legacy under the form of a direction to pay at a future time or upon a future event is not less favorable to vesting than a simple and direct bequest of a legacy at a like future time or upon a like event. The question is one of substance, and not of form; and in all cases it is, whether the testator intended it as a condition precedent that the legatees should survive the time appointed by him for the payment of their legacies, and the answer to this question must be sought for out of the whole will, and not in the particular expressions in which the gift is made.<sup>3</sup> So although in all cases of doubtful construction the courts lean towards vested interests, yet where it appears from express declaration or clear inference that the testator intended to confine his bequest to those only who answer the description at the happening of a certain contingency, such intention must be carried into effect.<sup>4</sup> In other words, whenever the meaning can be ascertained it must govern, whether it result in contingent or vested interests.<sup>5</sup> The leaning of the courts towards a vested rather than a contingent interest is probably because testators have in view the immediate benefit of a legatee, though they may wish to postpone the actual enjoyment of it to a future period, when the legatee might make a better use of the testator's bounty.<sup>6</sup>

<sup>1</sup> *Austin v. Bristol*, 40 Conn. 120, 136; 16 Am. Rep. 23. See *Harrison v. Foreman*, 5 Ves. 209; *Weatherhead v. Stoddard*, 58 Vt. 623; 56 Am. Rep. 573; *McLeod v. McDonald*, 6 Ala. 238.

<sup>2</sup> *Nixon v. Robbins*, 24 Ala. 663.

<sup>3</sup> *Leeming v. Sharratt*, 2 Harb. 14; *Read's Appeal*, 118 Pa. St. 215; 4 Am. St. Rep. 588, and note 592.

<sup>4</sup> *Austin v. Bristol*, 40 Conn. 120; 16 Am. Rep. 23.

<sup>5</sup> *Olney v. Hall*, 21 Pick. 311. See *Smith's Appeal*, 23 Pa. St. 9; *Knight v. Cameron*, 14 Ves. 389.

<sup>6</sup> *Shattuck v. Stedman*, 2 Pick. 467; *Brown v. Brown*, 44 N. H. 281; *Vanhook v. Vanhook*, 1 Dev. & B. Eq. 589, 596.

§ 3270. **When Legacy is Vested and when Contingent — General Rules.** — If a legacy be given generally without appointing the time for its payment, it vests immediately upon the testator's death. It is an interest *in præsentis solvendum in futuro*; and if the legatee dies before he is allowed to adopt coercive measures with a view to its recovery, his personal representative will be entitled to the legacy.<sup>1</sup> When, however, a period beyond the testator's death is prescribed by the will for the payment of the legacy, it often becomes a perplexing question whether it is vested or contingent; and in ascertaining the testator's intention in this respect it has become an established rule of construction that a bequest, payable or to be paid at the end of any certain and determinate period, confers on the legatee a vested interest immediately on the testator's death; for the words "payable" or "to be paid" are supposed to disannex the time from the gift to the legacy so as to leave the gift immediate, in the same manner in respect of its vesting as if the bequest stood singly, and contained no mention of time.<sup>2</sup> In a legacy to A, and if he dies before attaining the age of twenty-one, then to B, the interest of B, though dependent upon a contingency, is transmissible. It would be otherwise, however, if the gift over was to B at twenty-one; for if he should die before attaining that age he could never take, and could therefore have nothing to transmit.<sup>3</sup> Although time or other considerations be annexed to the substance of the gift, and not merely to the payment, yet when an interest, whether by way of maintenance or otherwise, is given to the legatee in the mean time, the legacy will, notwithstanding the gift appears to be postponed, vest immediately upon the death of the testator. This cir-

<sup>1</sup> *Marr v. McCullough*, 6 Port. 507; *Thomas v. Anderson*, 21 N. J. Eq. 22, 26; *Dominick v. Moore*, 2 Bradf. 201; *Felton v. Sawyer*, 41 N. H. 202, 212.

<sup>2</sup> *Major v. Major*, 32 Gratt. 819, 823; *Kimball v. Crocker*, 53 Me. 263; *Patterson v. Ellis*, 11 Wend. 259; <sup>3</sup> *Chess's Appeal*, 87 Pa. St. 362; 30 Am. Rep. 361; *Kelso v. Dickey*, 7 Watts & S. 279. See *Barker v. South-erland*, 6 Denio, 220.

cumstance indicates an intention that the beneficial enjoyment shall begin at once, and payment only of the principal or capital be postponed.<sup>1</sup> In other words, the gift of a legacy to be paid upon a future uncertain event, with a direction to pay to the legatee the interest accruing in the mean time, sufficiently indicates that it was not the testator's intention to make the legacy conditional.<sup>2</sup> The rule is otherwise, however, where the gift or interest or maintenance is distinct, and the direction is to pay or transfer the principal sum at the specified age, or upon the condition named.<sup>3</sup> So the rule applies exclusively to cases in which the entire interest or income is in the mean time to be paid to the legatee.<sup>4</sup> But where the testator directs a fund to be invested, and bequeaths the interest to A, and the principal after A's death to B, the latter takes a vested interest in the legacy at the death of the testator,<sup>5</sup> and where the benefit of a legacy is given for life to one, and after his death to another, the interest of the second legatee is vested, and his personal representative would be entitled to the property, though he die in the lifetime of the person to whom the property is bequeathed for life;<sup>6</sup> and although there be no other gift than that which appears in the direction to pay or distribute *in futuro*, yet if such payment or distribution seems to be postponed for the convenience of the fund or property, as where the future gift is only postponed to let in some other interest, the bequest vests immediately, and

<sup>1</sup> Provenchere's Appeal, 67 Pa. St. 463, 466; Bayard v. Atkyns, 10 Pa. St. 15, 20; Robert v. Corning, 89 N. Y. 225; Green v. Green, 86 N. C. 546; Read's Appeal, 118 Pa. St. 215; 4 Am. St. Rep. 588.

<sup>2</sup> Marr v. McCullough, 6 Port. 507. See Nixon v. Robinson, 24 Ala. 663, 669.

<sup>3</sup> Pleasanton's Appeal, 99 Pa. St. 362. See Anderson v. Felton, 1 Ired. Eq. 55.

<sup>4</sup> Matter of Baker, 6 Demarest,

271; Watson v. Hayes, 5 Mylne & C. 125. See Fox v. Fox, L. R. 19 Eq. 286.

<sup>5</sup> Baker v. Woods, 1 Sand. Ch. 129. See King v. King, 1 Watts & S. 205; 37 Am. Dec. 459; Mull v. Mull, 81 Pa. St. 393.

<sup>6</sup> Conklin v. Moore, 2 Bradf. 179; Terrill v. Public Administrator, 4 Bradf. 245; Bedell v. Gunyon, 12 Hun. 396; Naundorf v. Schuman, 41 N. J. Eq. 14; Watson v. Quarles, 23 Ark. 179.

will not be deferred to the period in question;<sup>1</sup> and although, as a general rule, legacies charged upon real estate do not vest until the time appointed for payment, yet if payment is postponed simply for the convenience of the estate, the legacy may vest, notwithstanding the death of the legatee before the time appointed for payment.<sup>2</sup>

According to a well-settled rule of construction, a legacy given to a person or class to be paid or divided at a future time takes effect in point of right on the death of the testator. A legacy is deemed vested when there is a person in being at the time of the testator's death capable of taking when the time arrives, although his interest is liable to be defeated by his own death, or to be diminished by future births.<sup>3</sup> The words "give and bequeath," in a testamentary paper, import a benefit in point of right to take effect upon the decease of the testator and proof of the will, unless it is made in terms to depend upon some contingency or condition precedent;<sup>4</sup> and where words of contingency or condition are used which may be construed as applying either to the gift itself or to the time of payment, the courts are inclined to construe them as applying to the time of payment, and to hold the gift as vested, rather than contingent.<sup>5</sup> So a vested legacy is given by a bequest of the interest of a sum to the testator's wife for life, and after her death then the principal to go to the testator's children "or their heirs," to be divided equally, and on the death of one of the children, living the wife, his share at her death goes to his personal representative.<sup>6</sup> And a legacy payable in installments after the legatee arrives at the age of eighteen, and

<sup>1</sup> *Peckham v. Gregory*, 4 Hare, 396; *Van Dyke v. Vanderpool*, 14 N. J. Eq. 198; *Brent v. Washington*, 18 Gratt. 526, 529; *Loder v. Hatfield*, 71 N. Y. 92; *Robert v. Corning*, 89 N. Y. 225, 240; *Little's Appeal*, 117 Pa. St. 14, 27.

<sup>2</sup> *Lyman v. Vanderspiegel*, 1 Aiken, 275, 280; *Roberts v. Malin*, 5 Ind. 18.

<sup>3</sup> *Scott v. West*, 63 Wis. 529; See *Tucker v. Bishop*, 16 N. Y. 402; *Leed v. Morton*, 60 N. Y. 502; *McArthur v. Scott*, 113 U. S. 340.

<sup>4</sup> *Eldridge v. Eldridge*, 9 Cush. 516.

<sup>5</sup> *Dale v. White*, 33 Conn. 294.

<sup>6</sup> *King v. King*, 1 Watts & S. 205; 37 Am. Dec. 459.

in case she dies before attaining the age of twenty-one years, unmarried, or without lawful issue, then, or in either case, over, is vested absolutely in the legatee upon her arriving at the age of twenty-one, although she die soon after without issue.<sup>1</sup> So the testator's children take a vested interest in the estate devised to the wife to be divided "amongst my children, as she may think best"; and on failure of appointment, the children take equally at the wife's death;<sup>2</sup> and a bequest of a fund to be paid a legatee, and if he dies without heirs, the fund to go to another, gives the first legatee a present vested interest in the fund, liable to be divested upon the contingency of his dying without issue.<sup>3</sup> It is evidence of an intent to vest a legacy when the testator in other cases limits the vesting of legacies to other persons by proper provisions, and fails to make such provisions in the case in question.<sup>4</sup> So a devise to a niece of four thousand pounds, to be paid to her one year after marriage, and in the mean time to remain in the executor's hands, he paying interest for the same, is not a marriage portion, but a vested legacy, and the payment to such legatee by the executor on her arriving of age is good, although it is not a year after marriage.<sup>5</sup> And where a testator provides for the investment of a certain fund, the income to be applied to the support and education of his nephew, and further provides that if he attains the age of twenty-one years, the principal is to be given to him, the severance of this fund from his estate is evidence of an intention to vest the legacy in his nephew; and this presumption is especially strong, where no limitation over is made to any person in the event of the decease of the nephew before attaining age.<sup>6</sup> A devisee who has capacity to take, at

<sup>1</sup> *Scott v. Price*, 2 Serg. & R. 59; 7 Am. Dec. 629.

<sup>2</sup> *Cathey v. Cathey*, 9 Humph. 470; 49 Am. Dec. 714.

<sup>3</sup> *Rowe's Executors v. White*, 16 N. J. Eq. 411; 84 Am. Dec. 169.

<sup>4</sup> *Robert's Appeal*, 59 Pa. St. 70; 98 Am. Dec. 312.

<sup>5</sup> *Boone v. Sinkler*, 1 Bay, 369; 1 Am. Dec. 622.

<sup>6</sup> *Robert's Appeal*, 59 Pa. St. 70; 98 Am. Dec. 312.

the death of the testator, whenever the possession becomes vacant, and is only withheld from possession by the temporary right of enjoyment of another, has a vested, transmissible interest, and not a merely contingent interest.<sup>1</sup> So a devise to trustees after the wife's death, or in case she should marry, to sell land, and divide the money among the testator's children when they should severally attain the age of twenty-one or become married, gives a vested legacy to a child who attained the age of twenty-one, married, died intestate, without issue, in the widow's lifetime, she not having married again.<sup>2</sup> But a bequest of personalty to the testator's son for life, and then to the latter's son, if he have one living at his death, otherwise to the testator's two grandsons on their attaining majority and assuming the testator's name, does not vest in the latter on the first taker's death, without issue, before the conditions are performed; but is contingent.<sup>3</sup> It is the English rule that "if it is clear, from the language of the will, that the attainment of a certain age is made a condition precedent to the vesting of the legacy, such legacy will be contingent, notwithstanding a gift of the legacy distinct from the direction to pay; . . . and in all cases where the payment or distribution is deferred, not merely until the lapse of a definite interval of time which will certainly arrive, but until an event which may or may not happen, the effect, it would seem, is to render the legacy itself contingent."<sup>4</sup>

**§ 3271. When Legacy or Gift is Absolute.**—Personal property bequeathed to one and the heirs of his body

<sup>1</sup> *Bentley v. Long*, 1 Strob. Eq. 43; 47 Am. Dec. 523.

<sup>2</sup> *Price v. Watkins*, 1 Dall. 8; 1 Am. Dec. 222.

<sup>3</sup> *Drayton v. Grimke*, Rich. Eq. Cas. 321; 24 Am. Dec. 419.

<sup>4</sup> 2 Jarman on Wills, Randolph and Talcott's notes, 456; see *Id.* 419, and note; *Bernard v. Montague*, 1 Mer.

422; *Knight v. Cameron*, 14 Ves. 389; *Elwin v. Elwin*, 8 Ves. 546; *Atkins v. Hiccocks*, 1 Atk. 500. For cases of contingent legacies, see also *Collier v. Slaughter*, 20 Ala. 263; *Moore v. Smith*, 9 Watts, 403; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315; *Travis v. Morrison*, 28 Ala. 494; *Putnam v. Gleason*, 99 Mass. 454.

passes to the person absolutely.<sup>1</sup> So a bequest to one for life, and "to her children forever," gives an absolute estate in personalty.<sup>2</sup> And where the terms of a bequest of personalty are such as would, in a devise of realty, create an estate-tail in the devisee, it operates as an absolute gift of the personalty, and a bequest over on the failure of issue of the first taker is void.<sup>3</sup> And a devise of certain rooms for life, and of a certain quantity of wood for fuel, entitles the legatee to sell the wood or to remove and burn it elsewhere.<sup>4</sup> A devise of the interest of a fund, there being no trustees interposed, and no investment directed, will, without more, carry an absolute estate in the fund to the legatee.<sup>5</sup> So the bequest of the interest or produce of a fund to a legatee, or in trust for him, without any limitation as to continuance, bequeaths also the principal.<sup>6</sup> And in case a will devises real and personal property to the testator's daughter, to be her right and property during her lifetime, and her heirs' after her, and in the event of her dying without an heir, to be equally divided among the rest of the testator's heirs, and bequeathing the residue to the said daughter, to be disposed of by her as she thinks best among the lawful heirs of the testator at the latter's death, the absolute estate passes to the daughter.<sup>7</sup>

§ 3272. **Legacies in Fraud of Creditors.**—Tangible property is always subject to the owner's or beneficiary's debts, and by the use of no terms or art in a will can property be given to a man, or to another for him, so that he may continue to enjoy it or derive any benefit from it, and at the same time defy his creditors and deny them satisfaction thereout.<sup>8</sup> But creditors may be excluded

<sup>1</sup> *Roach v. Martin*, 1 Harr. (Del.) 548; 27 Am. Dec. 746.

<sup>2</sup> *Shearman v. Angel*, 1 Bail. Eq. 351; 23 Am. Dec. 166.

<sup>3</sup> *Cleveland v. Havens*, 13 N. J. Eq. 101; 78 Am. Dec. 90.

<sup>4</sup> *Wiggin v. Wiggin*, 43 N. H. 561; 80 Am. Dec. 192.

<sup>5</sup> *Silknitter's Appeal*, 43 Pa. St. 365; 84 Am. Dec. 494.

<sup>6</sup> *Craft v. Snook*, 13 N. J. Eq. 121; 78 Am. Dec. 94; *Robert's Appeal*, 59 Pa. St. 70; 98 Am. Dec. 312.

<sup>7</sup> *Parish v. Parish*, 37 Ala. 591.

<sup>8</sup> *Mebane v. Mebane*, 4 Ired. Eq. 131; 44 Am. Dec. 102.

from satisfaction out of the property by excluding the debtor from all benefit from or interest in the property by such a limitation as will determine his interest, and make it go to some other person upon the contingency of his bankruptcy or insolvency.<sup>1</sup> A devise in the nature of a mere gift, or appointing persons to take in lieu of the heirs, is void as to creditors.<sup>2</sup> And a devise for the payment of debts, if sufficient and effectual for that purpose, is valid, and creditors can only take the estate devised; but if the property devised is insufficient, or the devise ineffectual, it is void against creditors.<sup>3</sup>

§ 3273. **Advancements and Satisfaction.**—Advancement is giving by anticipation the whole or part of what it is supposed a child will be entitled to on the death, intestate, of the party making it. This definition embraces the idea that the party has irrevocably parted from his title in the subject advanced.<sup>4</sup> So a gift to a child or heir by an ancestor in his lifetime is *prima facie* an advancement.<sup>5</sup> Although the presumption is as above stated, yet whether property given by a parent to a child shall be regarded as an advancement is purely a question of intention.<sup>6</sup> So money “advanced” and money “paid and advanced” by a father to his son, is presumed to have been a technical advancement,<sup>7</sup> and a deed from a parent to a child, in consideration of love and affection, is presumed to have been an advancement, though this presumption may be rebutted.<sup>8</sup> An advancement may be made by a man to his son-in-law on condition that the

<sup>1</sup> *Mebane v. Mebane*, 4 Ired. Eq. 131; 44 Am. Dec. 102.

<sup>2</sup> *Hall's Case*, 1 Bland Ch. 203; 17 Am. Dec. 275.

<sup>3</sup> *Campbell's Case*, 2 Bland Ch. 209; 20 Am. Dec. 360.

<sup>4</sup> *Darne v. Lloyd*, 82 Va. 859; 3 Am. St. Rep. 123; *Grattan v. Grattan*, 18 Ill. 167; 65 Am. Dec. 726; *Stimson's American Statute Law*, secs. 2811, 2812, 3160-3169, 3203.

<sup>5</sup> *Grattan v. Grattan*, 18 Ill. 167; 65 Am. Dec. 726; *Woolery v. Woolery*, 29 Ind. 249; 95 Am. Dec. 630.

<sup>6</sup> *Woolery v. Woolery*, 29 Ind. 249; 95 Am. Dec. 630.

<sup>7</sup> *Waller v. Todd*, 3 Dana, 503; 28 Am. Dec. 94.

<sup>8</sup> *Hatch v. Straight*, 3 Conn. 31; 8 Am. Dec. 152.

latter convey the property advanced in trust for the use of his wife, and a conveyance made in performance of such a condition will be upheld.<sup>1</sup> But the purchase of land by a parent in the name of a minor child is not deemed an advancement, where it expressly appears that such was not the parent's intention;<sup>2</sup> and an advancement to a son in full of all claims against the estate of his father will not, after his death, prevent the son taking as heir a *residuum* not disposed of by will.<sup>3</sup> So the heir advanced may elect to either retain what he has received, or to relinquish it and claim his equal share with the others in the distribution of the estate, but he is not entitled to participate with his co-heirs, unless he brings his advancement into hotchpot with the whole estate, and takes his equal portion thereof.<sup>4</sup> The rule of considering a legacy as satisfaction of a portion arises from the presumption that it was so intended by the testator, and may be repelled or confirmed. Accordingly where a father bequeaths certain articles to a daughter whose support and maintenance have been made a charge upon the son, and expressly wills that the daughter is to have her maintenance from the son, such bequest is to be considered an added bounty of the testator.<sup>5</sup> So a bequest to a creditor upon a bond for a sum of money less than the amount of the bond, together with certain specific articles, with a devise over of the residue of the property after payment of debts and legacies, will not operate as a satisfaction of the bond debt.<sup>6</sup>

<sup>1</sup> Waller v. Todd, 3 Dana, 503; 24 Am. Dec. 94.

<sup>2</sup> Jackson v. Matsdorf, 11 Johns. 91; 6 Am. Dec. 355.

<sup>3</sup> Needles's Ex'r v. Needles, 7 Ohio St. 432; 70 Am. Dec. 85.

<sup>4</sup> Grattan v. Grattan, 18 Ill. 167; 65 Am. Dec. 726; Sims v. Sims, 39 Ga. 308; 99 Am. Dec. 450. See further, as to advancements, Jackson v. Jackson, 28 Miss. 674; 64 Am. Dec. 114; Cecil v. Cecil, 19 Md. 72; 81 Am. Dec. 626; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685; 23 Am. Dec. 748;

Zeiter v. Zeiter, 4 Watts, 212; 28 Am. Dec. 698.

<sup>5</sup> Taylor v. Lanier, 3 Murph. 98; 9 Am. Dec. 599.

<sup>6</sup> Strong v. Williams, 12 Mass. 390; 7 Am. Dec. 81. See further, as to satisfaction, Rickets v. Livingston, 2 Johns. Cas. 97; 1 Am. Dec. 158; Byrne v. Byrne, 3 Serg. & R. 54; 8 Am. Dec. 641; Cloud v. Clinkinbeard, 8 B. Mon. 397; 48 Am. Dec. 397; Zeigler v. Eckert, 6 Pa. St. 13; 47 Am. Dec. 428. See Ademption of Legacies, § 3274.

### § 3274. Ademption and Abatement of Legacies.—

A legacy is adeemed when the testator conveys to another the specific property bequeathed, and does not afterwards become possessed of the same, or otherwise places it out of the power of the executor to deliver over the legacy. But if the testator attempts to convey, and fails for any cause, the legacy is still valid.<sup>1</sup> The doctrine of ademption has been held to apply as well to realty as personalty.<sup>2</sup> But it is said, however, that "the rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty. Ademption is the extinction or satisfaction of a legacy by some act of the testator which is equivalent to a revocation of the bequest, and indicates the intention to revoke."<sup>3</sup> Ademption is presumed where a testator advances money to his child for whom he has provided a general pecuniary legacy in his previously executed will, but not in case of a residuary bequest, nor in the cases of grandchildren or strangers. The presumption in the first case may be contradicted, and in the latter cases the intention to adeem may be established by extrinsic evidence.<sup>4</sup> The question of ademption is declared not to be one of intention, but an ademption is effected upon the principle that the subject is annihilated, or its condition so altered that nothing remains to which the terms of the bequest can apply.<sup>5</sup>

<sup>1</sup> Whitlock v. Vann, 38 Ga. 362.

<sup>2</sup> Hansbrough v. Hooe, 12 Leigh, 316; 37 Am. Dec. 659.

<sup>3</sup> Burnham v. Comfort, 108 N. Y. 535; 2 Am. St. Rep. 462, 464; citing Story's Eq. Jur., sec. 1111; 2 Williams on Executors, 1202; 1 Roper on Legacies, 365; Langdon v. Astor's Executors, 16 N. Y. 34; Davys v. Boucher, 3 Younge & C. Ch. 397.

<sup>4</sup> Allen v. Allen, 13 S. C. 512; 36 Am. Rep. 716. See Burnham v. Comfort, 108 N. Y. 535; 2 Am. St. Rep. 462; Beall v. Blake, 16 Ga. 119.

<sup>5</sup> Ross' Executor v. Carpenter, 9 B. Mon. 367; 50 Am. Dec. 513. See Advancement and Satisfaction, *ante*.

Legacy is adeemed when a parent who gives the legacy afterwards makes an advancement to her in the nature of a portion: Hansbrough v. Hooe, 12 Leigh, 316; 37 Am. Dec. 659. A sale of property given as a legacy by the testator in his lifetime operates as an ademption of the legacy: Singleton v. Bremar, 4 McCord, 12; 17 Am. Dec. 699. Advancement is considered an ademption of a legacy, if made subsequent to the will, but not so if made prior thereto: Zeiter v. Zeiter, 4 Watts, 212; 28 Am. Dec. 698. But see Stimson's American Statute Law, sec. 2811, and the statutes of California, Dakota, Montana, and Utah.

A bequest in lieu of dower accepted is not liable to abatement.<sup>1</sup>

§ 3275. **Lapsed Legacies and Devises.**—Lapsed legacies and devises ordinarily become a part of the residue of the estate.<sup>2</sup> The principal cases in which legacies lapse are the following: If the will is so obscure that the court cannot discern the intention of the testator, the legacy fails, and the property will pass under the residuary clause;<sup>3</sup> so a legacy will lapse if given to one who has no existence;<sup>4</sup> or if the legatee dies during the lifetime of the testator.<sup>5</sup> Legacies may lapse, however, from other causes, as in certain cases of gifts upon contingencies, or where estates even vest upon conditions, or where the property is consumable, and is for life, or upon conditions the happening of which may cause its use to be forfeited.<sup>6</sup> So legacies chargeable on land, and payable *in futuro*, are not vested, and lapse upon the legatee's death before the day of payment.<sup>7</sup> But legacies so chargeable do not lapse where the gift is so made under the will that the legacy vests upon the testator's death, even if the legatee dies before the day of payment.<sup>8</sup> The rule stated at the beginning of this section as to devises becoming, by lapse, a part of the residue of the estate is statutory; but as a statutory rule it does not prevail in all the states; on the

Ademption or destruction of legacy by delivery over of the property to the legatee by the testator during his lifetime is a question of fact to be decided by the jury under the evidence: *Clayton v. Akin*, 38 Ga. 320; 95 Am. Dec. 393. Where a legacy is given to a child, and afterwards an advancement is made to such child, the same will be presumed to be in satisfaction of the legacy, but such presumption may be rebutted; and although the thing advanced is not of the same kind as the thing bequeathed, it may be proved that it was the testator's intention that one should be in satisfaction of the other: *Jones v. Mason*, 5 Rand. 577; 16 Am. Dec. 761. See further, as to ademption of legacies,

*Blackstone v. Blackstone*, 3 Watts, 335; 27 Am. Dec. 359; *Walton v. Walton*, 7 Johns. Ch. 258; 11 Am. Dec. 456.

<sup>1</sup> *Security Company v. Bryant*, 52 Conn. 311; 52 Am. Rep. 599.

<sup>2</sup> *Stimson's American Statute Law*, sec. 2822.

<sup>3</sup> *Rothmahler v. Myers*, 4 Desaus. Eq. 215; 6 Am. Dec. 613.

<sup>4</sup> *Helms v. Franciscus*, 2 Bland, 544; 20 Am. Dec. 402.

<sup>5</sup> *Comfort v. Mather*, 2 Watts & S. 450; 37 Am. Dec. 523.

<sup>6</sup> 1 Jarman on Wills, Randolph and and Talcott's notes, 617 et seq.

<sup>7</sup> *Birdsall v. Hewlett*, 1 Paige, 32; 19 Am. Dec. 392.

<sup>8</sup> *Birdsall v. Hewlett*, 1 Paige, 32; 19 Am. Dec. 392.

contrary, it is expressly declared in some states that the lapsed devise vests in the heirs;<sup>1</sup> and it is held that in case of a lapsed devise the lands do not vest in the residuary devisee, but descend to the heir;<sup>2</sup> and that property devised or bequeathed to a person who is dead when the will is made, or who dies before the testator, does not pass to such person's heirs. If personalty, it goes to the residuary legatee; and if real estate, it descends to the heirs of the testator.<sup>3</sup> So legacies payable out of personalty differ from legacies payable out of realty, in that the latter, on the death of the legatee before the day of payment, lapse and merge in the land for the benefit of the heir, while the former would be transmissible to the legatee's personal representative.<sup>4</sup> So under a devise to a class of persons, where none can take by reason of alienage, the estate descends to the heirs of the testator, and not to the residuary of the devisees.<sup>5</sup>

**§ 3276. Time when Division of the Property should be Made.**—If the will directs a division of the property, but does not specify any time in which it shall be made, it must be made as soon after the death of the testator as the executors are ready to make a final settlement of the estate.<sup>6</sup>

**§ 3277. Estates Given by Will.**—As to the different estates which pass under particular words in a will, and as to executory devises, remainders, and reversions, see *ante*, Title Real Property.

<sup>1</sup> Stimson's American Statute Law, sec. 2822.

<sup>2</sup> *Greene v. Dennis*, 6 Conn. 293; 16 Am. Dec. 58.

<sup>3</sup> *Gore v. Stevens*, 1 Dana, 201; 25 Am. Dec. 141.

<sup>4</sup> *Spence v. Robbins*, 6 Gill & J. 507; 26 Am. Dec. 587.

<sup>5</sup> *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290. But see *Thayer v. Wellington*, 9 Allen, 283; 85 Am. Dec. 753. See also, as to lapsed lega-

cies and devises, *Cureton v. Massey*, 13 Rich. Eq. 104; 94 Am. Dec. 151; *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575; *Telfair v. Howe*, 3 Rich. Eq. 235; 55 Am. Dec. 637; *Bendall v. Bendall*, 24 Ala. 295; 60 Am. Dec. 469; *Mowatt v. Carew*, 7 Paige, 283; 32 Am. Dec. 641; *Coleman v. Hutcheson*, 3 Bibb, 209; 6 Am. Dec. 649.

<sup>6</sup> *Roper v. Roper*, 5 Jones Eq. 16; 75 Am. Dec. 427.

## CHAPTER CLX.

## REVOCATION, REPUBLICATION, AND REVIVAL.

- § 3278. Revocation of wills.
- § 3279. Revocation by burning.
- § 3280. Revocation by tearing or destroying.
- § 3281. Revocation by mutilation.
- § 3282. Revocation by cancellation.
- § 3283. Revocation by subsequent will.
- § 3284. Implied revocation.
- § 3285. Revocation by subsequent marriage.
- § 3286. Revocation by subsequent birth of children.
- § 3287. Revocation by obliterations.
- § 3288. Revocation by alterations, erasures, and interlineations.
- § 3289. Revocation by deed, or by a change in or sale of property.
- § 3290. Revocation by agreement or contract to convey property.
- § 3291. Revocation by subsequent clause.
- § 3292. Revocation procured or prevented by menace, undue influence, or fraud.
- § 3293. Partial revocation.
- § 3294. Revocation of specific devise.
- § 3295. Revocation by codicil — Revocation of codicil.
- § 3296. Republication of wills — Reviving former will.

§ 3278. **Revocation of Wills.** — Revocation must be by burning, tearing, destroying, canceling, or obliterating, in most of the states, either by the testator himself, or by some person for him, at his express direction or consent; and the act of revocation is required to be in his presence, with few exceptions, and some of the statutes insert the further proviso that whatever the act of revocation, though done within the statute, the intent to revoke must exist.<sup>1</sup> Wills may also be revoked by a subsequent will, or by words reduced to writing, properly witnessed and authenticated, but not by mere spoken words.<sup>2</sup> A will is not revoked by the death of legatees or beneficiaries, by marriage of the testator without issue, by alienation of

<sup>1</sup> Stimson's American Statute Law, sec. 2672, supplement, sec. 2672; Floyd v. Floyd, 3 Strob. 44; 49 Am. Dec. 626.

<sup>2</sup> Stimson's American Statute Law, sec. 2674, 2675.

the greater part of the estate specifically devised, by the acquisition of a much larger estate, nor by the concurrence of all these events.<sup>1</sup> Where the statute prescribes the mode by which a will may be revoked, evidence of its revocation in any other mode is inadmissible.<sup>2</sup> The law as to the revocation of wills is the same in law as in equity;<sup>3</sup> and a will is not any less subject to revocation by operation of law because it is made by a woman under the special power contained in a marriage settlement, instead of under the general power granted by law.<sup>4</sup>

**§ 3279. Revocation by Burning.** — Where the statute requires the burning of a will in the testator's presence to constitute a revocation, a burning by his direction, but not in his presence, does not work a revocation.<sup>5</sup> So the slightest burning, even of an unnecessary part of a will, accompanied by evidence *aliunde* of the intention to revoke, is a revocation;<sup>6</sup> and where the revocation of a will is attempted by burning, there must be a present intention on the part of the testator to revoke, and this intent must appear by some act or symbol appearing on the will itself, so that it may not rest upon mere parol testimony; and if the will is in any part burned or singed, it is sufficient to revoke the will.<sup>7</sup> If one ordered by the testator to burn a will deceives him by pretending to burn it, while it is in fact preserved, there is no revocation.<sup>8</sup>

**ILLUSTRATIONS.** — A testator threw a will into the fire with intent to revoke it, and after he had turned away, his wife took the paper from the fire and secretly concealed it, and the testator, up to the time of his death, thought the will was destroyed, and so frequently expressed himself, the will having been

<sup>1</sup> *Hoitt v. Hoitt*, 63 N. H. 475; 56 Am. Rep. 530.

<sup>2</sup> *Slaughter v. Stephens*, 81 Ala. 418.

<sup>3</sup> *Donahoo v. Lee*, 1 Swan, 119; 55 Am. Dec. 725.

<sup>4</sup> *Young's Appeal*, 39 Pa. St. 115; 80 Am. Dec. 513. As to what is revocation, see note to *Gains v. Gains*, 12 Am. Dec. 377. As to evidence of revocation, see note to *Pickens v. Davis*,

45 Am. Rep. 342. As to power of court to grant revocation, see note to *Waters v. Stickney*, 90 Am. Dec. 136.

<sup>5</sup> *Baldwin v. Spriggs*, 65 Md. 373.

<sup>6</sup> *Johnson v. Brailsford*, 2 Nott & McC. 272; 10 Am. Dec. 601.

<sup>7</sup> *White v. Casten*, 1 Jones, 197; 59 Am. Dec. 585.

<sup>8</sup> *Hise v. Fincher*, 10 Ired. 139; 51 Am. Dec. 383.

burned through in three different places, the outside scorched, and the edges of the paper singed, although no word or letter of the writing was in any manner destroyed or obliterated. *Held*, that the will was revoked: *White v. Casten*, 1 Jones, 197; 59 Am. Dec. 585.

§ 3280. **Revocation by Tearing or Destroying.**—Where there is evidence of an intention to revoke, the slightest tearing operates as a revocation.<sup>1</sup> Though a seal is not requisite to a will, yet if one is affixed to it, and is afterwards torn off, this will amount to a revocation, if so intended.<sup>2</sup> A will is not revoked by any act of spoliation or destruction not deliberately done *animo revocandi*.<sup>3</sup> A man who is incompetent to make a will is equally incompetent to revoke a will made previously; and his destruction of such will, when so incompetent, is not a revocation thereof.<sup>4</sup> Therefore the destruction of a will is not a revocation, unless the testator had at the time capacity to understand the nature and effect of the act, and performed it, or directed it to be done, voluntarily, with the intent to effect a revocation.<sup>5</sup> If a testator directs that his will be destroyed, and believes that it is destroyed accordingly, this will not be a revocation of it, if in fact it is not destroyed, although the testator believes it to have been actually destroyed.<sup>6</sup> And a will destroyed before or after the testator's death without his knowledge does not cease to be his will.<sup>7</sup>

Where a will was in the possession of the deceased, it is presumed, until the contrary is shown, to have been destroyed *animo revocandi*, from proof that it cannot be found after his death.<sup>8</sup> But the fact that a will is found among

<sup>1</sup> *Johnson v. Brailsford*, 2 Nott & McC. 272; 10 Am. Dec. 601.

<sup>2</sup> *Avery v. Pixley*, 4 Mass. 460.

<sup>3</sup> *White v. Casten*, 1 Jones, 197; 59 Am. Dec. 585.

<sup>4</sup> *Smith v. Wait*, 4 Barb. 28; *Ford v. Ford*, 7 Humph. 92; *Rhodes v. Vinson*, 9 Gill, 169; 52 Am. Dec. 685.

<sup>5</sup> *Rhodes v. Vinson*, 9 Gill, 169; 52 Am. Dec. 685.

<sup>6</sup> *Malone v. Hobbs*, 1 Rob. (Va.) 346; 39 Am. Dec. 263; *Boyd v. Cook*, 3 Leigh, 32; *Runkle v. Gates*, 11 Ind. 95. But see *White v. Casten*, 1 Jones, 197; 59 Am. Dec. 585.

<sup>7</sup> *Dickey v. Malechi*, 6 Mo. 177; 34 Am. Dec. 130.

<sup>8</sup> *Collyer v. Collyer*, 110 N. Y. 481; 6 Am. St. Rep. 405; *Holland v. Ferris*, 2 Bradf. 334; *McBeth v. McBeth*, 11

worthless papers in an insecure place, and not where the testator's valuable papers are kept, works no revocation of it.<sup>1</sup> And when an adequate motive for the destruction of a will is assigned by a third party who destroyed the will, and who seeks to set it up, and this is clearly established by evidence, an inadequate and dishonest motive will not be imputed on mere conjecture.<sup>2</sup>

**§ 3281. Revocation by Mutilation.**—Where a mutilated will is found, the testator, in the absence of proof, is presumed to have done the act, if it was done while in his possession, or discovered among his papers canceled or defaced.<sup>3</sup> But such presumption does not exist where the will is found in such mutilated condition under the control of a person to be benefited by its revocation; and where such person, on being asked for it, acknowledged that there was a will, said nothing about the mutilation, refused to deliver up the will, and it was not obtained until a subsequent time.<sup>4</sup>

**ILLUSTRATIONS.**—A statute provided that no will shall be revoked unless the testator shall destroy or "mutilate" the same. A testator drew pencil-lines across his signature, with intent to revoke, but left the signature still legible. *Held*, a "mutilation": *Woodfill v. Patton*, 76 Ind. 575; 40 Am. Rep. 269.

**§ 3282. Revocation by Cancellation.**—A will deliberately canceled without accident or mistake is revoked, though the testator afterwards intends to make a new one, but omits so to do.<sup>5</sup> But the cancellation of a will, to operate as a revocation thereof, must be directed against the will as a whole.<sup>6</sup> Therefore the cancellation of a be-

Ala. 586; *Weeks v. McBeth*, 14 Ala. 474; *Brown v. Brown*, 10 Yerg. 84; *Appling v. Eades*, 1 Gratt. 284; *Lively v. Harwell*, 29 Ga. 509; *Durant v. Ashmore*, 2 Rich. 184; *Minkler v. Minkler*, 14 Vt. 125.

<sup>1</sup> *Fellows v. Allen*, 60 N. H. 439, 441.

<sup>2</sup> *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401.

<sup>3</sup> *Bennett v. Sherrod*, 3 Ired. 303; 40 Am. Dec. 410.

<sup>4</sup> *Bennett v. Sherrod*, 3 Ired. 303; 40 Am. Dec. 410.

<sup>5</sup> *Semmes v. Semmes*, 7 Har. & J. 388.

<sup>6</sup> *Malone v. Hobbs*, 1 Rob. (Va.) 346; 39 Am. Dec. 263.

quest, standing separately from other bequests, does not cancel the other bequests.<sup>1</sup>

**ILLUSTRATIONS.** — The testator drew lines across his will. *Held*, an equivocal act, which might be explained by circumstances: *Bethel v. Moore*, 2 Dev. & B. 311. The testator drew a scroll through his signature, but not so as to render it illegible. *Held*, not a revocation: *Gay v. Gay*, 60 Iowa, 415; 46 Am. Rep. 78.

§ 3283. **Revocation by Subsequent Will.** — A will is not revoked by a subsequent will not expressly revoking it, and never becoming operative, because not found;<sup>2</sup> nor does a subsequent will revoke a former one, unless it contains a clause of revocation, or is inconsistent with it; and where it is inconsistent in some of the provisions merely, it is only a revocation *pro tanto*; and where such subsequent will has been lost, and its contents cannot be ascertained, so that there is no evidence that it contained a clause revoking the former will, it will not be a revocation of the former will.<sup>3</sup> But a second will, inconsistent with the first, and perfect in its form and execution, but incapable of operating as a will on account of the incapacity of the devisee or some circumstance *dehors* the instrument, may be set up as a revocation of the first will.<sup>4</sup> Where a second will is found to be invalid, with the exception of the clause of revocation, on the ground of undue influence, the clause of revocation alone is not sufficient evidence of the testator's intention to revoke a former will. The presumption is, that if the second will is found to be invalid the testator intended that the first will should stand, rather than that he should die intestate.<sup>5</sup> The rule of construction in cases of revocation of a former will by a subsequent one is this: where the words are im-

<sup>1</sup> Wikoff's Appeal, 15 Pa. St. 231; 53 Am. Dec. 597.

<sup>2</sup> Peck's Appeal, 50 Conn. 562; 47 Am. Rep. 685.

<sup>3</sup> Nelson v. McGiffert, 3 Barb. Ch. 153; 49 Am. Dec. 170.

<sup>4</sup> Carpenter v. Miller, 3 W. Va. 174; 100 Am. Dec. 744; Price v. Maxwell, 28 Pa. St. 23.

<sup>5</sup> Ruby v. Ulrich, 69 Pa. St. 177; 8 Am. Rep. 238. See Marsh v. Marsh, 3 Jones, 77; 64 Am. Dec. 598.

perative, though inoperative by reason of some incapacity in the devisee, they operate as a revocation; and where the words are precatory, if the object of the language be certain and definite, the words are considered imperative, creating a trust for the purpose indicated, and operate as a revocation; but whenever the prior dispositions of property are complete, and the words are precatory, and their object uncertain and indefinite, the words will not be held to create a trust, or be construed to revoke a former will.<sup>1</sup> Where a man dies leaving two separate and distinct wills properly executed and attested, both relating exclusively to the same kind of property, and where by specific legacies and residuary clauses each is entirely adequate to the disposition of all the property of the decedent, the latter will should alone be given effect; they cannot both stand together as constituting but one will.<sup>2</sup>

ILLUSTRATIONS.—General Kosciusko executed a will in this country in 1798, bequeathing his personal property situate here, and thereafter executed a will in France in 1806, charging said property with a legacy; then, in 1816, he executed a will in Switzerland revoking all previous wills, and in 1817 he made in the same place another will, whereby he bequeathed “all my effects [*effets*], my carriage and horses included,” to certain persons named, without particularly mentioning his property in the United States in his third or fourth will. *Held*, that the first two wills were revoked by the third; that the bequest in the fourth will did not include his property in the United States: *Ennis v. Smith*, 14 How. 400.

§ 3284. Implied Revocation.—An implied revocation of a will is a deduction of law from established facts.<sup>3</sup> It also exists under the statutes in many cases, as by subsequent marriage and the birth of a legitimate child.<sup>4</sup> If a testator's circumstances are so altered that such new moral

<sup>1</sup> *Carpenter v. Miller*, 3 W. Va. 174; *revoke a prior one*, see *McCune v. House*, 8 Ohio, 144; 31 Am. Dec. 438.

<sup>2</sup> *In re Edward Fisher*, 4 Wis. 254; 65 Am. Dec. 309. See also *Hughes v. Meredith*, 24 Ga. 325; 71 Am. Dec. 127. That nuncupative will does not

<sup>3</sup> *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41.

<sup>4</sup> *Stimson's American Statute Law*, sec. 2676, supplement, sec. 2676.

testamentary duties have accrued to him subsequent to the date of the will, as may be presumed to produce a change of intention, this will amount to an implied revocation, except as to persons who could gain nothing by a revocation, or whose remedy is perfect without it.<sup>1</sup>

§ 3285. **Revocation by Subsequent Marriage.**—Whether the marriage of a testator or testatrix entered into after making a will operates as a revocation depends largely upon the statutes of the several states.<sup>2</sup> And the seeming conflict of authority upon this point may in many cases be accounted for on this basis. It is held that the testator's marriage is not a ground of revocation;<sup>3</sup> and that a woman's antenuptial will is not revoked by her marriage.<sup>4</sup> So where a married woman has power to make wills as if single, the will of a single woman is not revoked by her subsequent marriage;<sup>5</sup> nor is the will of a married woman revoked by her subsequent marriage, where the statute secures to her the absolute right to dispose of her property during coverture; and there being no other issue than the children of a former marriage, her estate is given by said will to them. But whether such marriage would revoke a former will in favor of a stranger was undetermined.<sup>6</sup> But under a statute prescribing the modes of revoking a will, and recognizing revocation "implied by law from subsequent change in the condition or circumstances of the testator," a woman's will is revoked by her subsequent marriage.<sup>7</sup>

<sup>1</sup> Young's Appeal, 39 Pa. St. 115; 80 Am. Dec. 513. See further on implied revocation, note to *Graves v. Sheldon*, 15 Am. Dec. 659.

<sup>2</sup> Stimson's American Statute Law, sec. 2676.

<sup>3</sup> *Hoitt v. Hoitt*, 63 N. H. 475; 56 Am. Rep. 530.

<sup>4</sup> *Fellows v. Allen*, 60 N. H. 439; 49 Am. Rep. 328, and note 329. See also *Webb v. Jone*, 36 N. J. Eq. 163.

<sup>5</sup> *Noyes v. Southworth*, 55 Mich. 173; 54 Am. Rep. 359.

<sup>6</sup> *Will of Ward*, 70 Wis. 251; 5 Am. St. Rep. 174. See also *In re Fuller*, 79 Ill. 99, 22 Am. Rep. 164, where it is held that a woman's second marriage did not revoke a prior will, she having no children by her second husband.

<sup>7</sup> *Swan v. Hammond*, 138 Mass. 45; 52 Am. Rep. 255. See also *Brown v. Clark*, 77 N. Y. 369; *Hodsen v. Lloyd*, 2 Brown Ch. 534; *Tyler v. Tyler*, 19 Ill. 151; *Fransen's Will*, 26 Pa. St. 202; *Havens v. Van Den Burgh*, 1 Denio; 27; *Brush v. Wilkins*, 4 Johns. Ch.

**§ 3286. Revocation by Subsequent Birth of Children.**—Under the statutes of several states, the subsequent birth of a legitimate child, where there is no provision in the will covering such contingency, operates as a revocation of the will.<sup>1</sup> In most of the states, however, in case there are children living at the making of the will, and a child is thereafter born, such child is entitled to his share, as in case of intestacy, and the will is not thereby made void. This rule is, however, subject to certain limitations and exceptions in different states, as where such subsequently born children have been otherwise provided for by the testator in his lifetime, or it appears that there has been an advancement to them of their share, etc.<sup>2</sup>

**§ 3287. Revocation by Obliterations.**—Whether an alteration or obliteration of a will is a revocation depends upon whether it was so intended by the testator;<sup>3</sup> and where such intent is evident, an obliteration in part is effectual to work a revocation.<sup>4</sup> But a testator may not by obliterating certain words in his executed will convert a life estate into a fee-simple, but the will must be effectuated as originally executed.<sup>5</sup>

**ILLUSTRATIONS.**—A will containing some twenty legacies was found with all the legacies except four erased by pen-marks, but still legible. The clause appointing executors was erased in like manner, the names being legible with more difficulty. The testator's signature was still more completely

506. See generally, on the subject, 1 Jarman on Wills, 272; Parsons on Wills, 59; 4 Kent's Com. 522; 1 Redfield on Wills, 293; and § 763, *ante*. See generally, as revocation by subsequent marriage, notes to Fallon v. Chidester, 26 Am. Rep. 159, and to Young's Appeal, 80 Am. Dec. 516, and to Fellows v. Allen, 49 Am. Rep. 329.

<sup>1</sup> Stimson's American Statute Law, secs. 2676, 2843. See Young's Appeal, 39 Pa. St. 115; 80 Am. Dec. 513; Negus v. Negus, 46 Iowa, 487; 2 Am.

Rep. 157; Fallon v. Chidester, 46 Iowa, 588; 26 Am. Rep. 164; Ash v. Ash, 9 Ohio St. 383.

<sup>2</sup> Stimson's American Statute Law, secs. 2842, 2843, supplement, secs. 2842, 2843; and see sec. 2840. Examine note to Fallon v. Chidester, 26 Am. Rep. 159.

<sup>3</sup> Means v. Moore, 3 McCord, 282; Jackson v. Holloway, 7 Johns. 394.

<sup>4</sup> Lovell v. Quitman, 88 N. Y. 377; 42 Am. Rep. 254.

<sup>5</sup> Eschbach v. Collins, 61 Md. 478; 48 Am. Rep. 123.

marked out in like manner. In the margin were several additions in his handwriting, apparently designed for a new will. *Held*, that the will was revoked: *Succession of Muh*, 35 La. Ann. 394; 48 Am. Rep. 242.

§ 3288. **Revocation by Alterations, Erasures, and Interlineations.**—A will to which effect is to be given must be one which is in conformity with the requirements of the statutes; but the great object of courts is to give full effect to the intention of the testator; and in case of an interlineation by him without a new attestation, it is to be disregarded, and the will is not for that cause entirely void.<sup>1</sup> It is also necessary that the erasure, alteration, or interlineation should, in order to operate as a revocation, be of some important or material word or part of the will, so that neither the changing of an executor nor striking out a devise will amount to a revocation so as to require republication of the will;<sup>2</sup> and a memorandum at the foot of a will of an erasure of material words, which were in fact restored by the testator before the execution of the will, cannot affect such restored part; and an erasure of such memorandum after the execution cannot be deemed a material alteration of the will.<sup>3</sup>

**ILLUSTRATIONS.**—A testator made certain erasures and interlineations in a duly executed will. After he made the alterations, at his request two persons signed the will as witnesses to "the erasures and interlineations made" by testator. What the interlineations, etc., were, the witnesses did not know. *Held*, 1. That the alterations did not supersede the provisions of the will; 2. That the witnessing of such alterations did not amount to an attestation of the will as altered; and 3. That the alterations did not operate as a revocation of the original will: *Will of Penniman*, 20 Minn. 245; 18 Am. Rep. 368. After due execution of a will, the testator procured a scrivener to alter certain legacies by an erasure and interlineation, and change of the date of the will to date of alteration. In the presence of

<sup>1</sup> *Doane v. Hadlock*, 42 Me. 72.

<sup>2</sup> *Wells v. Wells*, 4 T. B. Mon. 152; 16 Am. Dec. 150. And see *Ex parte Brown*, 1 B. Mon. 56; 35 Am. Dec. 174.

<sup>3</sup> *Holman v. Riddle*, 8 Ohio St. 384.

See note to *Will of Penniman*, 18 Am. Rep. 376; *Lewis v. Lewis*, 2 Watts & S. 455. As to alterations and erasures, see note to *Bigelow v. Gillott*, 25 Am. Rep. 35.

the witnesses to the will, the testator acknowledged his former signature as the signature to the will. *Held*, not to be a revocation: *Dixon's Appeal*, 55 Pa. St. 424. A testator, after execution of his will, drew his pen transversely across the words creating some of the legacies, and in another instance, by means of visible alterations, substituted a less sum than that originally provided; several codicils were added. After probate of the whole, and in the absence of proof that the alterations were made after the last codicil, *held*, that the former legacies were canceled, and the latter not: *Linnard's Appeal*, 93 Pa. St. 313; 39 Am. Rep. 753.

**§ 3289. Revocation by Deed or by a Change in or Sale of Property.**—Where it appears to have been the intention of the testator to convey all his estate by will, a subsequent trust deed of the property devised with a power of revocation which is subsequently exercised does not work a revocation of the will.<sup>1</sup> But a conveyance by the testator of all lands owned by him at the time of making his will operates as a revocation of the will.<sup>2</sup> So any change by the testator in the land devised, or any act, though nugatory in itself, yet demonstrating an intention to revoke the devise, will amount to a revocation, except in case of a conveyance for the payment of debts.<sup>3</sup>

**ILLUSTRATIONS.**—A made a will devising all his real and personal property to certain devisees, and afterwards sold all of his real estate, and conveyed the same. *Held*, to be a revocation of the will as to the real estate only: *Balliet's Appeal*, 14 Pa. St. 451. Two instruments were executed on the same day, a trust deed and a will, but they were not inconsistent with each other. *Held*, that the deed was not a revocation of the will: *Vreeland v. McClelland*, 1 Bradf. 393.

**§ 3290. Revocation by Agreement or Contract to Convey Property.**—Under the statutes of many of the states, a will is not revoked by an agreement or contract to convey, made by the testator subsequently to the execution

<sup>1</sup> *Morey v. Sohler*, 63 N. H. 507; *Am. Dec.* 110; *Cooper's Estate*, 4 Pa. St. 88; 45 *Am. Dec.* 673.

<sup>2</sup> *Bowen v. Johnson*, 6 Ind. 110; 61 <sup>3</sup> *Walton v. Walton*, 7 Johns. Ch. 258; 11 *Am. Dec.* 456.

of the will, but it passes to the devisees or legatees subject to such contract or covenant as a charge upon the estate.<sup>1</sup> But outside of the statute, a valid agreement or covenant, such as a court of equity would enforce specifically, will in equity, though perhaps not in law, operate as a revocation of the estate previously devised, as it is regarded from that time as the property of the vendee.<sup>2</sup>

§ 3291. **Revocation by a Subsequent Clause.**—A clear and absolute gift under one clause of a will is not limited by a subsequent clause, except by the employment of clear and explicit terms.<sup>3</sup>

§ 3292. **Revocation Procured or Prevented by Menace, Undue Influence, or Fraud.**—If revocation of a will is obtained by menace, undue influence, or fraud, it is void in California.<sup>4</sup> But it seems that fraudulent prevention of the revocation of a will will not afford ground for setting it aside.<sup>5</sup> To prove that the destruction of a will was procured by undue influence, evidence showing what took place in the sick-room between the time the will was sent for and the time when it was brought back and destroyed, and also showing the motive by which the party exerting the undue influence was actuated, is admissible as a part of the *res gestæ*.<sup>6</sup>

§ 3293. **Partial Revocation.**—It is said that "so long as there remains anything upon which the will can operate, there can be no revocation as a matter of law, except by the mode pointed out by statute,"<sup>7</sup> so that a will may be revoked *pro tanto*, and any act may operate as an implied partial revocation, as a conveyance of land de-

<sup>1</sup> Stimson's American Statute Law, sec. 2810 c.

<sup>2</sup> Donohoo v. Lea, 1 Swan, 119; 55 Am. Dec. 725.

<sup>3</sup> Barksdale v. White, 28 Gratt. 224; 26 Am. Rep. 344.

<sup>4</sup> Deering's Civ. Code, sec. 1272.

<sup>5</sup> Floyd v. Floyd, 3 Strobr. 44; 49 Am. Dec. 626.

<sup>6</sup> Batton v. Watson, 13 Ga. 63; 58 Am. Dec. 504.

<sup>7</sup> Fellows v. Allen, 60 N. H. 439, 441.

vised,<sup>1</sup> or a mortgage of the property.<sup>2</sup> But the cancellation of a part of the will is an equivocal act, the legal effect of which depends, in a great measure, upon extrinsic proof of circumstances, indicating the intention with which it was done; and although it is *prima facie* evidence of intent to revoke, parol testimony is admissible to show that the intention to cancel applied only to so much of the instrument as was actually canceled.<sup>3</sup> "It is the undoubted general rule that a partial revocation only produces what is inaptly and inaccurately termed a revocation *pro tanto*, instead of an ademption, of the subject of the devise, and thus necessarily limits the operation of the will to the extent of the alienation; not, however, because of any defect in the will itself, but because it pleased the testator to make a disposition of such part of his estate different from what he originally intended, which it is always competent for him to do, either by a conveyance, or a new will or codicil."<sup>4</sup>

ILLUSTRATIONS.—Under a statute which provides that "no will shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence, or by his direction, or by some other will, codicil, or writing, signed, attested, and subscribed in the manner provided for making a will," *held*, that an erasure by a testator of certain clauses in his will, with the intention of revoking only those clauses, is a valid revocation of those clauses, but not of the whole will; and the property therein referred to passes under the residuary clause, in the absence of evidence of a contrary intention: *Bigelow v. Gillott*, 123 Mass. 102; 25 Am. Rep. 32.

<sup>1</sup> *Minuse v. Cox*, 5 Johns. Ch. 441; 9 Am. Dec. 313.

<sup>2</sup> *McTaggart v. Thompson*, 14 Pa. St. 149.

<sup>3</sup> *Brown's Will*, 1 B. Mon. 56; 35 Am. Dec. 174.

<sup>4</sup> The court, in *Hoitt v. Hoitt*, 63 N. H. 475, 497; 56 Am. Rep. 530, 534, citing *Fellows v. Allen*, 60 N. H. 439; 440; 49 Am. Rep. 328; *Carter v. Thomas*, 4 Greenl. 341, 343, 344; *Graves v. Sheldon*, 2 D. Chip. 71, 75; 15 Am. Dec. 653; *Blandin v. Blandin*, 9 Vt. 210, 211; *Hawes v. Humphrey*,

9 Pick. 350; 20 Am. Dec. 481; *Terry v. Edminster*, 9 Pick. 355, note; *Webster v. Webster*, 105 Mass. 538, 542; *Balliet's Appeal*, 14 Pa. St. 451; *Brush v. Brush*, 11 Ohio, 287; *Floyd v. Floyd*, 7 B. Mon. 290; *In re Mickel*, 14 Johns. 324; *McNaughton v. McNaughton*, 34 N. Y. 201; *Warren v. Taylor*, 56 Iowa, 182; *Wells v. Wells*, 35 Miss. 638; *Brydges v. Duchess of Chandos*, 2 Ves. Jr. 417; 4 Dane Abr. 576, 577; *Loveless on Wills*, 358; 1 *Redfield on Wills*, 335; *Parsons on Wills*, 63.

§ 3294. **Revocation of Specific Devise.** — The revocation of a specific devise of real property may arise from the alteration or alienation of the testator's estate during his lifetime, or by some writing executed with all the formalities required for a valid will. Hence a devisee of real estate is entitled thereto, notwithstanding she received from the testator in his lifetime a sum of money, and executed a receipt therefor, which stated that it was received as her part of the testator's estate "up to this time, and all such property as he may accumulate up to his decease."<sup>1</sup>

§ 3295. **Revocation by Codicil—Revocation of Codicil.** — A codicil which makes a different disposition of property from the will, though it is invalid from some defect *dehors* the instrument, is yet effectual to revoke the will, though it contains no express clause of revocation;<sup>2</sup> though a codicil which gives to a residuary legatee a certain sum of money will not *per se* revoke the residuary bequest to such legatee.<sup>3</sup> In some of the states all codicils to the will are, under the statute, revoked by the revocation of the will.<sup>4</sup>

**ILLUSTRATIONS.** — A testator, resident in Massachusetts, devised property, the income to be paid to S. for life, the principal to descend to his heirs. He also created a fund, the income of one half to S. for life, the principal to descend to his heirs, the other half to be paid in money to S. By a codicil, he revoked that part of his will by which any of his estate was bequeathed to S., and gave him only the income thereof, so no more than the income should come to S., the principal, on the death of S., to descend to the legal heirs. *Held*, that the codicil revoked the absolute gift of money to S., and placed it on the same footing as the other bequests for his benefit, both as regards S. and his heirs: *Homer v. Brown*, 16 How. 354.

§ 3296. **Republication of Wills—Reviving Former Will.** — A will cannot be revived after revocation, except

<sup>1</sup> *Burnham v. Comfort*, 108 N. Y. 535; 2 Am. St. Rep. 462.

<sup>2</sup> *Stultz v. Kiser*, 2 Ired. Eq. 538.

<sup>3</sup> *Read v. Manning*, 30 Miss. 308. See *Law*, sec. 2677, supplement, sec. 2677.

*Snowhill v. Snowhill*, 23 N. J. L. 447.

by re-execution or by a codicil, and the revocation of a will revoking a former will does not revive the former;<sup>1</sup> but a former will revoked by a subsequent one may, upon revocation of the latter, be revived by republication, under the statutes of some of the states;<sup>2</sup> a re-execution of a will and codicils has no other effect than a republication, and cannot annul the prior executions of the instruments, or alter or vary their effect any further than as a republication.<sup>3</sup> A codicil operates as a republication when referring to a previous will.<sup>4</sup> But a will once revoked by a written declaration cannot be republished by parol;<sup>5</sup> though it is held that the republication of a will of personalty may be proved by parol.<sup>6</sup>

<sup>1</sup> *Harwell v. Lively*, 30 Ga. 315; 2678; *Deering's Cal. Civ. Code*, sec. 76 Am. Dec. 649; *Pickens v. Davis*, 134 Mass. 252; 45 Am. Rep. 322.

<sup>2</sup> *Stimson's American Statute Law*, sec. 2679.

<sup>3</sup> *Langdon v. Astor*, 16 N. Y. 9. See *Stimson's American Statute Law*, sec. 2678.

<sup>4</sup> *Miles v. Boyden*, 3 Pick. 213; *Stimson's American Statute Law*, sec.

1287.

<sup>5</sup> *Witter v. Mott*, 2 Conn. 67. See *Jackson v. Potter*, 9 Johns. 312.

<sup>6</sup> *Cogdell v. Cogdell*, 3 Desana. Eq. 346. See *Boudinot v. Bradford*, 2 Dall. 266. As to revival of one will by revocation of another, examine the notes to *Pickens v. Davis*, 45 Am. Rep. 327, and to *Harwell v. Lively*, 76 Am. Dec. 652.

**TITLE XXXVI.**  
**REMEDIES AND PROCEDURE.**



# TITLE XXXVI.

## REMEDIES AND PROCEDURE.

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### PART I. — ARBITRATION AND AWARD.

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#### CHAPTER CLXI.

##### THE SUBMISSION.

- § 3297. Arbitration and submission defined — Common-law and statutory submission.
- § 3298. References.
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- § 3310. Submission need not be in technical form — Agreement to be bound by award unnecessary.
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- § 3316. Clerical errors in submission.
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- § 3320. General submission — What it includes.
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- § 3325. Agreements to arbitrate not specifically enforced—Damages.
- § 3326. Agreements to refer disputes do not prevent action.
- § 3327. Except where reference is made condition precedent to suit.

**§ 3297. Arbitration and Submission Defined—Common-law and Statutory Submissions.**—An arbitration is the submission by parties of matters in controversy between them to the judgment of a third person or persons, who are substituted in the place of the courts of law or equity.<sup>1</sup> That act by which parties refer any matters in dispute between them to the decision of a third person is called a submission; the person to whom the reference is made is called an arbitrator; the decision of the arbitrator is called the award.<sup>2</sup> A submission at common law is dependent entirely upon the agreement of the parties; and an award, being made under it, is merely a debt in favor of the party, upon which he must bring his action.<sup>3</sup> By statutes, however, parties may refer their disputes to arbitrators on pursuing certain forms, and their award is accepted as the judgment of a court. Such submissions are called statutory submissions. An award having been declared void, the agreement of submission is no longer a binding obligation.<sup>4</sup>

<sup>1</sup> Note to *Elemendorf v. Harris*, 5 Wend. 522; *Van Cortland v. Underhill*, 17 Johns. 405; 2 Johns. Ch. 339; *Percival v. Herbecourt*, 1 McMull. 59; *Dickenson v. R. R. Co.*, 7 W. Va. 390.

<sup>2</sup> See Senator Seward in *Garr v. Gomez*, 9 Wend. 661. An arbitration is not a suit in court within a statute: *Crook v. Chambers*, 40 Ala. 239. A bond to secure the performance of an award referring to, but not containing, an agreement to submit will not take the place of the required written submission: *Boots v. Canine*, 94 Ind. 408. A verbal agreement that the respective counsel of the parties should settle the differences between the parties does not constitute the counsels' decision an award, there being no definite submission: *Weichardt v. Hook*, 83 Pa. St. 434.

<sup>3</sup> See *Henderson v. Benton*, 52 Tex. 29. But the parties may stipulate that judgment may be entered in conformity with the award: *Bank v. Widner*, 11 Paige, 529; 43 Am. Dec. 768. Where, after evidence had been finished before a jury, it was agreed that the court should take the evidence, and after hearing counsel, "shall determine all questions of law and fact, the verdict shall then be entered as the verdict of the jury now impaneled, and the court to file an opinion and the evidence in the case," and the court filed an opinion finding the facts, and a sum to be paid by the defendant," it was held that the reference of the facts and the law was to the judge as an arbitrator: *Gwynn v. O'Hern*, 72 Pa. St. 29.

<sup>4</sup> *Calvert v. Carter*, 18 Md. 73.

§ 3298. **References.**—So a court, the parties consenting, may refer a case pending before it to arbitrators. Such a power “is incident to all judicial administration, where the right exists to ascertain the facts as well as to pronounce the law.”<sup>1</sup> By statute in many states, such a power is given to the courts, even against the consent of the parties.<sup>2</sup> Such arbitrations are usually termed references. If, during a trial, a reference appears to be necessary, the court may order it.<sup>3</sup> Where a court, having power to order a reference, has ordered it, it is presumed that the circumstances justifying the order existed, although no written consent appears on the face of the order.<sup>4</sup> If supported by substantial evidence, the finding of a referee is conclusive.<sup>5</sup> Under a rule that the case “be referred to the determination” of the referee, and that his report “should be final and conclusive between the parties,” the referee has power to decide questions of law as well as those of fact, and his decision thereon is conclusive.<sup>6</sup> But a reference to a master “to hear the evidence, find the facts, and report the same together with the evidence,” does not include conclusions of law.<sup>7</sup>

§ 3299. **Making Submission a Rule of Court, and Entering Judgment on Award.**—By statutes, both in this country (in some of the states) and in England, a submission may be made a rule of court, and judgment be entered on the award under it.<sup>8</sup> The submission may be made a rule of court, even after the award is made.<sup>9</sup>

<sup>1</sup> *Newcomb v. Wood*, 97 U. S. 581.

<sup>2</sup> *Morey v. Warrior Mower Co.*, 90 Ill. 307; *Blair Town Lot Co. v. Walker*, 50 Iowa, 376; *Monitor Iron Works v. Ketcham*, 47 Wis. 177; *Tribou v. Strowbridge*, 7 Or. 156. An account containing over a hundred items is a “long account,” justifying a compulsory reference by the court: *Crocker v. Currier*, 65 Wis. 682.

<sup>3</sup> *Central Trust Co. v. R. R. Co.*, 18

Abb. N. C. 64, 381; *Kelly v. Charlier*, 18 Abb. N. C. 416.

<sup>4</sup> *Cartee v. Spence*, 24 S. C. 550.

<sup>5</sup> *Hoyt v. Clark*, 8 Mo. App. 566.

<sup>6</sup> *Morse v. Beers*, 51 Vt. 359.

<sup>7</sup> *McNaught v. McAllister*, 93 Ind. 114.

<sup>8</sup> *Morse on Arbitration and Award*,

80. See *post*, § 3401.

<sup>9</sup> *McClure v. Gulick*, 17 N. J. L. 340; *Hazen v. Addis*, 14 N. J. L. 333; *Bemis v. Quiggle*, 7 Watts, 362.

But in the absence of such a statute a judgment will not be entered on an award made under submission *in pais*.<sup>1</sup> The rule as to statutory awards is that objections must be presented in answer to the application for confirmation; if not raised then, they will not be entertained afterwards.<sup>2</sup>

§ 3300. **Parties to Submission must be Capable of Contracting.**—The parties to a submission must have a legal capacity to contract, and to carry out the award when made.<sup>3</sup> But where there is a capacity to contract, with a liability to pay, there is generally a power to arbitrate. And the fact that one of the parties is a corporation makes no difference.<sup>4</sup> An award against two persons is not void as to both because one of them did not agree to submit the matter in dispute to arbitration. The award is good as to the one assenting.<sup>5</sup>

§ 3301. **Who may Submit to Arbitration.**—The powers of agents and attorneys to bind their principals by a submission to arbitration have been already discussed.<sup>6</sup> Assignees in bankruptcy<sup>7</sup> may submit claims to arbitration. So may a corporation, either public or private;<sup>8</sup> or an executor or administrator as to demands by or against the estate;<sup>9</sup>

<sup>1</sup> Shearer v. Moers, 19 Pick. 308; Simpson v. McBee, 3 Dev. 531. See Cushing v. Babcock, 38 Me. 452.

<sup>2</sup> Shroyer v. Bash, 57 Ind. 349; Gaines v. Clark, 23 Minn. 64.

<sup>3</sup> Bean v. Farnam, 6 Pick. 272; Brady v. Mayor, 1 Barb. 584; Wyatt v. Benson, 23 Barb. 327.

<sup>4</sup> Brady v. Mayor etc., 1 Barb. 584. <sup>5</sup> Mathews v. Mathews, 1 Heisk. 669. But see Yeamans v. Yeamans, 99 Mass. 585.

<sup>6</sup> See Title Principal and Agent.

<sup>7</sup> Morse on Arbitration and Award, 30.

<sup>8</sup> Brady v. Mayor, 1 Barb. 584; Alexandria Canal Co. v. Swann, 5 How. 83; Madison Ins. Co. v. Griffin, 3 Ind. 277; Proprietors v. Frye, 5 Greenl. 38; Wood v. R. R. Co., 8 N. Y. 160;

Isaacs v. Beth Hamedash Soc., 1 Hilt. 469; Tuscaloosa Bridge v. Jemison, 33 Ala. 476; City of Shawneetown v. Baker, 85 Ill. 563; Kane v. Fond du Lac, 40 Wis. 495; Remington v. Harrison Co. Ct., 12 Bush, 148; Memphis etc. R. R. Co. v. Scruggs, 50 Miss. 284.

<sup>9</sup> Kendall v. Bates, 35 Me. 357; Russell v. Lane, 1 Barb. 519; Alling v. Munson, 2 Conn. 691; Jones v. Deyer, 16 Ala. 221; Merchants' Bank v. Rawls, 21 Ga. 334; Overly v. Overly, 1 Met. (Ky.) 117; Yarborough v. Leggatt, 14 Tex. 677; Logsdon v. Roberts, 3 Mon. 257; Wheatly v. Martin, 6 Leigh, 62; Coffin v. Cottle, 4 Pick. 454; Bean v. Farnam, 6 Pick. 269; Chadbourn v. Chadbourn, 9 Allen, 173; Swicard v. Wilson, 2 Const. Rep. 218; Bennett v. Pierce, 28 Conn. 315; Boynton v.

or trustees;<sup>1</sup> or selectmen of a town or county;<sup>2</sup> so may the guardian of an infant,<sup>3</sup> or of a lunatic.<sup>4</sup> The submission of an infant is voidable; if to his interest, it will be sustained; otherwise, not.<sup>5</sup> "The wife may bind herself by her own sole submission in respect of any property in regard to which she has the absolute power of disposal and conveyance by her own independent and individual action; but she may not bind herself otherwise than in respect of such property. The husband may bind the wife to any undertaking, provided that he has the power to carry out the possible terms of the award without her joinder or acquiescence; or provided that the law would enforce such joinder or acquiescence, if it were legally in-

Boynton, 10 Vt. 117; Konigmacker v. Kimmel, 1 Penr. & W. 207; 21 Am. Dec. 375; Bailey v. Dillworth, 10 Smedes & M. 404; 48 Am. Dec. 760; Strodes v. Patton, 1 Brock. 228. *Contra*, Clark v. Hogle, 52 Ill. 427.

<sup>1</sup> Brower v. Osterhout, 7 Watts & S. 344; Isaacs v. Beth Hamedash Society, 1 Hilt. 469.

<sup>2</sup> Boston v. Brazer, 11 Mass. 447; Dix v. Dummerston, 19 Vt. 262; Campbell v. Upton, 113 Mass. 67; Buckland v. Conway, 16 Mass. 396; Hine v. Stephens, 33 Conn. 504; 89 Am. Dec. 217. See Griswold v. North Stonington, 5 Conn. 367; Hollister v. Pawlet, 43 Vt. 425.

<sup>3</sup> Bean v. Farnam, 6 Pick. 269; Weed v. Ellis, 3 Caines, 253; Coleman v. Turner, 14 Smedes & M. 118; Weston v. Stuart, 11 Me. 326; Strong v. Beronjon, 18 Ala. 168; Fort v. Battle, 13 Smedes & M. 133; Beebe v. Traforb, Kirby, 215; Hannum v. Wallace, 9 Humph. 129; Smith v. Kirkpatrick, 58 Ind. 254; McComb v. Turner, 14 Smedes & M. 119.

<sup>4</sup> Weston v. Stuart, 11 Me. 326; Hutchins v. Johnson, 12 Conn. 376; 30 Am. Dec. 622; the court saying: "Can a conservator submit to arbitration questions relative to the estate of the award? It has been settled by this court that an administrator may submit claims in behalf of the estate to arbitration: 1 Swift's Digest, 365; Alling v. Munson, 2 Conn. 691, 696; Bean v. Farnam, 6 Pick. 269, 271.

It is true that an administrator has a legal interest in the goods and chattels of the deceased. A guardian, too, may submit for his ward, and bind himself that the award shall be performed: Roberts v. Newbold, Comb. 318. It may be said that a guardian has also a vested interest in his ward's property. This is true of a guardian in socage and a testamentary guardian under the statute of Charles II. But it is only such an interest as is necessary for the performance of the trust, but not for himself: 14 Vin. Abr. 182; Bedell v. Constable, Vaughan, 181-183; People v. Byron, 3 Johns. Cas. 56. And a guardian in socage is said to differ only in name from a bailiff: Shopland v. Ryoler, Cro. Jac. 99. And in the case of Weed v. Ellis, 3 Caines, 253, it was held that a guardian could submit a claim arising from an assault and false imprisonment upon the infant, where no interest whatever had vested in him; and Livingston, J., says: 'It is difficult to conceive how it could ever have once been doubted whether guardians had this power. For the very reason that an infant should not bind himself in this way, a power should be lodged elsewhere; and where can it be so properly intrusted as to the very person who has the care of all his property?'

<sup>5</sup> Baker v. Lovett, 6 Mass. 78; 4 Am. Dec. 88; Britton v. Williams, 6 Munf. 453; See Handy v. Cobb, 44 Miss. 699.

dispensable to the due performance of the award.'" In an action upon an award, where the submission was entered into by husbands in right of their wives, and no objection was made to it below on this ground, and it did not appear affirmatively, when the rights of the wives accrued, what interest the husbands had, or whether the wives were living, the court refused to declare the submission void.<sup>2</sup>

§ 3302. **Who may not Submit.**—Bankrupts may not submit claims to arbitration;<sup>3</sup> nor a guardian *ad litem*;<sup>4</sup> nor a joint owner so as to bind the other;<sup>5</sup> nor officers of the government;<sup>6</sup> nor overseers of the poor.<sup>7</sup> One partner cannot bind his copartners by a submission of a firm matter to arbitration,<sup>8</sup> unless, as is held in some cases, the submission is by parol, and not by deed,<sup>9</sup> or unless there is some evidence of his copartners having authorized it.<sup>10</sup> Where the statute allows an action to be brought for a penalty created by it, by any person who may sue for it, no person has such an interest in it as can be the subject of arbitration, until an action has been brought.<sup>11</sup>

<sup>1</sup> Morse on Arbitration and Award, 26; Palmer v. Davis, 28 N. Y. 242; Weston v. Stuart, 11 Me. 326; McComb v. Turner, 14 Smedes & M. 119. See Handy v. Cobb, 44 Miss. 699.

<sup>2</sup> McComb v. Turner, 22 Miss. 119.

<sup>3</sup> Morse on Arbitration and Award, 30.

<sup>4</sup> Fort v. Battle, 13 Smedes & M. 133; Hannum v. Wallace, 9 Humph. 129.

<sup>5</sup> Eastman v. Burleigh, 2 N. H. 485; Smith v. Smith, 4 Rand. 95; Boyd v. Magruder, 2 Rob. (Va.) 761.

<sup>6</sup> United States v. Ames, 1 Wood. & M. 76.

<sup>7</sup> As to the claim of a pauper: Furbish v. Hall, 8 Me. 315.

<sup>8</sup> Story on Partnership, secs. 114-116; Buchanan v. Curry, 19 Johns. 137; 10 Am. Dec. 200; McBride v. Hagan, 1 Wend. 326; Jones v. Bailey, 5 Cal. 345; Eastman v. Burleigh, 2 N. H. 484; Southard v. Steele, 3 T. B. Mon. 435; Backus v. Coyne, 22 Mich. 5.

<sup>9</sup> Taylor v. Coryell, 12 Serg. & R. 243; Buchanan v. Curry, 19 Johns. 137; 10 Am. Dec. 200; Wilcox v. Singletary, Wright, 420; Hallack v. March, 25 Ill. 48; Southard v. Steele, 3 T. B. Mon. 435. The weight of modern authority, however, is to the effect that one partner cannot bind the firm, though he binds himself, by a reference to arbitration, unless specially authorized, whether it is done by deed or not: Jones v. Bailey, 5 Cal. 345; Abbott v. Dexter, 6 Cush. 108; Horton v. Wilde, 8 Gray, 425; Onion v. Robinson, 15 Vt. 510; Martin v. Thrasher, 40 Vt. 460; Karthairs v. Ferrer, 1 Pet. 222; Backus v. Coyne, 35 Mich. 5; Harrington v. Higham, 13 Barb. 660.

<sup>10</sup> Mackay v. Bloodgood, 9 Johns. 285; Martin v. Thrasher, 40 Vt. 460; Eastman v. Burleigh, 2 N. H. 485. See Harrington v. Higham, 15 Barb. 524.

<sup>11</sup> Middleton v. R. R. Co., 95 N. C. 167.

§ 3303. **To Warrant Submission, a "Controversy" Sufficient.**—In order to warrant a submission, it is not necessary that any suit should be pending between the parties,<sup>1</sup> or that a cause of action exists.<sup>2</sup> It is enough that there is or may be a controversy between the parties concerning a matter in which they are interested;<sup>3</sup> but it is essential that there should be a matter in doubt.<sup>4</sup> An award will be set aside, where there is no evidence whatever tending to show that the parties to it had any previous dispute.<sup>5</sup> Thus a reference to an accountant to find a sum due by simply adding up the figures in books of account is not a submission;<sup>6</sup> nor an agreement that the rent to be paid for land, or the price to be paid for goods, or the value of certain services, shall be determined by three disinterested persons.<sup>7</sup> It is held in a number

<sup>1</sup> *Titus v. Scantling*, 4 Blackf. 89.

<sup>2</sup> *Mayo v. Gardner*, 4 Jones, 359; *Findly v. Ray*, 5 Jones, 125; *O'Keson v. Barclay*, 2 Penn. & W. 531.

<sup>3</sup> *Brown v. Wheeler*, 17 Conn. 345; 44 Am. Dec. 550; *Lanman v. Young*, 31 Pa. St. 306; *Findly v. Ray*, 5 Jones, 125; *Robbins v. Clark*, 129 Mass. 145. In *Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550, the court say: "We do not understand that there must be a lawsuit, or even a quarrel, to make valid a submission and award. Two persons not agreeing about the location of a boundary, or a division of a common interest, may as well refer these questions to mutual friends, as if an action of trespass had been commenced, or an assault and battery had occurred in consequence of the dispute. A submission to arbitration is for the purpose of an amicable and easy settlement of a doubtful concern; and it is wholly immaterial whether there be any actual controversy or not."

<sup>4</sup> *Garr v. Gomez*, 9 Wend. 660. In *Thayer v. Bacon*, 3 Allen, 163, 80 Am. Dec. 59, the court say: "It is well settled by a series of decisions in this commonwealth that an award of arbitrators under a submission by which they are authorized to fix and establish the boundary line between the estates of adjacent proprietors is conclusive upon the parties, and that they

are estopped to dispute the boundary thus ascertained and settled: *Searle v. Abbe*, 13 Gray, 409, and cases there cited. And if the instrument upon which the defendant relies is to be construed as an agreement to submit to arbitration the line between him and the plaintiff, the ruling of the court at the trial was wrong, and a new trial must be granted. But we cannot so construe it. The signers of the paper say that they are desirous of having their respective lines run so that each of them may know their boundary; and they severally agree to employ Mr. Wadsworth to run said lines and put up stakes or marks to designate each lot, and agree to pay their proportion of the expense. We seek in vain for the usual and apt words to constitute a submission to arbitration. It does not appear that there was any controversy between the owners, anything requiring a notice or hearing, or decision of conflicting claims. So far as the paper shows, the service expected of Mr. Wadsworth was simply ministerial."

<sup>5</sup> *Cothran v. Knox*, 13 S. C. 496; *Curry v. Lackey*, 35 Mo. 389.

<sup>6</sup> *Kelly v. Crawford*, 5 Wall. 785.

<sup>7</sup> *Store v. Hessler*, 120 Ill. 433; 60 Am. Rep. 563; *Willingham v. Veal*, 74 Ga. 755; *Atkinson v. Dailey*, 107 Ind. 117; *Sutro Tunnel Co. v. Belcher Mining Co.*, 19 Nev. 121.

of cases that a mere measurer of work is not an arbitrator;<sup>1</sup> or one who merely calculates a matter of interest due.<sup>2</sup> And in England, and in some cases in this country, an agreement which leaves the value of an article or of labor to be fixed by the opinion of a third person is held not a submission to arbitration.<sup>3</sup> But the weight of authority in our courts is to the effect that an appraiser is an arbitrator.<sup>4</sup> "Though," says Bell, J., in a New Hampshire case,<sup>5</sup> where this view of the case is well stated, — "though there are cases where it has been held that a reference to a third person to measure materials or work, to judge of their quality, to fix a price, or to make an appraisal, or the like, is not a submission to arbitration, yet it seems to us that every agreement of parties by which they bind themselves to abide by the decision of an indifferent third person as to any matter affecting their rights is a submission to arbitration, and the decision of such party upon the matter thus referred to him is an award. We do not perceive that any difference in the nature or importance of the question submitted, or of the evidence upon which it must be decided, or in the means to be used to arrive at a correct result, can affect in this respect the nature of the proceeding. If the parties have a difference or dispute, however trivial, or upon a matter however simple, and in whatever mode the truth is to be ascertained, and they select an indifferent third person to be the judge between them, and bind themselves to abide his decision, that seems to us a submission to arbitration, and the decision to be an award."

<sup>1</sup> *Hale v. Handy*, 26 N. H. 206; *Condon v. R. R. Co.*, 14 Gratt. 302; *Baltimore etc. R. R. Co. v. Parley*, 14 Gratt. 447; *McKinney v. Page*, 32 Me. 513. But see *McAvoy v. Long*, 13 Ill. 147.

<sup>2</sup> *Grimes v. Blake*, 16 Ind. 160.

<sup>3</sup> *Leeds v. Burrows*, 12 East, 1; *Lee v. Hemingway*, 3 Nev. & M. 860; *Jenkins v. Betham*, 24 L. J. Com. P. 94; *Collins v. Collins*, 26 Beav. 306; *Garred*

*v. Macey*, 10 Mo. 161; *Curry v. Lackey*, 35 Mo. 389.

<sup>4</sup> *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339; 17 Johns. 405; *Efner v. Shaw*, 2 Wend. 567; *Lauman v. Young*, 31 Pa. St. 306; *Oakes v. Moore*, 24 Me. 214; 41 Am. Dec. 379; *Leonard v. House*, 15 Ga. 473. And see *Jebb v. McKiernan*, *Moody & M.* 340.

<sup>5</sup> *Smith v. R. R. Co.*, 36 N. H. 458.

§ 3304. **Matters Which may be Submitted.**—But subject to the qualifications in the last section, almost any matter in dispute may be submitted to arbitration;<sup>1</sup> as, for example, boundary lines,<sup>2</sup> dower claims,<sup>3</sup> ejectment suits,<sup>4</sup> the amount of compensation to be paid for land taken for a railroad right of way,<sup>5</sup> questions of law,<sup>6</sup> single items of a long account.<sup>7</sup>

§ 3305. **Disputes concerning Real Estate.**—Disputes concerning real estate were at one time, in England, not permitted to be referred to arbitrators, but this exception is not now known. "The law is well settled that where the parties might by their own act transfer real property, or exercise any act of ownership with respect to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement."<sup>8</sup> A general submission will include questions relating to realty as well as to personalty.<sup>9</sup>

<sup>1</sup> Jones v. Burns, 27 Miss. 373; Davenport v. Fulkerson, 70 Mo. 417.

<sup>2</sup> Jones v. Boston Mill Corp., 6 Pick. 148; Page v. Foster, 7 N. H. 392.

<sup>3</sup> Cox v. Jagger, 2 Cow. 638; 14 Am. Dec. 522.

<sup>4</sup> McCracken v. Clarke, 31 Pa. St. 498.

<sup>5</sup> Knoche v. R. R. Co., 34 Fed. Rep. 471.

<sup>6</sup> Morse on Arbitration and Award, 54; Johnson v. Noble, 13 N. H. 286; 38 Am. Dec. 485.

<sup>7</sup> McBride v. Hagan, 1 Wend. 326.

<sup>8</sup> Cox v. Jagger, 2 Cow. 649; 14 Am. Dec. 523; Blair v. Wallace, 21 Cal. 313; Penniman v. Rodman, 13 Met. 382. In Olcott v. Wood, 14 N. Y. 38, the court, in construing the New York statute (2 Rev. Stats., p. 541, sec. 2) declaring that no submission to arbitration shall be lawful "respecting the claim of any person to any estate in fee or for life in real estate," said: "Prior to the Revised Statutes, such claims as existed between these parties might have been submitted and determined by arbitration: Watson on Arbitration and Award, 62, 63; 3 Rev. Stats., 774, note to sec. 2; but in

regard to title to the freehold or inheritance, at an early period it was held that it could not be determined by arbitrament. That rule was deprived of its efficacy by its being decided that though the award would not pass the title, yet it would estop the parties: Doe v. Rosser, 3 East, 15; Sellick v. Addams, 15 Johns. 197. The object of the statute seems to have been to restore the old rule of the common law, and perhaps to carry out its principle further than the old rule had gone, and at the same time to prevent effectually its evasion. Its policy was to remove from the usually unlearned forum of arbitrators questions of title to estates in land in fee or for life, which, perhaps more than any other class of questions, depended upon principles of technical learning. These considerations would apply with much less force to controversies in respect to equitable rights to have legal titles, which ordinarily would depend upon broader principles of justice."

<sup>9</sup> Munro v. Allaire, 2 Caines, 320; Sellick v. Adams, 15 Johns. 197; Byers v. Van Dusen, 5 Wend. 268; Penniman v. Rodman, 13 Met. 382.

§ 3306. **Matters Which may not be Submitted.**— But parties cannot submit to arbitration the question of the liability of a person to a criminal prosecution;<sup>1</sup> or matters of an illegal nature;<sup>2</sup> or a claim which is absolutely forbidden by statute.<sup>3</sup>

§ 3307. **Informal Statutory Submission— Good as a Common-law Submission.**— It is generally held that the common-law arbitration is not superseded by the statutory one, and that a submission valid at common law will be sufficient to support an award, though it do not conform to the statute.<sup>4</sup> Where a statutory reference is not properly entered into, the statutory requirements not being followed, it may be treated as a common-law submission.<sup>5</sup>

<sup>1</sup> *Harrington v. Brown*, 9 Allen, 579. But see *Noble v. Peebles*, 13 Serg. & R. 319.

<sup>2</sup> *Morse on Arbitration and Award*, 53. See *Wyatt v. Benson*, 23 Barb. 327; 4 Abb. Pr. 182.

<sup>3</sup> *Hall v. Kimmer*, 61 Mich. 269; 1 Am. St. Rep. 575.

<sup>4</sup> *Wells v. Lain*, 15 Wend. 99; *Burnside v. Whitney*, 21 N. Y. 148; *Diedrick v. Richley*, 2 Hill, 271; *Howard v. Sexton*, 4 N. Y. 157; *Lamar v. Nicholson*, 7 Port. 158; *Dickerson v. Truer*, 4 Blackf. 253; *Titus v. Scantling*, 4 Blackf. 89; *Logsdon v. Robert*, 3 T. B. Mon. 256; *Evans v. McKinney*, Litt. Sel. Cas. 264; *Richardson v. Cassidy*, 3 Watts, 320; *Overly v. Overly*, 1 Met. (Ky.) 117; *Byrd v. Odem*, 9 Ala. 755; *Conger v. Dean*, 3 Iowa, 463; 66 Am. Dec. 93; *Fink v. Fink*, 8 Iowa, 313; *Brown v. Kincaid*, Wright, 37; *Carson v. Earlywine*, 14 Ind. 256; *Miller v. Goodwin*, 29 Ind. 46; *Shackelford v. Purket*, 2 A. K. Marsh. 435; 12 Am. Dec. 422; *Eisenmeyer v. Santer*, 77 Ill. 515; *Thomasson v. Risk*, 11 Bush, 619; *Smith v. Kirkpatrick*, 58 Ind. 254; *Galloway v. Gibson*, 51 Mich. 135. *Contra*, *Bulson v. Lohnes*, 29 N. Y. 291.

<sup>5</sup> *Dodge v. Waterbury*, 8 Cow. 136; *Diedrick v. Richley*, 2 Hill, 271; *Akely v. Akely*, 17 How. Pr. 21; *Pleasants v. Ross*, 1 Wash. 156; *Moore v. Barnett*, 17 Ind. 349; *Collins v. Karatopsky*, 36 Ark. 316. In *Conger v. Dean*, 3 Iowa,

463, 66 Am. Dec. 93, the court say: "The rejection [of the award below] was based upon the fact that the submission was not made in the manner required by the code; and thus the question arises, whether a submission and award will be good as between the parties, though they may not have pursued the course pointed out by the code on that subject. And briefly, we understand that if parties wish to ask the aid of the court for judgment upon an award, they must submit in the manner required by our law. But if they do not, a submission without complying with the regulations of the code may be made, by which the parties will be bound. By the common law of the land, parties may by parol submit any matters in controversy between them to arbitration; and this right has not been taken away by the provisions of the code governing those awards which are designed to be reported to the court for judgment and execution. There is nothing in chapter 119 taking away this right, either in express words or by implication. This chapter is similar in its terms to that found in many of the states, and we understand it to have been frequently, if not uniformly, held under such statutes that parties were not necessarily confined to such provisions in submitting matters in controversy to arbitrators, but that they may adopt other methods which will be equally obligatory to

So parties who do not choose to resort to the method and observe the formalities directed by the statute may nevertheless enter into an arbitration as at common law; and if the submission and proceedings conform to the requisites of the common law, the award will have the effect of a common-law award.<sup>1</sup>

**§ 3308. Statutory Requirements must be Followed.—**

Where the benefits of the statutory arbitration are sought, and the parties seek to enter into a submission under the statute, it is requisite that the statutory requirements shall be substantially followed.<sup>2</sup> Hence, if the submission is defective as a statutory submission, some courts

them. When submitted by parol, or in a manner different from that required by the code, it may be regarded as the means mutually adopted by the parties for an amicable settlement of their difficulties, by the aid and assistance of their neighbors and friends; and as such, should have the force and effect of a settlement made by the parties themselves. If there is a failure to comply with the agreement to submit, or with the terms of the award when rendered, the remedy would be by action either on the agreement or award, and such award could not, of course, like one under the code, be returned to court for judgment and execution. It may, however, be set up as a defense to an action brought or prosecuted for the subject-matter therein settled. In *King v. Hampton*, 4 G. Greene, 401, it appears that to an action to recover damages for the fraudulent sale of lands defendant pleaded in bar an arbitration and award. This was demurred to, for the reason that the arbitration was not conducted in strict conformity to the code; that the award, by the terms of the submission, was to be returned to a justice of the peace instead of the district court. The court, after disposing of other questions, add that they have no doubt but that the award was good, and could be enforced at common law, clearly indicating from the whole opinion that an award would be good as to the parties,

though not rendered in the manner required by the code. And to the same effect, see *Carpenter v. Edwards*, 10 Met. 200; *Wells v. Lain*, 15 Wend. 99; *Ressequie v. Brownson*, 4 Barb. 541; *McMullen v. Mayo*, 8 Smedes & M. 298; *Norton v. Savage*, 10 Me. 457; *Keep v. Goodrich*, 12 Johns. 397."

<sup>1</sup> *Martin v. Chapman*, 1 Ala. 278; *Byrd v. Odem*, 9 Ala. 755; *Titus v. Scantling*, 4 Blackf. 89; *Coffin v. Woody*, 5 Blackf. 423; *Carson v. Earlywine*, 14 Ind. 256; *Miller v. Goodwine*, 29 Ind. 46; *Conger v. Dean*, 3 Iowa, 463; 66 Am. Dec. 93; *Overly v. Overly*, 1 Met. (Ky.) 117; *Brown v. Kincaid*, *Wright*, 37; *Winne v. Elderskin*, 1 Chand. 219; 52 Am. Dec. 159; *Allen v. Chase*, 3 Wis. 249; *Pierce v. Kirby*, 21 Wis. 124; *Howard v. Sexton*, 4 N. Y. 157; 1 Denio, 440; *Miller v. Vaughan*, 1 Johns. 315; *Stevenson v. Beecker*, 1 Johns. 492; *Cranston v. Kenny*, 9 Johns. 212; *Peachy v. Ritchie*, 4 Cal. 205; *Meyers v. Easterwood*, 60 Tex. 107.

<sup>2</sup> *Abbott v. Dexter*, 6 Cush. 108; *Halloran v. Bray*, 29 Ga. 422; *Barnett v. Peck*, 6 Vt. 456; *Willingham v. Harrell*, 36 Ala. 583; *Monosiet v. Post*, 4 Mass. 532; *Bullard v. Coolidge*, 3 Mass. 324; *Smith v. Polack*, 2 Cal. 92; *Love v. Burns*, 35 Iowa, 153; *Moody v. Nelson*, 60 Ill. 229; *Price v. Byne*, 57 Ga. 176; *Burnett v. Gould*, 27 Hun, 366; *Forman Lumber Co. v. Ragsdale*, 12 Ill. App. 441; *Martine v. Harvey*, 12 Ill. App. 587.

have refused to uphold it as a common-law one.<sup>1</sup> Where a statute requires a submission to be in writing, an award made by an arbitrator appointed by a parol agreement subsequent to the written submission will not be valid.<sup>2</sup> A statute requiring a submission to be signed and acknowledged before a justice of the peace by both parties, the submission is not good if only one of two partners who sign it acknowledge it.<sup>3</sup> Where the statute requires the submission to be acknowledged, an unacknowledged submission is void.<sup>4</sup> So, also, where by statute a seal is required;<sup>5</sup> or where more than one arbitrator must be appointed.<sup>6</sup>

§ 3309. **Substantial Compliance Sufficient.**— But on the other hand, a substantial compliance is enough, and other courts have been liberal in accepting as good the efforts of the parties to follow the statute.<sup>7</sup> In spite of formal defects, the courts seek to uphold a submission according to the obvious intention of the parties.<sup>8</sup> So it has been held that the parties may by mutual consent waive a statutory provision;<sup>9</sup> as, for example, the oath of the arbitrators.<sup>10</sup> And the presumption is in favor of the regularity of a submission.<sup>11</sup> A submission required by statute to be signed by the parties is good if signed by one of a firm for the other.<sup>12</sup>

<sup>1</sup> *Deerfield v. Armes*, 20 Pick. 480; 32 Am. Dec. 228; *Allen v. Chase*, 3 Wis. 249; *Williams v. Walton*, 9 Cal. 142; *Franklin Mining Co. v. Pratt*, 101 Mass. 359. And though the parties may elect between a submission at common law, and under the statute, and under a rule of court, yet having made their election by beginning under one, they must pursue that one to the end: *Francis v. Ames*, 14 Ind. 251.

<sup>2</sup> *Jones v. Payne*, 41 Ga. 23.

<sup>3</sup> *Abbott v. Dexter*, 6 Cush. 108.

<sup>4</sup> *Fink v. Fink*, 8 Iowa, 313.

<sup>5</sup> *Hamilton v. Hamilton*, 27 Ill. 153.

<sup>6</sup> *Bowes v. French*, 11 Me. 182.

<sup>7</sup> *Humphry v. Strong*, 14 Mass. 262; *Inman v. Wheeler*, 1 Pick. 504; *Buck-*

*man v. Davis*, 28 Pa. St. 211; *McAdam v. Stillwell*, 13 Pa. St. 90; *Harmon v. Jennings*, 22 Me. 240; *Wood v. Holden*, 45 Me. 374; *Barnett v. Peck*, 6 Vt. 456; *Kendall v. Bates*, 35 Me. 357; *Withers v. Haines*, 2 Pa. St. 435; *Forsley v. R. R. Co.*, 16 Tex. 516; *Hays v. Hays*, 23 Wend. 363.

<sup>8</sup> *Large v. Passmore*, 5 Serg. & R. 51; *Harris v. Hayes*, 6 Binn. 422; *Massey v. Thomas*, 6 Binn. 333; *Clement v. Comstock*, 2 Mich. 359; *French v. New*, 20 Barb. 481.

<sup>9</sup> *Day v. Hammond*, 57 N. Y. 479; 15 Am. Rep. 522.

<sup>10</sup> *Howard v. Sexton*, 1 Denio, 440.

<sup>11</sup> *Wright v. Raddin*, 100 Mass. 319.

<sup>12</sup> *Skillings v. Coolidge*, 14 Mass. 43.

**§ 3310. Submission need not be in Technical Form—Agreement to be Bound by Award Unnecessary.**—No technical phrases or set form of words is required to make a binding submission; it is sufficient if it appears that the parties mutually agreed to submit the dispute to the person or persons named.<sup>1</sup> Nor is it necessary that the parties should expressly agree that they will be bound by the decision; this will be implied from the agreement to submit.<sup>2</sup> But the submission should be certain as to the questions to be decided, and the powers of the arbitrators.<sup>3</sup>

**§ 3311. Oral Submission Valid—When Written One Required.**—An oral submission is, as a rule, valid and binding.<sup>4</sup> But there are cases in which a submission is required to be in writing or by deed, as where the statutes

<sup>1</sup> Sharswood, J., in *Wilson v. Getty*, 57 Pa. St. 266; *Kimball v. Walker*, 30 Ill. 482; *Galloway v. Webb*, Hardin, 319. The following have been held sufficiently certain: A submission of all "our accounts and claims in relation to the Mill Rock Mills": *Zook v. Spray*, 38 Iowa, 273. A submission of "our business pertaining to a trade in land": *McKinnis v. Freeman*, 38 Iowa, 364.

<sup>2</sup> *Wilson v. Getty*, 57 Pa. St. 266; *Stewart v. Cass*, 16 Vt. 663; 42 Am. Dec. 534; *McManus v. McCulloch*, 6 Watts, 357; the court saying: "No technical phrases or set form of words are requisite to constitute a submission; it is sufficient if it appears from what has passed between the parties that they mutually agreed to submit the matter in dispute between them to the decision of the person or persons named and mutually agreed on by them for that purpose. And though at one time it would seem that where the award was for any collateral act, and not for the payment of money, as if an express promise to perform it was deemed requisite to enable the party in whose favor the award was given to maintain an action for the non-performance of it, yet it has long since been held and taken that in either case the very act of

submission implies a promise by the party to abide by the determination of the person to whom the matter is referred; and mutual promises, being thus given, form a sufficient consideration in law to render the promise of each to the other that he will abide by and reform the award binding: See *Truman v. Bernard*, 1 Ld. Raym. 248; *Squire v. Grevell*, 2 Ld. Raym. 965; 6 Mod. 35; *Boisloe v. Baily*, 2 Ld. Raym. 1039, 1340; 6 Mod. 221; *Knox v. Simmonds*, 3 Brown Ch. 361; *Kyd on Award*, 8-11."

<sup>3</sup> Though it is said that an uncertain submission may be cured by a certain award: *Woodward v. Atwater*, 3 Iowa, 61. See *post*, § 3318.

<sup>4</sup> *Byrd v. Odem*, 9 Ala. 755; *Titus v. Scantling*, 4 Blackf. 89; *Carson v. Earlywine*, 14 Ind. 256; *Winne v. Elderkin*, 1 Chand. 269; 2 Pinn. 248; 52 Am. Dec. 159; *Wells v. Lain*, 15 Wend. 99; *Bulsom v. Lampman*, 1 Kan. 324; *Shockey v. Glasford*, 6 Dana, 9; *Green v. Ford*, 17 Ark. 568; *McManus v. McCulloch*, 6 Watts, 357; *Haliburton v. Flowers*, 12 Heisk. 25; *Koon v. Hollingsworth*, 97 Ill. 52; *Webb v. Zeller*, 70 Ind. 408; *Dilks v. Hammond*, 86 Ind. 563; *Ehrman v. Stanfield*, 80 Ala. 118; *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834.

prescribe a written submission;<sup>1</sup> or the questions submitted involve the title to or an interest in lands;<sup>2</sup> or a sealed instrument;<sup>3</sup> or a writing be necessary to pass the title to the thing in controversy.<sup>4</sup>

**§ 3312. Where Title to Land not Actually in Dispute, Submission by Parol Good.**—But unless the title to land is actually at issue in the arbitration, the submission need not be by deed, and the courts, in favor of parol submission, have construed such questions strictly.<sup>5</sup> Thus in a large number of cases where the arbitration related to real estate, yet the title was not actually in dispute, parol submissions have been sustained; e. g., where the question was as to the boundaries of land;<sup>6</sup> as to the price of land;<sup>7</sup> as to the price to be paid for a right of way over land;<sup>8</sup> as to the proceeds of the sale of real estate.<sup>9</sup>

**§ 3313. Written Submission will Supersede Previous Oral One.**—A subsequent written submission will supersede a previous oral one.<sup>10</sup> And so a subsequent complete agreement to refer will supersede a previous incomplete memorandum.<sup>11</sup>

**§ 3314. Written Submission not Variable by Parol.**—A written submission cannot be varied or explained by parol evidence.<sup>12</sup>

<sup>1</sup> *Smith v. Pollock*, 2 Cal. 92; *Boots v. Canine*, 58 Ind. 450.

<sup>2</sup> *Philbrick v. Preble*, 18 Me. 255; 36 Am. Dec. 718; *Walters v. Morgan*, 2 Cox, 369; *McMullen v. Mayo*, 8 Smedes & M. 298; *French v. New*, 20 Barb. 481. A parol submission to arbitration of disputes concerning title to land is void by the statute of frauds: *Stark v. Cannady*, 3 Litt. 399; 14 Am. Dec. 76. An award relative to a right to flow land, made in part under a mere oral agreement, is not binding: *Copeland v. Wading River Reservoir Co.*, 105 Mass. 397.

<sup>3</sup> *Logsdon v. Roberts*, 3 T. B. Mon. 255.

<sup>4</sup> *Smith v. Douglass*, 16 Ill. 34; *French v. New*, 20 Barb. 481; *Evans*

*v. McKinney*, Litt. Sel. Cas. 262; *Martin v. Chapman*, 1 Ala. 278.

<sup>5</sup> *French v. Richardson*, 5 Cush. 450; *Carson v. Earlywine*, 14 Ind. 256; *Byrd v. Odem*, 9 Ala. 755.

<sup>6</sup> *Jackson v. Gager*, 5 Cow. 383; *Stewart v. Cass*, 16 Vt. 563; 42 Am. Dec. 534.

<sup>7</sup> *Davy v. Faw*, 7 Cranch, 171.

<sup>8</sup> *Mitchell v. Bush*, 7 Cow. 185.

<sup>9</sup> *Palmer v. Davis*, 28 N. Y. 242.

<sup>10</sup> *Loring v. Alden*, 3 Met. 576; *Symonds v. Mayo*, 10 Cush. 39; *Palmer v. Green*, 6 Conn. 14.

<sup>11</sup> *Billington v. Sprague*, 22 Me. 34.

<sup>12</sup> *Efner v. Shaw*, 2 Wend. 567; *De Long v. Stanton*, 9 Johns. 38; *McNear v. Bailey*, 18 Me. 251.

**§ 3315. Submission may be Extended or Altered by Consent of Both Parties.**—An oral submission may be extended or altered by consent of the parties.<sup>1</sup> And so may a written one.<sup>2</sup>

**§ 3316. Clerical Errors in Submission.**—Clerical errors or omissions in the submission will not be permitted to invalidate it.<sup>3</sup> The same degree of particularity is not demanded in the acknowledgment of the execution of a submission to arbitration as is required in the acknowledgment of deeds.<sup>4</sup>

**§ 3317. Submission Liberally Construed to Include All Disputes.**—In construing the language of a submission, the courts put upon it as liberal an interpretation as is consistent with the apparent intent of the parties to include all controversies between them.<sup>5</sup> "All disputes" will include a claim of damages for an assault and battery.<sup>6</sup> "All matters of controversy," in relation to a livery-stable, include an injunction bond given in a suit in relation thereto.<sup>7</sup> A submission of a pending suit and "all other demands" includes all demands and claims between the parties.<sup>8</sup> A submission to settle "all partnership affairs" includes the question as to what is and is not partnership property.<sup>9</sup> A submission of a "claim" includes both its legality and amount.<sup>10</sup> "Divers other

<sup>1</sup> *Eveleth v. Chase*, 17 Mass. 458.

<sup>2</sup> *Woods v. Page*, 37 Vt. 252; *Blanchard v. Murray*, 15 Vt. 548; *Loring v. Alden*, 3 Met. 575; *Graham v. Graham*, 9 Pa. St. 254; 49 Am. Dec. 557; *Shockey v. Glasford*, 6 Dana, 9; *Bloomer v. Sherman*, 5 Paige, 575.

<sup>3</sup> *Hill v. Taylor*, 15 Wis. 190; *Bacon v. Ward*, 10 Mass. 141.

<sup>4</sup> *McKnight v. McCullough*, 21 Iowa, 111.

<sup>5</sup> *Estep v. Laish*, 21 Ind. 190; *Shockey v. Glasford*, 6 Dana, 9; *Orcutt v. Butler*, 42 Me. 83; *Ross v. Watt*, 16 Ill. 99; *Gerrish v. Ayres*, 3 Scam. 245; *Hopson v. Doolittle*, 13

Conn. 326; *Graham v. Graham*, 9 Pa. St. 254; 49 Am. Dec. 557; *Owen v. Boerum*, 23 Barb. 187; *Berkshire Woolen Co. v. Day*, 12 Cush. 128; *Com. v. Fejepsut Props.*, 7 Mass. 399; *Blair v. Wallace*, 21 Cal. 317; *Adams v. Harrold*, 29 Ind. 198; *Newton v. West*, 3 Met. 24; *Carey v. Wilcox*, 6 N. H. 177; *Higby v. Upton*, 3 Met. (Ky.) 409.

<sup>6</sup> *Noble v. Peebles*, 13 Serg. & R. 319.

<sup>7</sup> *Jesse v. Cater*, 28 Ala. 475.

<sup>8</sup> *Harmon v. Jennings*, 22 Me. 240.

<sup>9</sup> *Masters v. Gardner*, 5 Jones, 298.

<sup>10</sup> *Colcord v. Fletcher*, 50 Me. 398.

matters" extend to real as well as personal disputes, and is a general submission of all controversies between the parties.<sup>1</sup> An award for damages actually sustained is within the terms of a submission to arbitration of the amount of damages to be paid for any injury or loss the plaintiff may sustain.<sup>2</sup> Upon a submission to arbitration of the accounts of a partnership, the arbitrators may award payment by one of the partners of a partnership debt, where the creditor is a party, though in another capacity.<sup>3</sup> Arbitrators have no power under a submission of a matter in dispute between two parties, and of all outstanding accounts between them, to award concerning the costs of a criminal prosecution instituted by one of the parties against the other, though growing out of such disputed matter.<sup>4</sup> A submission reciting that whereas "a controversy is now existing concerning the settlement of book-accounts and all other deal and disputes between them, the said parties," and submitting "all said controversies, which we cannot settle ourselves, if any there be," does not include matters not in controversy and not laid before the arbitrators; and suits on such matters are not barred by the award.<sup>5</sup>

ILLUSTRATIONS. — A referee is appointed to "take proof concerning a confession of judgment, and whether the same was actually filed in the clerk's office." *Held*, not to include the question whether or not the judgment has been satisfied in whole or in part: *Solomon v. Maguire*, 29 Cal. 227. A submission authorized the arbitrators to award upon any demands of A against B and against C, all being parties to the submission, and also to charge B with any claims against D, who was not a party to the submission, if they should find that he ought to pay the same. *Held*, an excess of authority to charge B with claims against C, on the ground that he had converted C's property to his own use: *Matter of Williams*, 4 Denio, 194.

<sup>1</sup> *Munro v. Allaire*, 2 Caines, 320.

<sup>4</sup> *Harrington v. Brown*, 9 Allen,

<sup>2</sup> *Maryland etc. R. R. Co. v. Porter*, 579.

19 Md. 458.

<sup>5</sup> *Robinson v. Morse*, 29 Vt. 404;

<sup>3</sup> *Waugh v. Mitchell*, 1 Dev. & B. Trescott v. Baker, 29 Vt. 459. Eq. 510.

§ 3318. **Uncertain or Ambiguous Submission.**—If a submission be uncertain or indefinite, the court, if it can supply the deficiency, will seek to do so, and to uphold it.<sup>1</sup> Mr. Morse says: "Where a submission is so worded as to leave its extent ambiguous, and to create a doubt whether a certain matter or class of matters were included in it, the conduct of the parties at the hearing before the arbitrators may be looked to for elucidation. If such matter or matters have been presented by one without objection by the other, if evidence has been offered upon them, and they have been considered in argument, it will be presumed that they fall within the scope of the submission. But if they have been wholly omitted in the proceedings, a contrary presumption would prevail."<sup>2</sup> In a statutory reference of matters not the subject of an existing suit, the particularity requisite in pleading is not necessary; it is enough if the matters referred, and the character in which the parties are to be bound, intelligibly appear.<sup>3</sup>

But though it is the desire of the courts to have a submission include as many disputes as are manifestly within its scope, still the language of the submission will not be stretched by a forced construction to include matters not obviously within it.<sup>4</sup> Where demands made to one party only are submitted to arbitrators, if they award a sum in favor of the party on whom the demand is made, such award is void.<sup>5</sup> A submission to referees of "the question of damages," in an action for debauching plaintiff's

<sup>1</sup> *Rexford v. Nye*, 20 Vt. 132; *Price v. White*, 27 Mo. 275; *King v. Jenison*, 33 Ala. 499; *Cheshire Bank v. Robinson*, 2 N. H. 126; *Hays v. Hays*, 23 Wend. 363.

<sup>2</sup> *Morse on Arbitration and Award*, 62.

<sup>3</sup> *Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476; *King v. Jemison*, 33 Ala. 499.

<sup>4</sup> *Scott v. Barnes*, 7 Pa. St. 134; *Adams v. Adams*, 8 N. H. 82; *Hop-*

*son v. Doolittle*, 13 Conn. 36; *Solomon v. Maguire*, 29 Cal. 227; *Irvine v. Marshall*, 7 Minn. 286; *Bixby v. Whitney*, 5 Greenl. 192; *Gilman v. Brown*, 1 Mason, 191; *Richards v. Todd*, 127 Mass. 167. An award is void *in toto*, if it embrace a note not owned by one of the parties at the time of the submission: *Thraasher v. Haynes*, 2 N. H. 429.

<sup>5</sup> *Worthen v. Stevens*, 4 Mass. 448.

wife, does not include the question of the defendant's liability.<sup>1</sup>

**§ 3319. Statutes Providing for Submissions Liberally Construed.**—Statutes concerning submissions are liberally construed, where the question of what causes may be submitted to arbitration is raised.<sup>2</sup> A statute permitting "accounts" to be submitted has been construed to embrace not only an ejectment suit,<sup>3</sup> but "every other cause of action."<sup>4</sup> "Civil actions" include matters cognizable only in a court of equity.<sup>5</sup> "Claims" include equitable claims against the estate of a deceased person.<sup>6</sup> A "long account" is a series of charges made at various times, as the transactions occurred.<sup>7</sup> "Claims against the estate" include a personal claim of the executor, but not claims held by him as such executor.<sup>8</sup> "Subject of a personal action at law or a suit in equity" does not include a claim for the future surrender of a lease.<sup>9</sup> "Controversies which may be the subject of a personal action, and wherein judgment could be entered up on the award by a court of law," include a claim for damages for breach of a contract, but not a claim for its specific performance.<sup>10</sup>

**§ 3320. General Submission—What It Includes.**—A general submission includes all controversies between the parties of every kind,<sup>11</sup> whether relating to realty or personality;<sup>12</sup> or whether in their individual or representative

<sup>1</sup> *Samson v. Young*, 50 N. H. 62.

<sup>2</sup> *Primer v. Kuhn*, 1 Dall. 452; *Pettit v. Wingate*, 25 Pa. St. 74; *Francisco v. Fitch*, 25 Barb. 130; *Eastanson v. Dupuy*, 2 Browne (Pa.), 100. *Contra*, *Fowler v. Bigelow*, 8 Mass. 1.

<sup>3</sup> *Austin v. Snow*, 2 Dall. 157.

<sup>4</sup> *Primer v. Kuhn*, 1 Dall. 452. See *Druse v. Horter*, 57 Wis. 644.

<sup>5</sup> *Tomlinson v. Hammond*, 8 Iowa, 40.

<sup>6</sup> *White v. Story*, 43 Barb. 124.

<sup>7</sup> *Druse v. Horter*, 57 Wis. 644.

<sup>8</sup> *Dana v. Prescott*, 1 Mass. 200.

<sup>9</sup> *Hubbell v. Bissell*, 13 Gray, 298.

<sup>10</sup> *Butler v. Mace*, 47 Me. 423.

<sup>11</sup> *De Long v. Stanton*, 9 Johns. 38; *Barker v. Belknap*, 39 Vt. 168; *Woods v. Page*, 37 Vt. 252; *Orcutt v. Butler*, 42 Me. 83; *Brown v. Leavitt*, 26 Me. 251.

<sup>12</sup> *Munro v. Allaire*, 2 Caines, 320; *Byers v. Van Denson*, 5 Wend. 268; *Sellick v. Adams*, 15 Johns. 197; *Indiana Central R. R. Co. v. Bradley*, 7 Ind. 49; *Merritt v. Merritt*, 11 Ill. 565; *Shackelford v. Purket*, 2 A. K. Marsh. 435; 12 Am. Dec. 422.

capacities.<sup>1</sup> It authorizes the arbitrators to decide both the law and the facts;<sup>2</sup> to order mutual releases;<sup>3</sup> to award costs;<sup>4</sup> to assign one person's interest to another on the facts found;<sup>5</sup> or to order the surrender of papers or property;<sup>6</sup> or to award conveyances.<sup>7</sup> Under a general submission of all causes of action, an allegation of a fraud in a sale is included.<sup>8</sup> A submission by A and B, of all claims and demands, in law or equity, against each other, embraces a note, not negotiable, assigned by C to A, for value, with notice to B;<sup>9</sup> a submission of "all and every question of difference growing out of this contract" includes a dispute in reference to damages from non-performance of the contract.<sup>10</sup> But a general submission does not include future matters,<sup>11</sup> or matters not directly existing between the parties,<sup>12</sup> nor really in dispute between them;<sup>13</sup> or matters previously settled.<sup>14</sup>

**ILLUSTRATIONS.**—Two partners submitted to arbitration all the differences between them, in respect to their partnership affairs, in general terms. *Held*, that the arbitrators were authorized to adjust every question of dispute arising out of the partnership transactions, however complicated, and that they were not limited to the books of the partnership account: *Tucker v. Page*, 69 Ill. 179. Pending an injunction suit for the abatement of a livery-stable, the parties agreed to submit to arbitration the matters in controversy between them. The agreement contained a stipulation "that the award of the arbitrators, made in pursuance of the agreement, shall terminate and forever decide all matters of controversy, at law or in equity, in relation to the said livery-stable." *Held*, that an action on the injunction bond, though the bond was not mentioned in the award, could not be maintained: *Jesse v. Cater*, 28

<sup>1</sup> *King v. Cook*, 1 T. U. P. Charlt. 286; 4 Am. Dec. 715.

<sup>2</sup> *Indiana Central R. R. Co. v. Bradley*, 7 Ind. 49.

<sup>3</sup> *Shepherd v. Briggs*, 28 Vt. 81.

<sup>4</sup> *Bowman v. Downer*, 28 Vt. 532.

<sup>5</sup> *Ford v. Burleigh*, 60 N. H. 278.

<sup>6</sup> *Leavitt v. Comer*, 5 Cush. 129.

<sup>7</sup> *Williams v. Warren*, 21 Ill. 541.

<sup>8</sup> *De Long v. Stanton*, 9 Johns. 38.

<sup>9</sup> *Brown v. Leavitt*, 28 Me. 251.

<sup>10</sup> *Connor v. Simpson*, 104 Pa. St. 440.

<sup>11</sup> *Thrasher v. Haynes*, 2 N. H. 429. But under a submission of all demands, the referees may award upon all the damage, arisen or expected, from breaches of a bond of indemnity: *Cheshire Bank v. Robinson*, 2 N. H. 126. And see *Daren v. Getchell*, 55 Me. 241.

<sup>12</sup> *Adams v. Adams*, 8 N. H. 82.

<sup>13</sup> *Robinson v. Morse*, 29 Vt. 404.

<sup>14</sup> *Calvert v. Calvert*, 18 Md. 73; *Carter v. Calvert*, 4 Md. Ch. 199.

Ala. 475. The submission was of "all claims, whether in law or equity, existing between the parties." *Held*, that the arbitrators may inquire whether a previous settlement of a suit in equity between the parties, by the entry "bill dismissed" upon the docket, was not fraudulently obtained; and if it appears that it was so obtained, they may reopen the cause: *Mickles v. Thayer*, 14 Allen, 114.

§ 3321. **Claims Barred by Limitation.**—A general submission will not revive a claim barred by the statute of limitations,<sup>1</sup> though it seems that the submission of a specific claim barred by time will revive it.<sup>2</sup> And a court of law will not inquire whether there was such proof of fraud or mistake as will justify the opening of the account.<sup>3</sup> The rule that the mere submission to arbitration of matters on which the arbitrators never acted would not prevent the running of the statute of limitations during the continuance of the submission is not affected by the fact that, pending the submission, the right of action was suspended.<sup>4</sup>

§ 3322. **Submission of Pending Cause.**—The submission of a pending cause of action includes all the issues, both of law and fact, raised by the pleadings in the case.<sup>5</sup> It does not, however, include anything which is not involved in the action.<sup>6</sup> By the submission or reference of a pending cause, all technical exceptions to the form of the pleadings are waived.<sup>7</sup> The arbitrator is not bound by the particular declaration and pleadings,

<sup>1</sup> *Adams v. Adams*, 8 N. H. 82. Even a power to settle disputes on principles of equity and justice gives no right to disregard the plea of the statute of limitations: *Pearce v. Roller*, 5 Lea, 485.

<sup>2</sup> *Colkings v. Thackston*, Cam. & N. 93; *Hunt v. Guilford*, 4 Ohio, 310.

<sup>3</sup> *Emmet v. Hoyt*, 17 Wend. 410.

<sup>4</sup> *Cowart v. Perrine*, 21 N. J. Eq. 101.

<sup>5</sup> *Cushing v. Babcock*, 38 Me. 452; *Newton v. West*, 3 Met. (Ky.) 241; *Renouil v. Harris*, 2 Sand. 641; *Lee v.*

*Tillotson*, 24 Wend. 337; 35 Am. Dec. 624.

<sup>6</sup> *Morse on Arbitration and Award*, 72.

<sup>7</sup> *Page v. Monks*, 5 Gray, 492; *Merrill v. Gold*, 1 Cush. 457; *Eddy v. Sprague*, 10 Vt. 216; *Briggs v. Oaks*, 26 Vt. 138; *Coffin v. Cottle*, 4 Pick. 454; *Davis v. Campbell*, 23 Vt. 236; *Maxfield v. Scott*, 17 Vt. 634; *Waterman v. R. R. Co.*, 30 Vt. 610; 73 Am. Dec. 326; *Taylor v. Sayre*, 24 N. J. L. 647; *Ames v. Stevens*, 120 Mass. 218.

but may award upon the subject-matter of the suit, without regard to them.<sup>1</sup> But though liberal powers of amendment are thus secured, a new and independent cause of action cannot be introduced.<sup>2</sup> So a submission or voluntary reference is a waiver of errors in the proceedings taken in the cause up to that time,<sup>3</sup> unless the error is jurisdictional, or fatal to the maintenance of the action.<sup>4</sup>

The submission of a pending cause, according to some cases, works a discontinuance of it.<sup>5</sup> On the other hand, in other states, it is held that a mere submission of a

<sup>1</sup> *Cook v. Carpenter*, 34 Vt. 121; 80 Am. Dec. 670.

<sup>2</sup> *Merrill v. Gold*, 1 Oush. 457.

<sup>3</sup> *Vanderhoof v. Dean*, 1 Mich. 463; *Forseth v. Shaw*, 10 Mass. 253; *Maxfield v. Scott*, 17 Vt. 634; *Swift v. Harriman*, 30 Vt. 607; *Hix v. Sumner*, 50 Me. 290; *Spaulding v. Warren*, 25 Vt. 316; *Read v. Stockwell*, 34 Vt. 206; *Hazen v. Addis*, 14 N. J. L. 334; the court saying: "A question was raised on the argument as to the correctness of such an action, and the statute (Rev. Laws, 174, sec. 2) was cited on the one side, and the case of *Cooper v. Crane*, 9 N. J. L. 178, on the other. But this is a question that cannot be raised and need not be settled in this case. The parties, instead of taking the opinion of the court on that point, voluntarily withdrew the cause from this tribunal, and submitted it to another of their own choosing. The subsequent proceedings out of court were not in that action. It was abandoned and constructively discontinued by a submission of all the matters touching and concerning the trespass complained of to arbitrators; and any rule this court can now make cannot be made in that cause but upon the submission and award. That the parties so understood and intended is manifest from their agreement that the submission should be made a rule of this court on motion of either party. But even if it was a reference instead of a submission, it would now be too late to except to the form of action, or to anything in the process

or declaration: *Smith v. Minor*, 1 N. J. L. 16, 24; *Forseth v. Shaw*, 10 Mass. 253."

<sup>4</sup> *Garcie v. Sheldon*, 3 Barb. 232; *Porter v. Dickerman*, 11 Gray, 482. But see *Brickhouse v. Hunter*, 4 Hen. & M. 363; 4 Am. Dec. 528.

<sup>5</sup> *Green v. Patchen*, 13 Wend. 294; *Wells v. Lain*, 15 Wend. 99; *West v. Stanley*, 1 Hill, 69; *Towns v. Wilcox*, 12 Wend. 503; *Jordan v. Hyatt*, 3 Barb. 275; *Buel v. Dewey*, 22 How. Pr. 342; *Camp v. Root*, 18 Johns. 22; *Johnson v. Parmely*, 17 Johns. 129; *Yates v. Russell*, 17 Johns. 461; *Gunter v. Sanchez*, 1 Cal. 45; *Moore v. Allen*, 35 Me. 276; 58 Am. Dec. 700; *Saffie v. Cox*, 9 Humph. 142; *Bigelow v. Goss*, 5 Wis. 421; *Jewell v. Blankenship*, 10 Yerg. 439; *Crooker v. Buck*, 41 Me. 355; *Healey v. San Francisco*, 4 Cal. 1; *Bank v. Widner*, 11 Paige, 529; 43 Am. Dec. 768; *Reeve v. Mitchell*, 15 Ill. 297; *Cunningham v. Craig*, 53 Ill. 252; *Ex parte Wright*, 6 Cow. 399; *Jacoby v. Johnston*, 1 Hun, 242; *Baldwin v. Barrett*, 4 Hun, 119; *Rogers v. Wall*, 6 Humph. 29; *Susong v. Jack*, 1 Heisk. 415; *Muckey v. Pierce*, 3 Wis. 307; *Bowen v. Lasalere*, 44 Mo. 383; *McNulty v. Solley*, 95 N. Y. 242; *Larkin v. Robbins*, 2 Wend. 505. An express agreement that the action shall cease is not necessary, and is implied, in all cases, from the selection of another mode of adjustment and settlement of the litigation: *Grosvenor v. Hunt*, 11 How. Pr. 355.

pending suit does not discontinue it.<sup>1</sup> But if the submission provides that judgment shall be entered on the report or award, the suit will be kept alive for such purpose;<sup>2</sup> so if it appears from the submission that the parties did not intend that the cause should be discontinued.<sup>3</sup> A submission of the action to arbitration after appeal taken from a judgment recovered therein operates as a discontinuance, not only of the appeal, but of all proceedings in the action from its inception.<sup>4</sup>

**§ 3323. Submission may be Conditional.**—A submission may be conditional, i. e., may be based on the fulfillment of an agreement of one of the parties or a third person, as a condition precedent.<sup>5</sup> In such cases a substantial fulfillment, though not a technical one, will suffice.<sup>6</sup>

**§ 3324. Stipulations not to Appeal from Award.**—A stipulation in a submission that the parties shall not appeal from the award is valid,<sup>7</sup> and will estop the losing parties from filing exceptions or bringing a writ of error,<sup>8</sup> except on the ground of fraud or mistake appearing on the face of the award;<sup>9</sup> for where parties agree to submit to and abide by an award, the agreement will be con-

<sup>1</sup> *Lary v. Goodnow*, 48 N. H. 170; *Dinsmore v. Hanson*, 48 N. H. 413; *Paulison v. Halsey*, 38 N. J. L. 488; *Knaus v. Jenkins*, 40 N. J. L. 237; 29 Am. Rep. 237; *Hearne v. Brown*, 67 Me. 156; *Nettleton v. Gridley*, 21 Conn. 531; 56 Am. Dec. 378.

<sup>2</sup> *Green v. Patchen*, 13 Wend. 296; *People v. Onondago Ct.*, 1 Wend. 314; *Ex parte Wright*, 6 Cow. 399; *Ryan v. Dougherty*, 30 Cal. 218; *Wear v. Ragan*, 30 Miss. 83; *Roger v. Wall*, 6 Humph. 29; *Crocket v. Beaty*, 7 Humph. 66; *Wilson v. Williams*, 66 Barb. 209. And see *Elliott v. Quimby*, 13 N. H. 182; *Chapman v. Seccomb*, 36 Me. 102.

<sup>3</sup> *Jacoby v. Johnston*, 1 Hun, 242; *Hearne v. Brown*, 67 Me. 156; *Ensign v. R. R. Co.*, 62 How. Pr. 123.

<sup>4</sup> *Grosvonor v. Hunt*, 11 How. Pr. 355; *Baldwin v. Barrett*, 6 Thomp. &

C 362; 4 Hun, 119. After a reference has been made by consent of parties, neither party can accept or have a trial by jury. A motion must be made to set aside the report as a verdict for proper cause: *Beattie v. David*, 40 N. J. L. 102; *Spencer v. Curtis*, 57 Ind. 221.

<sup>5</sup> *Morse on Arbitration and Award*, 67; *Merritt v. Thompson*, 27 N. Y. 225.

<sup>6</sup> *Boston v. Brazer*, 11 Mass. 447.

<sup>7</sup> *McCahan v. Reamey*, 33 Pa. St. 535; *Andrews v. Lee*, 3 Penr. & W. 99; *Rogers v. Playford*, 12 Pa. St. 181; *Bingham v. Guthrie*, 19 Pa. St. 418; *Williams v. Danziger*, 91 Pa. St. 232.

<sup>8</sup> *Cuncle v. Dripps*, 3 Penr. & W. 291; 23 Am. Dec. 84.

<sup>9</sup> *Andrews v. Lee*, 3 Penr. & W. 99; *Muldrow v. Norris*, 2 Cal. 74; 56 Am. Dec. 313.

strued to mean that they will abide by a legal award.<sup>1</sup> And the agreement not to appeal must be clearly expressed; it will not be implied from the words "final and conclusive,"<sup>2</sup> or that the parties will "abide the award."<sup>3</sup>

ILLUSTRATIONS.—Two parties submitted their matters in controversy to arbitration, agreeing that there should be no appeal from the decision of the referees, save for "actual fraud." *Held*, that the award should be sustained, in the absence of a showing that there was a mistake of fact, or injustice: *Struthers v. Clark*, 40 Iowa, 508. Included in a promissory note were the following words: "If not paid at maturity, waiving inquisition, appeals, etc." *Held*, that the maker was thereby precluded from an appeal from an award of arbitrators and a compulsory rule of reference: *Watson v. Wetter*, 91 Pa. St. 385.

§ 3325. **Agreements to Arbitrate not Specifically Enforced — Damages.**—An agreement to submit to arbitration will not be specifically enforced,<sup>4</sup> the rule generally adopted being that the party refusing to carry out his agreement is simply liable for damages as for a breach of contract.<sup>5</sup> But where parties to a contract agree that dis-

<sup>1</sup> *Atlanta etc. R. R. Co. v. Manghan*, 49 Ga. 266.

<sup>2</sup> *McCahan v. Reamey*, 33 Pa. St. 535.

<sup>3</sup> *Shaw v. Hatch*, 6 N. H. 162.

<sup>4</sup> *Tobey v. County of Bristol*, 3 Story, 800; *Greason v. Keteltas*, 17 N. Y. 491; *Hurst v. Litchfield*, 39 N. Y. 377; *March v. R. R. Co.*, 40 N. H. 548; 77 Am. Dec. 732; *Smith v. R. R. Co.*, 36 N. H. 487; *Tscheider v. Biddle*, 4 Dill. 55; *Copper v. Wells*, 1 N. J. Eq. 10; *Corbin v. Adams*, 76 Va. 58.

<sup>5</sup> *Haggart v. Morgan*, 5 N. Y. 422; 55 Am. Dec. 350. But see *Orne v. Sullivan*, 3 How. (Miss.) 161, 34 Am. Dec. 74, where it was held that where two parties enter into an agreement by which one is to erect improvements on the lands of the other, the value thereof to be estimated by two disinterested persons, one party cannot defeat the right to an appraisement by refusing to appoint an arbitrator, and a refusal or failure to appoint gives the other party an undisputed right to have the valuation made. When no mode of appointment is agreed upon

in such a case, the court infers the intention to be that each party is to appoint one arbitrator. Where one party requests the other to appoint an appraiser, and the latter appoints a man to survey the land, but instructs him not to appraise, as he had fixed rules for valuing improvements, this would be a sufficient refusal to justify the first party in having the appraisement made. In *Tschieder v. Biddle*, 4 Dill. 55, the court refused to leave the party simply to his action for damages, on the ground that such a course would result in manifest injustice. A lease of certain real property was made for ten years with a covenant by the lessor for periodical renewals extending through terms aggregating a period of five hundred years; the amount of the rental at the end of each ten years was to be ascertained by assessors to be appointed by the parties; the lessor fraudulently sought to evade the provisions of the lease in respect to renewal; the lessee, on the faith of the covenant for renewal, had expended in buildings on the demised

putes shall be decided by referees, the party who refuses to join in selecting referees cannot invoke the provision of the contract as against the other party.<sup>1</sup> If either party brings an action for a breach of the contract, he should be required to show either an arbitration and award, or some facts to excuse a resort to arbitration.<sup>2</sup> In an action for the wrongful revocation of a submission to arbitration, the plaintiff is not entitled to recover for the expense incurred in making the agreement, but can recover for his loss of time and for his trouble, and for his necessary expenses in preparing for the hearing, employing counsel, taking depositions, and paying witnesses and arbitrators, so far as he cannot avail himself of these things for the subsequent trial of his case before a court.<sup>3</sup>

**ILLUSTRATIONS.**—A lease provided that the lessee might erect a building, and that at the end of the term the lessor might elect to renew the lease, buy the building, or sell the lot at a price to be fixed by arbitrators. The lessee built. The lessor failed to elect, and the lessee elected to purchase the lot, but the lessor refused to arbitrate as to the price. *Held*, that equity would relieve the lessee: *Coles v. Peck*, 96 Ind. 333; 49 Am. Rep. 161. A suit with reference to a boundary line was settled, and, as incidental to the settlement, it was agreed that the value of a strip of land should be fixed by arbitration. *Held*, that the agreement would be enforced, and that the court would substitute itself in the place of the arbitrators, one of the parties refusing to select an arbitrator: *Black v. Rogers*, 75 Mo. 441.

**§ 3326. Agreements to Refer Disputes do not Prevent Action.**—A mere executory agreement to arbitrate is not a bar to an action.<sup>4</sup> A clause in a contract that any disputes which may arise thereunder shall be re-

premises one hundred and thirteen thousand dollars. The lessors sued the lessee at law for use and occupation, whereupon the lessee filed this bill in equity to stay the action at law until the lessor appointed an assessor as required by the lease. *Held*, that a general demurrer to the bill should be disallowed; and the lessee being willing to comply with the lease as to

renewal, the court entered an order staying the proceedings at law until the lessor should appoint an impartial assessor to make the valuation. And see *Illustrations, post*.

<sup>1</sup> *Cox v. Volkert*, 86 Mo. 505.

<sup>2</sup> *Fox v. R. R. Co.*, 3 Wall. Jr. 243.

<sup>3</sup> *Pond v. Harris*, 113 Mass. 114.

<sup>4</sup> *Lafin v. R. R. Co.*, 34 Fed. Rep. 859.

ferred to an arbitrator or arbitrators does not oust the courts of jurisdiction, and either party may have recourse to them without carrying out his agreement to refer.<sup>1</sup> An agreement to submit to arbitration is void when its effect would be to oust the courts of jurisdiction.<sup>2</sup>

<sup>1</sup> Gray v. Wilson, 4 Watts, 39; Hill v. Moore, 40 Me. 515; Cavanagh v. Dooley, 6 Allen, 66; Rowe v. Williams, 97 Mass. 163; Hurst v. Litchfield, 39 N. Y. 377; Smith v. R. R. Co., 36 N. H. 487; March v. R. R. Co., 40 N. H. 548; 77 Am. Dec. 732; Stone v. Dennia, 3 Port. 231; Lauman v. Young, 31 Pa. St. 306; Snodgrass v. Gavit, 28 Pa. St. 221; Allegre v. Maryland Ins. Co., 6 Har. & J. 408; 14 Am. Dec. 289; Wood v. Humphrey, 114 Mass. 185; Pearl v. Harris, 121 Mass. 390; Trott v. City Ins. Co., 1 Cliff. 443; Robinson v. Georges Ins. Co., 17 Me. 131; 35 Am. Dec. 239; Liverpool etc. Ins. Co. v. Creighton, 51 Ga. 95; Horton v. Sayer, 4 Hurl. & N. 643; 5 Jur., N. S., 989; Lee v. Page, 7 Jur., N. S., 768; 9 Week. Rep. 754 (but see the Pennsylvania cases: O'Reilly v. Kerna, 52 Pa. St. 214; Reynolds v. Caldwell, 51 Pa. St. 298); Haggart v. Morgan, 5 N. Y. 422; 55 Am. Dec. 350; Hart v. Lauman, 29 Barb. 419; Sinclair v. Tallmadge, 35 Barb. 607; Binuse v. Page, 1 Abb. App. 154; Doyle v. Halpin, 1 Jones & S. 369; Holmes v. Ricket, 56 Cal. 307; 38 Am. Rep. 54. In Delaware Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 258, the court say: "It appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration will not oust a court of law or equity of jurisdiction. The reason of the rule is by some traced to the jealousy of the courts, and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction; and by others, to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced. An agreement of this character induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly, or undue pressure, might well be refused a specific performance, or disregarded

when set up as a defense to an action. But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it, and the judgment of the tribunal of their choice. Were the question *res nova*, I apprehended that a party would not now be permitted, in the absence of fraud, or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned; and the decision of the appeal of the present defendant does not make it necessary to inquire into the reasons of the rule, or question its existence. The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties, and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases, unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law, and the rule is essentially modified and qualified."

<sup>2</sup> Wood v. Humphrey, 114 Mass. 185.

If, pending an action, the parties agree otherwise than under a rule of court to arbitrate, the remedy for a refusal by one of them is by an independent action, not by supplemental complaint in the pending action.<sup>1</sup> But if the parties have proceeded under the agreement, and an award has been made, this will prevent a suit in the courts.<sup>2</sup>

**§ 3327. Except where Reference is Made Condition Precedent to Suit.**—Where, however, it is agreed in a contract that a reference to an arbitrator or person selected shall be a condition precedent to the institution of a suit, such an agreement will be upheld, and neither party can sue until he has performed the condition precedent.<sup>3</sup> Although the courts will take jurisdiction not-

<sup>1</sup> *Metcalf v. Guthrie*, 94 N. C. 447.

<sup>2</sup> *Smith v. R. R. Co.*, 36 N. H. 487.

<sup>3</sup> *Rowe v. Williams*, 97 Mass. 163; *Smith v. R. R. Co.*, 36 N. H. 458; *Hurst v. Litchfield*, 39 N. Y. 377; *United States v. Robeson*, 9 Pet. 327; *Delaware etc. Canal Co. v. Pennsylvania Coal Co.*, 60 N. Y. 258; *Berry v. Carter*, 19 Kan. 135; *Scott v. Liverpool Corporation*, 3 De Gex & J. 334; 5 Jur., N. S., 105; *Lowndes v. Stamford and Warrington*, 18 Q. B. 425; 21 L. J. Q. B. 371; *Hood v. Hartshorn*, 100 Mass. 119; 1 Am. Rep. 89; the court saying: "The question whether an arbitration clause in a contract is valid has often arisen, and in some of its aspects presents great difficulties. But the present case comes within the principle stated by Coleridge, J., in *Avery v. Scott*, 8 Ex. 500, that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damage, or the time of paying it, or any matters of that kind that do not go to the root of the action: See also *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 243. There is no policy of the law in this commonwealth adverse to the settlement of controversies or questions between parties by arbitration; and contracts to that effect are enforced so far as they can be consistently with the principles of law. Judicial tribunals are

provided by the government to enable parties to enforce their rights when other means fail, but not to hinder them from adjusting their differences themselves, or by agents of their own selection." In *Dawson v. Fitzgerald*, 3 Cent. L. J. 477, L. R. 1 Ex. Div. 257, this question was examined by the court of appeal. "I take it," said Jessel, M. R., "that the law on the subject is really settled by the highest authority by which we are bound, viz., by the decision of the house of lords. The rule is this, that where there is an agreement to refer to arbitration, and, either from the nature of the sum to be recovered, it must be previously ascertained by the arbitration, or it is expressed that the arbitration is a condition precedent, no action can be maintained unless the arbitration has taken place. In other words, there are two cases in which the arbitration clause can be pleaded successfully: 1. Where the action is only to be brought for a sum to be named by an arbitrator; 2. Where, whatever the form of the covenant, it is agreed that no action shall be brought until the award has been made. In those two cases, therefore, there can be no action." The principle was very well put up by Mr. Baron Bramwell in the case of *Tredwen v. Holman*, 10 Week. Rep. 652; 1 Hurl. & C. 72. He says: "If a tenant cove-

withstanding an agreement to arbitrate, yet when the agreement is that the covenantor shall pay such sum, and only such sum, as shall be determined by arbitrators, the procuring an award is as clearly a condition precedent as if the parties had expressly so provided.<sup>1</sup>

**ILLUSTRATIONS.**—An insurance policy provided that in case of differences arising touching any loss or damage, the matter may, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties to the amount of such loss or damage, "but shall not decide the liability of the company under this policy"; also, "it is furthermore mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until an award shall have been obtained fixing the amount of such claim in the manner hereinabove provided." *Held*, that no suit could be sustained against the objection of the company until an award had been made, although neither party previous to the suit had requested arbitration: *Yeomans v. Guard Fire etc. Ins. Co.*, 5 Ins. Law J. 858; see *Scott v. Avery*, 5 H. L. Cas. 811; *Braunstein v. Accidental Death Ins. Co.*, 1 Best & S. 782; 31 L. J. Q. B. 17. By a written agreement a tenant of a furnished house agrees at the expiration of the tenancy to deliver up possession of the house and the furniture in good order, and in the event of loss, damage, or breakage, to make good or pay for the same the amount of such payment; if disputed, to be settled by two valuers; the settlement of the amount of the payment by the valuers is a condition precedent to the right of the landlord to bring an action in respect of the dilapidations: *Babbage v. Coulburn*, L. R. 9 Q. B. D. 235; 51 L. J. Q. B. D. 638; 46 L. T., N. S., 283; 30 Week. Rep. 950; affirmed L. R. 9 Q. B. D. 237, note; 46 L. T., N. S., 794; 30 Week. Rep. 950, note.

nants that he will cultivate the demised land in a husband-like manner, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he

has ascertained them." And see *Edwards v. Aberayron Ins. Co.*, L. R. 1 Q. B. 513.

<sup>1</sup> *Holmes v. Richet*, 56 Cal. 307; 38 Am. Rep. 54; *Smith v. Briggs*, 3 Denio, 73; *Hurst v. Litchfield*, 39 N. Y. 377. And see, *ante*, Title Contracts, § 2504.

## CHAPTER CLXII.

## THE ARBITRATION.

- § 3328. Who may be arbitrators — Causes of disqualification.
- § 3329. Arbitrators entitled to compensation for services.
- § 3330. Arbitrators need not be sworn — Required by statute.
- § 3331. Parties entitled to notice of hearing.
- § 3332. Of what proceedings notice to parties not necessary.
- § 3333. Power of arbitrators to administer oath.
- § 3334. To compel attendance or production.
- § 3335. Arbitrators judges of law and fact.
- § 3336. Powers of arbitrators — Admission of evidence.
- § 3337. Conduct of hearing.
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- § 3339. Arbitrator must not exceed his authority.
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- § 3341. To order conveyances.
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- § 3345. Appointment of substitute.
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- § 3347. Effect of making unenforceable order.
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- § 3349. All of several arbitrators must act.
- § 3350. Unless one withdraws or refuses to act.
- § 3351. All of several arbitrators must unite in award — When award of majority binding.
- § 3352. Final unanimity only necessary.
- § 3353. Arbitrator must exercise judicial judgment and discretion — Cannot delegate authority.
- § 3354. Irregularities in proceedings may be waived.
- § 3355. When umpire may be appointed — Distinguished from third arbitrator.
- § 3356. Appointment of umpire.
- § 3357. Umpire must examine case himself — May order rehearing.

§ 3328. Who may be Arbitrators — Causes of Disqualification. — Any person (subject to certain disqualifications to be presently noticed) may be an arbitrator.<sup>1</sup> These

<sup>1</sup> Neither natural nor legal disabilities hinder a person from being an arbitrator. It has been laid down as law in works to which great respect is due that idiots, lunatics, infants, married women, persons attainted and

disqualifications arise from facts in regard to the arbitrator, unknown, at the time of his being chosen, to one of the parties; e. g., that he is personally interested in the matter, or is related to one of the parties, or has already formed an opinion on the matter in dispute, or is prejudiced in favor of one of the parties.<sup>1</sup> A person having a secret interest in the decision, or in the result of the controversy, is incompetent to act as an arbitrator.<sup>2</sup> But a mere remote or contingent or trifling interest which could not be expected to influence him in his decision will not disqualify;<sup>3</sup> as that he is a debtor or creditor of one of the parties,<sup>4</sup> or had formerly been his counsel in another action.<sup>5</sup> That the arbitrator is related or connected by family to one of the parties, unknown at the

excommunicated, are disqualified for the office; but the better opinion is, that they may be arbitrators; for every person is at liberty to choose whom he likes best for his judge, and he cannot afterwards object to the manifest deficiencies of those whom he has himself selected. And see *Evans v. Ives*, 15 Phila. 635; *Hopkins v. Lodouskie*, 1 Bibb, 148; *Galloway v. Webb*, Hardin, 318.

<sup>1</sup> *Morse on Arbitration and Award*, 100; *Poole v. Hennessy*, 39 Iowa, 192; 18 Am. Rep. 44; *Bowen v. Steers*, 6 R. I. 251; *Beattie v. Hilliard*, 55 N. H. 428; *Earl v. Stocker*, 2 Vern. 251; *Fox v. Hazelton*, 10 Pick. 275.

<sup>2</sup> *Morse on Arbitration and Award*, 100; *Ætna Ins. Co. v. Stevens*, 48 Ill. 31; *Woodworth v. McGovern*, 52 Vt. 318. Where plaintiff has given the referee in the cause a lien for his fees on the judgment, the referee is disqualified from settling the case: *Leonard v. Mulry*, 93 N. Y. 392. So an arbitrator becomes disqualified where, pending the proceedings, the interest of one party in the subject-matter in dispute is transferred to a near relative of the arbitrator; as his son: *Spearman v. Wilson*, 44 Ga. 473.

<sup>3</sup> *Leominster v. R. R. Co.*, 7 Allen, 38; *Cheney v. Martin*, 127 Mass. 304. Where a claim against a city is submitted to arbitration, the award cannot

be impeached on the ground that one of the arbitrators, being an alderman of the city, had been active in the council in endeavoring to procure payment or arbitration of the claim: *Kane v. Fond du Lac*, 40 Wis. 495.

<sup>4</sup> *Morgan v. Morgan*, 1 Dow. P. R. 611; *Fisher v. Towner*, 14 Conn. 26; *Chicago etc. R. R. Co. v. Hughes*, 28 Mich. 186. In *Wallis v. Carpenter*, 13 Allen, 24, the court said: "The defendants object that one of the arbitrators was a creditor of the plaintiff, and therefore was not impartial. But for aught that appears, the debt may have been very inconsiderable, or it may have been well secured, or the plaintiff may be in such circumstances that the decision of this case may not appreciably affect his ability to pay the debt, and therefore there is no established fact which authorizes the suggestion that the existence of the debt creates partiality." It would, perhaps, be otherwise if the arbitrator's chances of payment were thereby increased: *Cases ante*. A large award to an insolvent, who was indebted to an arbitrator, to whom it was immediately assigned, was set aside in an early case: *Rand v. Redington*, 13 N. H. 72. See also *Woodworth v. McGovern*, 52 Vt. 318.

<sup>5</sup> *Goodrich v. Hullbert*, 123 Mass. 190; 25 Am. Rep. 60; *Cheney v. Martin*, 127 Mass. 304.

time, or objected to when ascertained, is sufficient to render him incompetent.<sup>1</sup> So where the arbitrator is a partner of one of the parties, and this is concealed from the other.<sup>2</sup> It is improper for an arbitrator to accept hospitality from either of the parties; and where this was extended for the purpose and had the effect of inducing the arbitrator to act unfairly, his award was set aside.<sup>3</sup>

<sup>1</sup> *Brown v. Leavitt*, 26 Me. 251; *Rand v. Redington*, 13 N. H. 72; *Stephenson v. Oatman*, 3 Lea, 462; *Baird v. Mayor*, 74 N. Y. 382. In *Poole v. Hennessy*, 39 Iowa, 192, 18 Am. Rep. 44, a lease provided that the rent should be fixed by three appraisers, one to be chosen by each party, and the third by these two. One of the parties chose his brother and business agent. Held, that this avoided the appraisement. Said the court: "One of the grounds of complaint on the part of plaintiff is, that the appraiser appointed on the part of Bishop Hennessy was his brother and confidential business agent. That he was such, there is no manner of doubt; indeed, it is not questioned that he did sustain these relations, but it is claimed that since the lease authorized each party to select an individual for himself, and those two to select a third, that it was 'optional with the parties to select whomsoever they chose, without restriction as to interest or partiality.' It seems to us that such a doctrine cannot be admitted. The very fact that the parties to the lease stipulated for the submission of the question of the value of the leased premises as a basis for the rent to persons to be chosen in the manner provided, conclusively shows that they intended to have the value established by an impartial tribunal. The object and purpose in providing for an appraisement in the mode mentioned in the leases it is manifest was to secure a fair and just valuation of the leased premises as a basis for the second five years of the term. This purpose could be attained only by means of fair and impartial persons as appraisers. The person to be selected by the respective parties ought not to be respectively the agent of the parties. If this were al-

lowed it would be the same in effect as the parties themselves acting in their own behalf as appraisers; for what a man does by his agent, he does by himself. The persons selected as appraisers should be indifferent between the parties. They should be impartial judges. The fact that, by the stipulations of the lease, each party was authorized to choose one appraiser, does not lead to the conclusion claimed by appellants. The authority to choose confers no authority to choose an improper person. This provision of the lease merely provides a mode by which the tribunal shall be created which is to determine the question of the value of the property for the purposes of the lease. That the parties expected that this should be an impartial tribunal that would place a fair and just valuation upon the leased premises cannot be doubted. That they intended the contrary will not be presumed, and will not be held, in the absence of express words to that effect. True, it is not stated in express words that the appraisers shall be 'disinterested,' 'impartial,' or 'indifferent' persons, but, in the absence of anything to manifest a contrary intention, this must be presumed. For the reasons that one of the appraisers was the brother of the defendant and his business agent, and that these facts were not known to the plaintiffs until after the appraisement was made, the court below decided rightly in setting the appraisement aside."

<sup>2</sup> *Connor v. Simpson*, 104 Pa. St. 440; *Wheeling Gas Co. v. Wheeling*, 5 W. Va. 448. But see *Graves v. Fisher*, 5 Me. 69; 17 Am. Dec. 203; *Morville v. Amer. Tract Soc.*, 123 Mass. 129; 25 Am. Rep. 40.

<sup>3</sup> In *re Hopper*, 8 Best & S. 100; *Noyes v. Gould*, 57 N. H. 20.

So the partiality of an arbitrator may be alleged in defense of an action upon the award.<sup>1</sup> That the arbitrator had already formed an opinion on the subject-matter of the arbitration renders him incompetent to so act.<sup>2</sup> And it is gross misconduct for a person who has formed and expressed an opinion on the case to accept the office of arbitrator without informing the parties of the fact.<sup>3</sup>

The mere expression of an opinion on a matter by one to whom it is, long afterwards, submitted for arbitration will not disqualify him, where no bias or unfairness appears at the time of the submission or in the award.<sup>4</sup> Nor will mere conversations of the arbitrators with others, or even with the parties, respecting the subject of the arbitration, necessarily require the setting aside of the award.<sup>5</sup> And if these objections are known to the parties, and they nevertheless select the persons as arbitrators, they waive such objections.<sup>6</sup> "They are at liberty to select a person interested or a person prejudiced, a relation or an enemy, or either of them."<sup>7</sup> Knowledge of a party's

<sup>1</sup> *Hieronimus v. Allison*, 52 Mo. 102. A was acting as referee in a case in which B was attorney. Held, that B should not be appointed referee in a case in which A was attorney: *Carrall v. Lupkins*, 29 Hun, 17.

<sup>2</sup> *Fox v. Hazelton*, 10 Pick. 275; *Kemp v. Rose*, 1 Giff. 258; *Conrad v. Massasoit Ins. Co.*, 4 Allen, 20; *Boston Water Power v. Grey*, 6 Met. 131; *Strong v. Strong*, 9 Cush. 560; *Calcraft v. Roebuck*, 1 Ves. Sr. 227; *Bowen v. Steere*, 6 R. I. 251; *Smith v. Cooley*, 5 Daly, 401. But see *Graves v. Fisher*, 5 Me. 69; 17 Am. Dec. 203; *Morville v. American Tract Soc.*, 123 Mass. 129; 25 Am. Rep. 40. Evidence of partiality held insufficient in *Butler v. Boyles*, 10 Humph. 155; 51 Am. Dec. 697.

<sup>3</sup> *Beattie v. Hilliard*, 55 N. H. 423.

<sup>4</sup> *Brush v. Fisher*, Mich. 1888.

<sup>5</sup> *Flatter v. McDermitt*, 25 Ind. 326; *Shear v. Mosher*, 8 Ill. App. 119. But see *Catlett v. Dougherty*, 114 Ill. 568.

<sup>6</sup> *Conrad v. Massasoit Ins. Co.*, 4

*Allen*, 20; *Wheeling Gas Co. v. City of Wheeling*, 5 W. Va. 448; *Davis v. Forshee*, 34 Ala. 107; *Dougherty v. McWhorter*, 7 Yerg. 239; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205; *Bell v. Vernoooy*, 18 Hun, 125; *Robb v. Brachman*, 38 Ohio St. 423.

<sup>7</sup> *Morse on Arbitration and Award*, 102; *Strong v. Strong*, 9 Cush. 560; *Johnston v. Cheape*, 5 Dow. 247; *Morgan v. Birnie*, 9 Bing. 672; *Perry v. Moore*, 2 E. D. Smith, 32, where the objection was known to the party's attorney; *Combs v. Wyckoff*, 1 Caines, 147; *Brown v. Leavitt*, 26 Me. 251. In *Fox v. Hazelton*, 10 Pick. 277, it was said: "*But volenti non fit injuria*. If parties are content to submit questions in controversy to those who are known to have formed and expressed opinions upon the subject-matter, or who are known to have partialities and prejudices for or against the respective parties, an award made by such arbitrators is binding. And it is not infrequent in practice for each party to select a friend known to have

attorney has been held to be the knowledge of the party himself.<sup>1</sup> The objection should be made at the earliest opportunity,<sup>2</sup> even at the trial before the arbitrators themselves.<sup>3</sup> An arbitrator, like a judge, is exempt from liability to an action for any judgment given by him in his official character.<sup>4</sup>

**ILLUSTRATIONS.** — An architect had assured a female that the price for building a church should not exceed a certain sum. *Held*, that he was incompetent to act as arbitrator upon claims for extras made against her in building such church: *Kemp v. Rose*, 1 Giff. 258. The owner of land through which a railroad was built, and the railroad company, submitted the question of damages to arbitrators. *Held*, that their award must be set aside because one of them was related to the mortgagees of the land, and because said mortgage was not known to the company: *Stephenson v. Oatman*, 3 Lea, 462. The mother of a child resisted its father's attempt to obtain its custody on *habeas corpus*. The proceedings were sent to a referee, who, in a divorce suit between the parents, had found the mother guilty of adultery. *Held*, that she was entitled, on motion, to have the

formed and expressed opinions upon the subject and preferences for the parties respectively, trusting that these opposite prejudices will balance each other, especially with the aid of an impartial umpire. Without commending the expediency of such references, the court can entertain no doubt of the validity of an award made by such referees, nor could the parties be heard to impeach it on this ground. If the objection is known to the party before the hearing, and not then disclosed, and no exception taken, the objection must be taken to be waived, and the consent of the parties be presumed that the hearing shall proceed. It is like the case of challenge of a juror. If a party knows of any prejudice entertained by a juror, and makes no exception when the jury is impaneled, however good his cause of challenge then is, it must be deemed to be waived. Otherwise, knowing of a secret taint to which the verdict may be exposed, he takes his chance for a favorable verdict, reserving a power to impeach it should it happen to be against him, — a proceeding inconsistent with the

plain principles of fair dealing, and with the frankness which ought to characterize the whole course of judicial proceedings. In the present case, the evidence is quite sufficient to show that if the party was not fully apprized of the partiality of the referee before the hearing, he had ample notice to put him upon inquiry, which would have led to the full knowledge of the fact; and had the exception been taken at the hearing, and the referees had persisted in proceeding, it would have been a strong ground of objection to the award. As he was content to proceed with the knowledge of the fact, relying upon the strength of his cause, or the capacity and firmness of the other referees, he must be deemed to have waived his exceptions."

<sup>1</sup> *Perry v. Moore*, 2 E. D. Smith, 32.

<sup>2</sup> *Combs v. Wyckoff*, 1 Caines, 147; *Fox v. Hazelton*, 10 Pick. 275; *Robb v. Brachman*, 38 Ohio St. 423.

<sup>3</sup> *Cones v. Vanosdol*, 4 Ind. 248.

<sup>4</sup> *Hoosac Tunnel Dock Co. v. O'Brien*, 137 Mass. 424; 50 Am. Rep. 323.

referee changed: *In re Bliss*, 39 Hun, 594. Arbitrators had rendered an award fixing the value of a building, and it appeared that one of the arbitrators had, before his appointment, and in view of it, at the instance of the party afterwards proposing him, examined the building and formed an opinion as to its value. *Held*, sufficient evidence of partiality in the arbitrator to warrant a court of equity in setting aside the award: *Smith v. Cooley*, 5 Daly, 401. A is a stockholder in a bank, which holds shares in a railroad company as collateral security for a loan to a customer. A is not disqualified to act as an arbitrator in a reference to which the railroad is a party: *Leominster v. R. R. Co.*, 7 Allen, 38. One of the arbitrators was familiarly acquainted with one of the parties, and, before the submission, had heard him honestly state the facts in the case, and thereupon expressed the opinion that no commercial house could stand upon the transaction. *Held*, not to invalidate the award: *Morville v. American Tract Society*, 123 Mass. 129; 25 Am. Rep. 40.

**§ 3329. Arbitrator Entitled to Compensation for Services.**—Arbitrators and referees are entitled to their fees, as any other person for services rendered;<sup>1</sup> and a referee

<sup>1</sup> *Ott v. Schroepfel*, 3 Barb. 63; *Holcomb v. Tiffany*, 38 Conn. 271. In *Hinman v. Hapgood*, 1 Denio, 188, 43 Am. Dec. 663, the court say: "The defendant relies upon the objection that no express promise or request by the defendant to the plaintiff to render such services had been proved, and therefore his services must be deemed to have been rendered gratuitously: *Virany v. Warns*, 4 Esp. 47, is cited as decisive of this point. In that case the plaintiff's counsel, in stating the case to the jury, said that the action was brought to recover a sum of money due to the testator for acting as an arbitrator on the part of the defendant in a certain dispute with another. Lord Kenyon decided that the plaintiff was not entitled to recover anything unless he could prove an express promise; that the appointment of an arbitrator was not of such a nature as to raise a demand for payment. Whatever may be the law in England, I do not doubt but in this state an arbitrator selected by the parties to perform such services, and having performed the services, attended by the parties, may

recover a reasonable compensation therefor, in the absence of an express promise to pay; and it has, since the time of the case referred to, been so adjudged in England: *Swinford v. Burn*, 1 Gow, 7, 8; *Chitty on Contracts*, 165, 166. The evidence in this case shows that the plaintiff was appointed an arbitrator by the parties to the controversy; that the arbitrators were engaged five days as such, attended by the defendant and the other parties to the submission, and until the powers of the arbitrators were revoked by the defendant. I cannot doubt but the evidence showed a sufficient employment of the plaintiff as an arbitrator to entitle him to compensation for services rendered as such arbitrator. An objection is made here, for the first time, that the plaintiff in error could not sustain a separate action for his services; that the other arbitrator had a joint interest with him. Several cases have been cited, supposed to sustain this point, but I am unable to see the application of the principle decided by those cases to the question before us. I have no doubt but that the claim of each ar-

or arbitrator has a lien on his report or award for his fees.<sup>1</sup> Arbitrators are entitled to pay for all the days they are necessarily employed in the case, including the time of deliberation;<sup>2</sup> and for attending a meeting that is rightly adjourned without any other proceeding; but not for a meeting where they adjourn on their own motion, when both parties are present, without proceeding in the cause, and without consent of either party.<sup>3</sup> Whatever may be the agreement between the parties to an arbitration as to which shall pay the arbitrator's fees, if the arbitrator is not privy thereto, both parties are liable to him for the full amount of his services.<sup>4</sup> They are not entitled to pay until they are organized, unless they are prevented from organizing by the default of the parties, or one of them, or by agreement of the parties attending.<sup>5</sup> Where a statute provides for a referee's fee for each day occupied in a hearing, a fee is not chargeable for days on which there was an adjournment only.<sup>6</sup> And where they hear two cases together, the matters of which are identical, and no more time is consumed in investigating both of them together than would have been necessary to devote to each separately, they are entitled to fees as for only one case.<sup>7</sup> An arbitrator who has rendered some services contemplated by the submission will not necessarily be defeated of all right to compensation by reason of a failure to render all the services necessary to enable him to make

bitrator is several and not joint, and that a joint action by the arbitrators for their compensation could not be sustained. The defendant cannot object that the other parties to the submission should have been joined. This could only be availed of by plea in abatement."

<sup>1</sup> *Devlin v. Mayor*, 54 How. Pr. 68; *Clement v. Comstock*, 2 Mich. 359; *Fischer v. Raab*, 58 How. Pr. 221. But they cannot demand more than the statutory fees: *Greenwood v. Marvin*, 29 Hun, 99; *Derlin v. Mayor* etc. of New York, 7 Daly, 486. The lien of arbitrators upon property in contro-

versy which is awarded to one of the parties for the portion of their fees due from him is superior to a mortgage executed by such person after the date of the award, but before it is entered on the minutes of the court: *Miller v. Fisk*, 47 Ga. 270.

<sup>2</sup> *Hassinger v. Diver*, 2 Miles, 411.

<sup>3</sup> *Baker v. Hunter*, 1 Miles, 357.

<sup>4</sup> *Young v. Starkey*, 1 Cal. 426. And see *Malone v. Roby*, 62 Wis. 459.

<sup>5</sup> *Baker v. Hunter*, 1 Miles, 357.

<sup>6</sup> *In re Clark*, 36 Hun, 301.

<sup>7</sup> *Butcher v. Scott*, 1 Pa. L. J. 311; *Girard v. Hutchinson*, 4 Serg. & R. 81.

a valid award binding upon the parties, but he will be entitled, notwithstanding, to a reasonable compensation for the services actually rendered, in good faith, in pursuance of the submission.<sup>1</sup> But an arbitrator through whose misconduct an award has been set aside cannot recover for his services as such.<sup>2</sup>

**§ 3330. Arbitrators need not be Sworn—Required by Statute.**—At common law an arbitrator need not be sworn.<sup>3</sup> But by statutes which, in several of the states, provide for arbitration, it is required that the arbitrators be sworn. This formality in New Jersey, Louisiana, and some other states is imperative;<sup>4</sup> while in New York and others it is permissive merely, and may be waived by the parties.<sup>5</sup>

<sup>1</sup> Goodall v. Cooley, 29 N. H. 48.

<sup>2</sup> Bever v. Brown, 56 Iowa, 565; 41 Am. Rep. 118.

<sup>3</sup> Bradstreet v. Erskine, 50 Me. 407; Daggy v. Connelly, 20 Ind. 474; Dickenson v. Hays, 4 Blackf. 44. An award is not vitiated by the fact that the arbitrator's oath was not signed by them till after the hearing: Ogden v. Forney, 33 Iowa, 205.

<sup>4</sup> Inslee v. Flagg, 26 N. J. L. 368; 69 Am. Dec. 580; Combs v. Little, 4 N. J. Eq. 310; 40 Am. Dec. 207; Overton v. Alpha, 13 La. Ann. 558; Jackson v. Steele, Sneed, 21; Lile v. Barnett, 2 Bibb, 166; French v. Moseley, 1 Litt. 248; Walt v. Huse, 38 Mo. 210; Toler v. Hayden, 18 Mo. 399; Fassett v. Fassett, 41 Mo. 516; Hepburn v. Jones, 4 Col. 98. See Ruckman v. Ransom, 35 N. J. L. 565.

<sup>5</sup> Browning v. Wheeler, 24 Wend. 258; 35 Am. Dec. 617; Howard v. Sexton, 1 Denio, 440; 4 N. Y. 157; Sloan v. Smith, 3 Cal. 406; Winship v. Jewett, 1 Barb. Ch. 173; Tucker v. Allen, 47 Mo. 488; Sonneborn v. Lavarello, 4 Thomp. & C. 536; Day v. Hammond, 57 N. Y. 479; 15 Am. Rep. 522; Newcomb v. Wood, 97 U. S. 581; Nason v. Luddington, 56 How. Pr. 172; 8 Daly, 149; Woodrow v. O'Connor, 28 Vt. 776; Browning v. Marvin, 5 Abb. N. C. 285; Kankakee etc. R. R. Co. v. Alfred, 3 Ill. App. 511; Mil-

waukee Supervisors v. Ehlers, 45 Wis. 281; Kelsey v. Darrow, 22 Hun. 125; In re Vilmar, 10 Daly, 15. In Day v. Hammond, 57 N. Y. 479, 15 Am. Rep. 522, the court said: "The first subject of inquiry is, whether Slater's failure to take the statutory oath invalidates the award so completely as to make it a nullity, or whether it is an irregularity which leaves the award in force until set aside by the court, or whether it is of no legal consequence. On these points there is a great conflict in the decisions of the respective states. In New Jersey, where an oath of office is required by law of arbitrators, an award made without taking the oath is a nullity: Combs v. Little, 4 N. J. Eq. 310; 40 Am. Dec. 207; Inslee v. Flagg, 26 N. J. L. 368; 69 Am. Dec. 580. The same rule prevails in Kentucky: Lile v. Barnett, 2 Bibb, 166. So in Louisiana: Overton v. Alpha, 13 La. Ann. 558; Bethesda v. Hood, 9 La. Ann. 88; and in Missouri: Frissell v. Fickes, 27 Mo. 557; Toler v. Hayden, 18 Mo. 399; Fassett v. Smith, 41 Mo. 516. On the other hand, it has been held in Vermont, in Wisconsin, and in Pennsylvania that the oath of the arbitrator may be waived, and that its absence is not a vital or jurisdictional question: Woodrow v. O'Connor, 28 Vt. 776; Hill v. Taylor, 15 Wis. 190; Otis v. Northrop, 2 Miles, 350. This

§ 3331. **Parties Entitled to Notice of Hearing.** — Each party is entitled to be present at the hearing,<sup>1</sup> and therefore is entitled to a reasonable notice of the time and place of the hearing;<sup>2</sup> and an award made without notice

result has also been reached in the New York cases: *Browning v. Wheeler*, 24 Wend. 258; 35 Am. Dec. 617; *Winship v. Jewett*, 1 Barb. Ch. 173; *Howard v. Sexton*, 1 Denio, 440; 4 N. Y. 157. The defendant insists that the question did not come up directly in the last case. The principle, however, was involved. The oath cannot be waived if it is jurisdictional. In *Inalee v. Flagg*, 26 N. J. L. 368, 69 Am. Dec. 580, the case of *Howard v. Sexton* is commented upon, and the decision is made to rest upon the ground that the New York courts hold that the agreement of the parties gives the arbitrator jurisdiction, and that the absence of the oath is not vital. In following *Howard v. Sexton* this court must hold that the failure of Slater to take an oath as arbitrator was, at the most, an irregularity, and could be waived. There was, however, in the present case no waiver. The irregularity continued down to the issuing of the award. The true view is, that the court, acting as a court of equity, should, where there is no waiver, set aside the award on proper application. The statute should be regarded as having some practical operation. While it is reasonable to hold, as in *Howard v. Sexton*, that the parties may, by mutual consent, waive the statutory provision, yet, in a case like the present, where there is no evidence whatever of waiver, the correct construction of the statute is, that a party may insist upon the observance of its requirements; and the court may, in the exercise of a sound discretion, set aside the award for want of such observance. The oath, to a certain extent, tends to secure freedom from bias and partiality, and to exclude from the arbitrament of cases men who are for these reasons unfit to act. The parties have a right to ask the arbitrators to purge themselves from any imputations of this kind. They should be protected by the courts in the exercise of this right." After an award

has been executed, the court will not set it aside because the arbitrators were not sworn: *Johnson v. Ketchum*, 4 N. J. Eq. 364. Where an award is recommitted to the arbitrators for reconsideration, it is not necessary that the arbitrators should be resworn; nor need the award, after such reconsideration, show upon its face that the arbitrators were sworn in the first instance: *Tomlinson v. Hammond*, 8 Iowa, 40. If the parties to an arbitration consent to the arbitrator's oath being administered by another officer than those prescribed by statute, their consent will be valid as a waiver of the oath: *Hill v. Taylor*, 15 Wis. 190. If an award state that the arbitrators were sworn before J. S., it will be presumed that J. S. had power to administer the oath to them: *Shryock v. Morton*, 2 A. K. Marsh. 561. Where arbitrators were sworn "faithfully and impartially to discharge their duties as arbitrators in a matter submitted to them by A and B, by articles of agreement," etc., this was held to be a substantial compliance with the statute: *Vaughn v. Graham*, 11 Mo. 575.

<sup>1</sup> *Hollingsworth v. Leiper*, 1 Dall. 161; *Hagner v. Musgrove*, 1 Dall. 83; *Chaplin v. Kirwan*, 1 Dall. 187; *Innes v. Miller*, 1 Dall. 188; *Tate v. Vance*, 27 Gratt. 571; *Linde v. Republic Fire Ins. Co.*, 50 N. Y. 362.

<sup>2</sup> *Young v. Reynolds*, 4 Md. 375; *McKinney v. Page*, 32 Me. 513; *Brown v. Leavitt*, 26 Me. 251; *Upshaw v. Hargrove*, 6 Smedes & M. 286; *Webber v. Ives*, 1 Tyler, 441; *Armstrong v. United States*, 1 Ct. of Cl. 22; *Taylor v. Vessel Owners' Towing Co.*, 25 Ill. App. 503; *Bullitt v. Musgrave*, 3 Gill, 31; *Rigden v. Martin*, 6 Har. & J. 403; *Bushey v. Culler*, 26 Md. 534; *Morewood v. Jewett*, 2 Robt. 496; *Peters v. Newkirk*, 6 Cow. 103; *Lutz v. Linthicum*, 8 Pet. 178; *Conrad v. Massasoit Ins. Co.*, 4 Allen, 20; *Knowlton v. Mickles*, 29 Barb. 465; *Goodall v. Cooley*, 29 N. H. 48; *Selby v. Gibson*, 1 Har. & J. 362; *Emerson v. Udall*, 8

to the party is not binding on him.<sup>1</sup> So when the decision is postponed to enable the defendant to produce further testimony, and the arbitrators afterwards receive such testimony, and decide the case, without notifying the plaintiff of the time and place of the last meeting, the award is void.<sup>2</sup> An award made without hearing one of the parties is void as to him, unless he has agreed that there shall be no hearing.<sup>3</sup> And the award of two of three

Vt. 357; *Jordan v. Hyatt*, 3 Barb. 284; *Briggs v. Smith*, 20 Barb. 413; *Day v. Hammond*, 57 N. Y. 486; 15 Am. Rep. 522; *Emery v. Owings*, 7 Gill, 488; 48 Am. Dec. 581; *Curtis v. Sacramento*, 64 Cal. 102. In *Elmendorf v. Harris*, 23 Wend. 628, 35 Am. Dec. 587, the court said: "What is a reasonable notice of the time and place of hearing, upon a submission to arbitration, must of course be left to the discretion of the arbitrator. And if he acts in good faith in reference to that question, he acts within the authority of the submission; and his award will be valid at law, although he actually mistakes the true rule as to what was a reasonable notice. But I apprehend that, as a fundamental rule of construction in reference to every transaction in the nature of a judicial proceeding, the contract of submission necessarily implies that the arbitrator is not authorized or empowered to decide the question in controversy without giving the parties an opportunity to be heard in relation thereto; unless by the terms of the submission the right of the party to be heard before the arbitrator is waived. If I am correct as to this principle, it necessarily follows that where the arbitrator proceeds entirely *ex parte*, without giving the party against whom the award is made any notice of the proceedings on the submission, the award is without authority, and void. The only case I have been able to find in our own reports upon this point is *Peters v. Newkirk*, 6 Cow. 103, referred to in the opinion of the late Chief Justice Savage in the present case. There the supreme court of this state distinctly decided that an appraisal which was to control the rights of parties in the

nature of an award was a nullity, the appraisal having been made by the arbitrator to whom the parties had agreed to submit the question, on the *ex parte* application of one party only, and without any notice whatever to the other party, who was not present. In *Lutz v. Linthicum*, 8 Pet. 178, Mr. Justice Story, in reference to such a proceeding, says that, without question, due notice should be given to the parties of the time and place of hearing; and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside. Neither is it of any importance, in such a case, that the arbitrator, who has condemned one of the parties unheard, did not intend to act corruptly, but merely mistook his duty in that respect; for the want of an opportunity to be heard goes directly to the authority of the arbitrator to make an award."

<sup>1</sup> *McFarland v. Mathis*, 10 Ark. 560; *Emery v. Owings*, 7 Gill, 488; 48 Am. Dec. 580; *Cobb v. Wood*, 32 Me. 455; *Hook v. Philbrick*, 23 N. H. 288; *Jordan v. Hyatt*, 3 Barb. 275; *Selby v. Gibson*, 1 Har. & J. 362; *Willson v. Boor*, 40 Md. 483; *Downey v. Knower*, 55 Iowa, 722; *Curtis v. Sacramento*, 64 Cal. 102; *Dreyfous v. Hart*, 36 La. Ann. 929; *Wood v. Helms*, 14 R. I. 325; *Lincoln v. Taunton Copper Mfg. Co.*, 8 Cush. 415; *Moran v. Bogert*, 16 Abb. Pr., N. S., 303; *Wheaton v. Crane*, 27 N. J. Eq. 368; *Republic Bank v. Darragh*, 30 Hun, 29; *Goodall v. Cooley*, 29 N. H. 48.

<sup>2</sup> *Shinnie v. Coil*, 1 McCord Ch. 478; *McCormick v. Blackford*, 4 Gratt. 133; *West Jersey R. R. Co. v. Thomas*, 21 N. J. Eq. 205.

<sup>3</sup> *Billings v. Billings*, 110 Mass. 225.

arbitrators is void, if the third arbitrator had no notice to act in the matter.<sup>1</sup> But notice to his attorney is notice to the party.<sup>2</sup> The notice must be given before the hearing,<sup>3</sup> and the parties must have sufficient time to examine documentary evidence.<sup>4</sup> One who, in order to sustain an award, relies upon an agreement to dispense with a hearing before the arbitrators, must establish such agreement by affirmative evidence.<sup>5</sup> If, after notice given, a party does not attend, the arbitrators may proceed *ex parte*,<sup>6</sup> and notice may be waived by the parties.<sup>7</sup> The appear-

<sup>1</sup> *Bannister v. Read*, 6 Ill. 92.

<sup>2</sup> *Morse on Arbitration and Award*, 119. *Contra*, *Rivers v. Walker*, 1 Dall. 81. If the attorney of the party has agreed to the time and place or the arbitrators' meeting, notice to the party, personally, becomes unnecessary: *Shibe v. Rex*, 1 Brown, 174.

<sup>3</sup> *Conrad v. Massasoit Ins. Co.*, 4 Allen, 20; the court saying: "A notice after the arbitrators had examined the property and made up their minds as to the extent of the damages sustained by the plaintiffs was too late. The object of the notice is to give an opportunity to the parties to present their case to the arbitrators before a conclusion is arrived at. It is an idle ceremony if given after the judgment of the arbitrators is formed." Where, upon the application of one party, the time for rendition of an award is enlarged, he is not entitled, in the absence of stipulations, to notice of the time when it is rendered, after the enlarged time has elapsed: *Scruggs v. Bibb*, 33 Ala. 481.

<sup>4</sup> *Passmore v. Pettit*, 4 Dall. 271. See *Winsor v. Griggs*, 5 Cush. 210.

<sup>5</sup> *West Jersey R. R. Co. v. Thomas*, 23 N. J. Eq. 431.

<sup>6</sup> *Bray v. English*, 1 Conn. 498; *Brown v. Leavitt*, 26 Me. 251; *Scott v. Van Sandau*, 6 Q. B. 237; *Harcourt v. Ramsbottom*, 1 Jacob & W. 512.

<sup>7</sup> *Shockey v. Glasford*, 6 Dana, 9; *Harding v. Wallace*, 8 B. Mon. 536; *Hill v. Hill*, 11 Smedes & M. 616; *Spencer v. Curtis*, 57 Ind. 221; *Wiberly v. Matthews*, 91 N. Y. 648; *Duckworth v. Diggles*, 139 Mass. 51. In *Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec.

557, the court say: "The evidence was, that formal notice of the time and place of hearing by the umpire had not been given; but that Richard, being told of the umpirage by one of the arbitrators, declared that, acting by the advice of his counsel, he would not appear; in earnest of which he handed a paper to the arbitrator, with instruction to lay it before the umpire, in order to bring into his view certain accounts which he feared might be overlooked. Notice may be waived in advance by a communication addressed to the person who would be bound to give it, and had there been merely a declaration of intention, in this instance, without the message which accompanied it, there would perhaps have been no waiver. It is true that arbitrators are not *functi officio* by the appointment of an umpire; for they may still go on and award; and where they do not, it is their business to give information and assistance to the umpire, at least they may do so. But though it was their province to give notice to the parties of their own meetings in the first instance, and of the appointment of the umpire in the second, it became his province, having the duties to perform which had before rested on them, to appoint the time and place of his sitting, and to warn the person concerned: *Kyd on Awards*, 59. But as a party may beforehand signify his determination not to appear, and thus dispense with notice of the time and place, he may do it in person, or by an agent authorized to communicate it. In this instance there was more

ance of parties at the time and place fixed for hearing waives a defect in giving notice.<sup>1</sup> Upon submission to arbitration made by a city, the fact that the city attorney appeared on the hearing, and argued and submitted the cause, is a waiver of notice of the time and place of hearing.<sup>2</sup> After an award is made, that notice was given to the parties will be presumed.<sup>3</sup> The recital in an award that the parties had been heard is conclusive, in a court of error, that the parties appeared, and thus waived the want of notice of the time and place of meeting, the record on error showing no evidence to the contrary.<sup>4</sup>

**§ 3332. Of What Proceedings Notice to Parties not Necessary.** — No notice is essential of the meeting of the arbitrators to consider and make up the award;<sup>5</sup> or of a meeting called simply to arrange an adjournment.<sup>6</sup> It is not always necessary that notice should be given of the time and place of making an award.<sup>7</sup> Referees authorized to locate a line may make measurements without the parties' knowledge.<sup>8</sup> A referee's report will not be set aside because, after hearing, he took a second view of the premises alone, the court finding that the fairness of the trial was not affected by such view.<sup>9</sup> A surety upon a submission is not entitled to notice;<sup>10</sup> nor a surety on a lease the subject of the dispute.<sup>11</sup>

**§ 3333. Power of Arbitrators to Administer Oath.** — An arbitrator at common law has no power to administer

than an expression of intention; it was accompanied by a paper to be laid before the umpire and used in the party's defense, and the declaration of his intention thus assumed the character of a communication, as it would have done had it been confided to a stranger. Besides, without an appearance, a party is not entitled to the benefit of matter of defense, or, having given it, to treat the proceeding as *ex parte*. After that it would be idle to trouble him with notice."

<sup>1</sup> Pike v. Stallings, 71 Ga. 860.

<sup>2</sup> Kane v. Fond du Lac, 40 Wis. 495.

<sup>3</sup> Lutz v. Linthicum, 8 Pet. 178; Rigden v. Martin, 6 Har. & J. 403; Mayor of New York v. Butler, 1 Barb. 325; Bullitt v. Musgrave, 3 Gill, 31.

<sup>4</sup> Vankirk v. McKee, 9 Pa. St. 100.

<sup>5</sup> Roloson v. Carson, 8 Md. 208; Zell v. Johnston, 76 N. C. 302. And see Herrick v. Blair, 1 Johns. Ch. 101.

<sup>6</sup> In re Morphet, 2 Dowl. & L. 967.

<sup>7</sup> Miller v. Kennedy, 3 Rand. 2.

<sup>8</sup> Straw v. Truesdale, 59 N. H. 109.

<sup>9</sup> Adams v. Bushey, 60 N. H. 290.

<sup>10</sup> Farmer v. Stewart, 2 N. H. 97.

<sup>11</sup> Binasse v. Wood, 47 Barb. 624.

an oath to a witness.<sup>1</sup> By statute in many of the states he is given such power, and a referee may be given it by the order of court appointing him. But the award will not be vitiated by their swearing the witnesses without authority.<sup>2</sup> Even where power to administer the oath is given by statute, an examination without the formality will be sustained,<sup>3</sup> the parties assenting to it without objection.<sup>4</sup>

§ 3334. **To Compel Attendance or Production.**—In the absence of a statute an arbitrator has no power to compel the attendance of witnesses, or the production of documents.<sup>5</sup> But by statute in some states arbitrators may summon witnesses, compel their attendance, and punish for contempt by fine or imprisonment to the extent of justices of the peace, administer proper oaths to parties and witnesses, and preserve order, etc.<sup>6</sup>

§ 3335. **Arbitrators Judges of Law and Fact.**—They are the judges both of the law and the facts;<sup>7</sup> they are not obliged to follow the strict rules of law, but they may decide according to what they believe to be right and just.<sup>8</sup>

<sup>1</sup> *Tobey v. County of Bristol*, 3 Story, 800; *Large v. Passmore*, 5 Serg. & R. 51; *People v. Townsend*, 5 How. Pr. 315.

<sup>2</sup> *Large v. Passmore*, 5 Serg. & R. 51. <sup>3</sup> *Maynard v. Frederick*, 7 Cush. 247; *Bergh v. Pfeiffer*, Hill & D. 110. But see *Wolfe v. Hyatt*, 76 Mo. 156.

<sup>4</sup> *Ridout v. Pye*, 1 Bos. & P. 91; *Allen v. Francis*, 9 Jur. 691.

<sup>5</sup> *Tobey v. County of Bristol*, 3 Story, 800.

<sup>6</sup> *Thomasson v. Risk*, 11 Bush, 619. <sup>7</sup> *Maynard v. Frederick*, 7 Cush.

246; *White Mountains R. R. Co. v. Beane*, 39 N. H. 107; *Kleine v. Catara*, 2 Gall. 61; *Myers v. R. R. Co.*, 2 Curt. 28; *Brown v. Clay*, 31 Me. 518; *Johnson v. Noble*, 13 N. H. 286; 38 Am. Dec. 485; *Walker v. Sanborn*, 8 Greenl. 288; *Whitmore v. Le Ballistier*, 35 Me. 488; *Sweetsir v. Kenney*, 32 Me. 464; *Tyler v. Dyer*, 13 Me. 41; *Haseltine v. Smith*, 3 Vt. 535; *Hall v.*

*Decker*, 51 Me. 31; *Rundell v. La Fleur*, 6 Allen, 490; *Bigelow v. Newell*, 10 Pick. 348; *Chapline v. Overseers*, 7 Leigh, 231; 30 Am. Dec. 504; *Curd v. Wallace*, 7 Dana, 190; 32 Am. Dec. 85; *Colcord v. Fletcher*, 50 Me. 398; *Austin v. Kimball*, 12 Cush. 485; *Memphis etc. R. R. Co. v. Scruggs*, 50 Miss. 284; *Forbes v. Turner*, 54 Ga. 252; *Fudichar v. Guardian Mut. Ins. Co.*, 62 N. Y. 392.

<sup>8</sup> See cases in last note; and *Johnson v. Noble*, 13 N. H. 286; 38 Am. Dec. 485; *Kleine v. Catara*, 2 Gall. 61; *Sweetsir v. Kenney*, 32 Me. 464; *Porter v. R. R. Co.*, 32 Me. 539; *West Jersey R. R. Co. v. Thomas*, 21 N. J. Eq. 205; *Ruckman v. Ransom*, 23 N. J. Eq. 118; *Leach v. Harris*, 69 N. C. 532. Arbitrators need not decide according to law. They are a law unto themselves: *Robbins v. Killebrew*, 95 N. C. 19. Where a submission confers power "to make a just and equitable

In the absence of any showing of partiality, an award on a common-law arbitration will be sustained, even if the relief granted is outside of the legal rights of the parties.<sup>1</sup> Arbitrators may disregard the defense of usury, and decide according to the justice of the case, without affecting the validity of their award, unless it be expressly stipulated in the rule of reference that the parties shall be entitled to all legal defenses.<sup>2</sup> Arbitrators appointed under a rule of court have authority, if they think proper, to refer questions of law decided by them to the revision and adjudication of the court.<sup>3</sup> In Missouri a referee's conclusions of law are not binding upon the court, which may accept the facts found by him, and render such judgment thereupon as is applicable.<sup>4</sup>

**§ 3336. Powers of Arbitrators—Admission of Evidence.**—Arbitrators are not bound by the strict rules of law as to the admissibility of evidence.<sup>5</sup> They are the

settlement," the arbitrators may look beyond the strict technical and legal rights and obligations of the parties: *Cobb v. Dolphin Mfg. Co.*, 108 N. Y. 463. "If, knowing what the law is, the referees choose to disregard it, and decide according to what they think to be the equity and good conscience of the case, the report is not for this cause to be rejected": *Greenough v. Rolfe*, 4 N. H. 357. "The referees, being judges of the party's choice, are not obliged to decide upon the strict principles of law, but may disregard them altogether, and adopt certain principles of equity and justice to govern their decision": *Hazeltine v. Smith*, 3 Vt. 535. "Where a matter is referred to arbitrators by the mere act of the parties, it is no ground of objection to their award, in an action to enforce it, that it is against law": *Mitchell v. Bush*, 7 Cow. 185. "Arbitrators are to decide according to their own opinions of equity and conscience, without being tied down to the observance of precedents either of law or equity, or of any other positive rules": *Jocelyn v. Donnel*, Peck, 274; 14 Am. Dec. 753.

<sup>1</sup> *McKinnis v. Freeman*, 38 Iowa, 364.

<sup>2</sup> *Edrington v. League*, 1 Tex. 64.

<sup>3</sup> *Knight v. Wilder*, 2 Cush. 199; 48 Am. Dec. 660.

<sup>4</sup> *Moniteau Bank v. Miller*, 73 Mo. 187.

<sup>5</sup> *Maynard v. Frederick*, 7 Cush. 246; *Fuller v. Wheelock*, 10 Pick. 135; *Hooper v. Taylor*, 39 Me. 224; *Imlay v. Wikoff*, 4 N. J. L. 132; *Fennimore v. Childs*, 6 N. J. L. 386; *Eyre v. Fennimore*, 3 N. J. L. 932; *Adams v. Macfarlane*, 65 Me. 143. In *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485, the court, after a lengthy review of the authorities, say: "The plain doctrine, deducible from the cases cited, is, that a submission of the law of a case to referees is to be considered as embracing in it a submission of the rules of evidence; and that the decision of the referees is as conclusive in relation thereto as in relation to any other matter of law or fact submitted. And it is a reasonable doctrine. No reason occurs to us why the rules of evidence should not be regarded as being within the purview of the submission; but strong reason is seen which

judges both of the admissibility and the weight of evi-

would induce the court to construe the submission, and the power conferred by it, as embracing those rules, when it is not otherwise expressly stipulated. The question of the admissibility of a witness, or of the competency or relevancy of testimony, is purely a question of law, and the law governing the admissibility and competency of evidence is necessarily a portion of the law of the case, and when the law of the case is submitted, it must necessarily be considered as being submitted as a branch of the law. It would result from this view that an error in the application of those rules would not alone constitute a valid reason for setting aside an award. And a different doctrine on this subject would in its operation be wholly intolerable. If every award of referees were to be overhauled and rejudged because they may have listened to an interested witness, or because evidence for some one or more of the great variety of existing causes, deemed incompetent or inadmissible in the ordinary legal tribunals, should be laid before them, surely speedy justice would be a thing wholly unknown as the result of the action of these domestic tribunals; and the law's delay would become more than ever a subject of complaint. Ordinarily, persons chosen to discharge the duties of referees are not selected with reference to the extent of their legal learning, but with reference to their sound and discriminating judgment in regard to right and justice, and their general probity of character. Errors in such tribunals, in the application of the strict legal rules of evidence, if such strictness were required, must necessarily be frequent and inevitable. And accuracy in that regard would be so little to be expected that it is unreasonable to suppose that it is either expected or designed by parties who submit to place any such limit upon their action without an express provision to that effect; and it results, as a fair presumption, that no such restriction is intended when none is expressed. Upon the authorities, then, we think the doctrine is clear that, under a general and unlimited sub-

mission, the fair and impartial judgment of the referees is conclusive, both upon the law and the facts of the matters submitted and decided, in case the referees themselves have placed no limit upon the exercise of the power conferred by the submission. And in such case the rules as well as the weight of evidence are matters wholly within their power. And it is wholly immaterial whether the judgment of the referees be based on legal or equitable principles. The legal and equitable considerations of the case are equally within the scope of their authority; and in neither case, when the judgment of the referees is fairly exercised, is it the duty or within the province of the court to interfere and set aside the report. In the case under consideration, the submission was general and unrestricted as to the power conferred and the mode of the exercise of that power. The report is silent as to the principles and grounds of the decision; and no aid of the court is asked by the report, either in the determination of the law or facts of the case, either in express terms or by implication. The referees have exercised the power conferred upon them, as rightfully they might, in the determination of both the law and the facts of the case, without such aid, and it falls not within the proper exercise of the authority of the court to set aside or in any other way disturb the report made under such circumstances. What might have been the opinion of this court as to the admissibility of the evidence of the promise of marriage, for any purpose connected with the action, upon a trial at law, upon the authority of *Gillet v. Mead*, 7 Wend. 193, 22 Am. Dec. 578, or what might have been the opinion of this court upon the sufficiency of the facts detailed in the deposition of *Lucy M. Johnson*, as evidence of the existence of the relation of master and servant at the time of the alleged trespass, upon the authority of *Miller v. Thompson*, 1 Wend. 447, *Nickleason v. Stryker*, 10 Johns. 115, 6 Am. Dec. 318, and *Martin v. Payne*, 9 Johns. 387, 6 Am. Dec. 288,—are questions wholly immaterial to the decision of this cause. It is

dence.' That they have received evidence which is not

sufficient that the parties clothed the referees with authority to decide those questions according to their own views, and that they have exercised that power. A coincidence or difference of opinion in the two tribunals upon those questions cannot affect the result."

<sup>1</sup> Campbell v. Western, 3 Paige, 124; Hooper v. Taylor, 39 Me. 224; Pike v. Gage, 30 N. H. 461; Shaifer v. Baker, 38 Ga. 135. In Boston Water Power Co. v. Gray, 6 Met. 165, Shaw, C. J., said: "In general, arbitrators have full power to decide upon questions of law and fact which directly or incidentally arise in considering and deciding the questions embraced in the submission. As incident to the decision of the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to evidence and the inferences of fact to be drawn from it. So when not limited by the terms of the submission, they have authority to decide questions of law necessary to the decision of the matters submitted; because they are judges of the parties' own choosing. Their decision upon matters of fact and law, thus acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive; which is, that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata*; it is the final judgment for that case, and between those parties. It is amongst the rudiments of the law that a party cannot, when a judgment is relied on to support or to bar an action, avoid the effect of it by proving, even if he could prove to perfect demonstration, that there was a mistake of the facts or of the law. But this general rule is to be taken with some exceptions and limitations, arising either from the submission, or from the award itself, or from matters distinct from either. If the submission be of a certain controversy, expressing that it is to be decided conformably to the principles of law, then both parties proceed upon the assumption that their case is to

be decided by the true rules of law, which are presumed to be known to the arbitrators, who are then only to inquire into the facts, and apply the rules of law to them and decide accordingly. Then if it appears, by the award, to a court of competent jurisdiction, that the arbitrators have decided contrary to law, — of which the judgment of such a court, when the parties have not submitted to another tribunal, is the standard, — the necessary conclusion is, that the arbitrators have mistaken the law, which they were presumed to understand; the decision is not within the scope of their authority, as determined by the submission, and is for that reason void. But when the parties have expressly, or by reasonable implication, submitted the questions of law, as well as the questions of fact, arising out of the matter of controversy, the decision of the arbitrators on both subjects is final. It is upon the principle of *res judicata*, on the ground that the matter has been adjudged by a tribunal which the parties have agreed to make final, and a tribunal of last resort for that controversy; and therefore it would be as contrary to principle for a court of law or equity to rejudge the same question as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction, or a revising power acting directly upon the judgment alleged to be erroneous. It has sometimes been made a question whether the court will not set aside an award on the ground of mistake of the law when the arbitrator is not a professional man, and decline inquiry into such mistake when he was understood from his profession to be well acquainted with the law. Some of the earlier cases may have countenanced this distinction, but the probability is, that this distinction was taken rather by way of instance to illustrate the position that when the parties intended to submit the questions of law as well as of fact the award should be final; but otherwise not, which we take to be the true principle. But we think the more modern cases adopt the prin-

competent by rules of law will not suffice to avoid their report, unless their course evinces partiality or corruption.<sup>1</sup> And books and papers may be examined by them without regard to their not being strictly legal evidence.<sup>2</sup>

As to rejecting proffered evidence, while an arbitrator has undoubtedly some discretion in determining how much evidence to establish a given point he will hear, yet it will be safer for him to hear all evidence offered material to the case.<sup>3</sup> But the arbitrator must not reject evidence which he thinks not admissible under the submission, but which is legally so, as this is a mistake concerning the scope of the submission which the court will feel bound to rectify,<sup>4</sup> and he must not receive evidence going

ciple that inasmuch as a judicial decision upon a question of right, by whatever forum it is made, must almost necessarily involve an application of certain rules of law to a particular statement of facts, and as the great purpose of a submission to arbitration usually is to obtain a speedy determination of the controversy, a submission to arbitration embraces the power to decide questions of law, unless that presumption is rebutted by some exception or limitation in the submission. We are not aware that there is anything contrary to the policy of the law in permitting parties thus to substitute a domestic forum for the courts of law for any good reason satisfactory to themselves, and having done so, there is no hardship in holding them bound by the result. *Volenti non fit injuria.*"

<sup>1</sup> *Harding v. Wallace*, 8 B. Mon. 536; *Vaughn v. Graham*, 11 Mo. 575; *Pike v. Gage*, 29 N. H. 461; *Johnson v. Noble*, 13 N. H. 286; 38 Am. Dec. 485; *Campbell v. Western*, 3 Paige, 124; *Sharp v. Dusenbury*, 2 Johns. Cas. 117; *Viele v. R. R. Co.*, 21 Barb. 381.

<sup>2</sup> *Hollingsworth v. Leiper*, 1 Dall. 161. But see *Cameron v. Castleberry*, 29 Ga. 495; *Emery v. Owings*, 7 Gill, 488; 48 Am. Dec. 580; *Cleland v. Hedly*, 5 R. I. 163; *Jenkins v. Liston*, 13 Gratt. 535.

<sup>3</sup> *Morse on Arbitration and Award*,

142; *Russell on Arbitration and Award*, 178; *Van Cortland v. Underhill*, 17 Johns. 405.

<sup>4</sup> *Morse on Arbitration and Award*, 138; *Samuel v. Cooper*, 2 Ad. & E. 752. In the leading case of *Boston Water Power Co. v. Gray*, 6 Met. 168, Shaw, C. J., reviews the cases in which the mistake of the arbitrators in the admission of testimony will be reversed by the courts. He says: "But where the whole matter of law and fact is submitted, it may be open for the court to inquire into a mistake of law arising from matter apparent on the award itself; as where the arbitrator has, in his award, raised the question of law, and made his award in the alternative, without expressing his own opinion; or, what is perhaps more common, where the arbitrator expresses his opinion, and, conformably to that opinion, finds in favor of one of the parties; but if the law is otherwise in the case stated, then his award is to be for the other party. In such case, there is no doubt the court will consider the award conclusive as to the fact, and decide the question of law thus presented. Another case, somewhat analogous, is where it is manifest upon the award itself that the arbitrator intended to decide according to law, but has mistaken the law. Then it is set aside, because it is manifest that the result does not conform to the real

to establish an illegal or unenforceable claim.<sup>1</sup> A referee appointed simply to take testimony in a case, and to re-

judgment of the arbitrator. For then, whatever his authority was to decide the questions of law, if controverted, according to his own judgment, the case supposes that he intended to decide as a court of law would decide; and therefore, if such decision would be otherwise, it follows that he intended to decide the other way. Another ground for setting aside the award is a mistake of fact apparent upon the award itself; and this is held to invalidate the award upon the principle, stated in the preceding proposition, that the award does not conform to the judgment of the arbitrators, and the mistake, apparent in some material and important particular, shows that the result is not the true judgment of the arbitrators. The mistake, therefore, must be of such a nature, so affecting the principles upon which the award is based, that if it had been seasonably known and disclosed to the arbitrators, if the truth had been known and understood by them, they would probably have come to a different result. A familiar instance of this class of mistakes is an obvious error in computation, by which the apparent result, in sums or times, or other things of like kind, is manifestly erroneous. In such case it is clear that the result stated is not that intended; it does not express the real judgment of the arbitrators. The class of cases in which the court will set aside an award, upon matter not arising out of the submission or award, is where there is some corruption, partiality, or misconduct on the part of the arbitrators, or some fraud or imposition on the part of the party attempting to set up the award, by means of which the arbitrators were deceived or misled. In neither of these cases is the result the deliberate and fair judgment of the judges chosen by the parties; the former is the result of prejudice, uninfluenced by law and fact; the latter may be a true judgment, but upon a case falsely imposed on them by the fraud of a party. Under this class of cases, where the

award may be set aside upon matter not arising out of the submission or award, another was stated at the trial; that is, where the arbitrators make a mistake in matter of fact, by which they are led to a false result. This would not extend to a case where the arbitrators come to a conclusion of fact erroneously, upon evidence submitted to and considered by them, although the party impeaching the award should propose to demonstrate that the inference was wrong. This would be the result of reasoning and judgment upon facts and circumstances known and understood; therefore, a result which, upon the principles stated, must be deemed conclusive. But the mistake must be of some fact, inadvertently assumed and believed, which can now be shown not to have been as so assumed; and the principal illustration was that of using a false weight or measure, believing it to be correct. Suppose, as a further illustration, that a compass had been used to ascertain the bearings of points, and it should be afterwards found that by accident, or the fraud of a party, a magnet had been so placed as to disturb the action of the needle, and this wholly unknown to the arbitrators, it is not a fact, or the inference of a fact, upon which any judgment or skill had been exercised, but a pure mistake by which their judgment, as well as the needle, had been swerved from the true direction, which it would have taken had it followed the true law understood to govern it. One test of such a mistake is, that it is of such a kind, and so obvious, that when brought to the notice of the arbitrators it would induce them to alter the result to which they had come in the particular specified. It is not to be understood that such mistake can be proved only by the testimony or by the admission of the arbitrators. They may, from various causes, be unable to testify, or may not be able to recollect the facts and circumstances sufficiently. It is not, therefore, as matter of law,

<sup>1</sup> *De la Riva v. Berreyesa*, 2 Cal. 195.

port to the court, cannot decide upon the admissibility of the evidence.<sup>1</sup> An award was held valid although no evidence as to the value of certain jute was submitted, the arbitrators being experts, and having determined the value from personal examination.<sup>2</sup>

### § 3337. Powers of Arbitrator — Conduct of Hearing.

— The mode in which the reference is to be conducted is in the discretion of the arbitrator.<sup>3</sup> Thus he has the right to appoint the time and place of meeting.<sup>4</sup> He has a right, in his discretion, to limit the number of witnesses;<sup>5</sup> or to reopen a case to hear new evidence.<sup>6</sup> If it appear that the award is in strict conformity to the articles of submission, it is of no importance that the arbitrators were informed only verbally of the contents of the agreement of submission, or that the paper was not actually before them in their proceedings.<sup>7</sup> But both parties must have an opportunity of being heard, and that in the presence of each other; witnesses must give their evidence in the presence of the parties; and the parties must have a reasonable time to bring forward their witnesses.<sup>8</sup> A referee acts as a court; and in order to a review of his rulings,

confined to a case of mistake admitted or proved by the arbitrators; but it must be of a fact upon which the judgment of the arbitrators has not passed as a part of their judicial investigation, and one of such a nature, and so proved, as to lead to a reasonable belief that they were misled and deceived by it, and that if they had known the truth, they would have come to a different result."

<sup>1</sup> *Brotherton v. Brotherton*, 14 Neb. 186.

<sup>2</sup> *Cobb v. Dolphin Mfg. Co.*, 108 N. Y. 463.

<sup>3</sup> *Morse on Arbitration and Award*, 115, citing *Russell on Arbitration and Award*, 164. A bill to set aside an award, on the ground that the arbitrators had refused to take down the heads of the testimony in writing, was

dismissed in *Ewing v. Beauchamp*, 2 Bibb, 456.

<sup>4</sup> *Bray v. English*, 1 Conn. 498; *Blodgett v. Prince*, 109 Mass. 44.

<sup>5</sup> *Sizer v. Bent*, 4 Denio, 426.

<sup>6</sup> *Williams v. Hayes*, 20 N. Y. 58; *Delafield v. De Grauw*, 9 Bosw. 1; *Spear v. Myers*, 6 Barb. 445; *Pearson v. Fiske*, 2 Hilt. 146; *Cooper v. Stevenson*, 5 Minn. 201; *Derguid v. Ogilvie*, 3 E. D. Smith, 527; *Sweeney v. Vaudry*, 2 Mo. App. 352.

<sup>7</sup> *Boor v. Wilson*, 48 Md. 305.

<sup>8</sup> *Hollingsworth v. Leiper*, 1 Dall. 161; *Peters v. Newkirk*, 6 Cow. 103. The referees, in the absence of one of the parties, after the hearing was closed, compared the account submitted with the book of entries. Held, not to constitute an *ex parte* hearing: *Small v. Trickey*, 41 Me. 507; 66 Am. Dec. 255.

exception must be taken as definitely and seasonably as if the trial were proceeding in court.<sup>1</sup>

ILLUSTRATIONS. — Arbitrators excluded the parties during the hearing, while permitting the presence of the secret partner of one of them. They appointed others to examine the accounts and vouchers, and adopted their conclusions without examining the vouchers themselves. *Held*, that the award should be set aside: *Shipman v. Fletcher*, 82 Va. 601.

§ 3338. Powers of Arbitrator — Adjournments. — Adjournments are in the arbitrators' discretion, provided only they are reasonable.<sup>2</sup> Their power is not determined by their neglect to attend at the time and place appointed for the hearing; but they may appoint another session within a reasonable time, unless their authority is expressly revoked, or they are prohibited by the terms of the submission.<sup>3</sup> The following have been held good causes for adjournment: Surprise caused by unexpected evidence;<sup>4</sup> absence of a material witness;<sup>5</sup> absence of some of the arbitrators.<sup>6</sup> A provision in a statute that arbitrators may adjourn from day to day does not exclude necessarily the right to adjourn for a longer time should the exigencies of the case require it.<sup>7</sup> If arbitrators refuse a request for an adjournment founded on sufficient reasons, and offered at a proper season, it is a good cause for setting aside an award.<sup>8</sup>

<sup>1</sup> *Cincinnati v. Cameron*, 33 Ohio St. 336.

<sup>2</sup> *Ex parte Rutter*, 3 Hill, 464; *Brown v. Leavitt*, 26 Me. 251; *Bray v. English*, 1 Conn. 498; *Bixby v. Whitney*, 11 Me. 62; *Richardson v. Hartsfield*, 27 Ga. 528; *Forrest v. Forrest*, 3 Bosw. 650; *Ringer v. Joyce*, 1 Marsh. 404; *Deputy v. Betts*, 4 Harr. (Del.) 352; *Boring v. Boring*, 2 W. Va. 297. Adjourning to hear further argument on behalf of one party, against the objection of the other, and after an agreement that the case should be deemed closed on a previous day, was held an excess of power on the part of the arbitrators, avoiding their award: *Cole v. Blunt*, 2 Bosw. 116. If arbitrators do not meet on the day appointed, their proceedings afterwards will be irregu-

lar, unless the defendant appears or consents to them: *Weir v. Johnston*, 2 Serg. & R. 459; *Frey v. Vanlear*, 1 Serg. & R. 435.

<sup>3</sup> *Harrington v. Rich*, 6 Vt. 666.

<sup>4</sup> *Morse on Arbitration and Award*, 150; *Solomon v. Solomon*, 28 L. J. Ex. 129; *Packer v. French*, Hill & D. 103; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Forbes v. Frary*, 2 Johns. Cas. 224; See *Woodworth v. Van Buskirk*, 1 Johns. Ch. 432.

<sup>5</sup> *Sudam v. Swart*, 20 Johns. 476.

<sup>6</sup> *Harrington v. Rich*, 6 Vt. 666.

<sup>7</sup> *Richardson v. Hartsfield*, 27 Ga. 528.

<sup>8</sup> *Coryell v. Coryell*, 1 N. J. L. 385; *Passmore v. Pettit*, 4 Dall. 271; *Forbes v. Frary*, 2 Johns. Cas. 224. But see *Woodworth v. Van Buskirk*, 1 Johns. Ch. 432.

### § 3339. Arbitrator must not Exceed his Authority.

—The arbitrator's authority is derived either from a statute, an order of court, or from the submission under which he acts. These must be followed, and he must not act in excess of them; for his award which exceeds his powers so given is void.<sup>1</sup> When the arbitrator takes into consideration and makes an award about matters not involved in the matters submitted, nor submitted according to law, the award is good only as to the matters submitted.<sup>2</sup> The presumption is in favor of the award, and that the arbitrator has not exceeded his authority.<sup>3</sup> The burden is upon the party objecting to show that the authority was exceeded.<sup>4</sup>

ILLUSTRATIONS. — Claims made by A against B are submitted to arbitration. The arbitrator has no authority to award as to claims of B against A: *Morse on Arbitration and Award*, 181. The submission was of a question of title. *Held*, that arbi-

<sup>1</sup> *Cook v. Carpenter*, 34 Vt. 121; 80 Am. Dec. 670; *Howard v. Edgell*, 17 Vt. 9; *Blanton v. Gale*, 6 B. Mon. 260; *Adams v. Adams*, 8 N. H. 82; *Richardson v. Huggins*, 23 N. H. 106; *Smith v. Kincaid*, 7 Humph. 28; *Butler v. Mayor of New York*, 7 Hill, 329; *Robinson v. Moore*, 17 N. H. 479; *Haynes v. Forskoll*, 31 Me. 112; *Worthen v. Stevens*, 4 Mass. 448; *Gilmore v. Hubbard*, 12 Cush. 220; *Sawyer v. Freeman*, 35 Me. 542; *Wyman v. Hammond*, 55 Me. 534; *Culver v. Ashley*, 17 Pick. 98; *Shearer v. Handy*, 22 Pick. 417; *Curd v. Wallace*, 7 Dana, 190; 32 Am. Dec. 85; *Stewart v. Cass*, 16 Vt. 663; 42 Am. Dec. 534; *Denman v. Bayless*, 22 Ill. 300; *Reynolds v. Reynolds*, 15 Ala. 398; *Lee v. Oustott*, 1 Ark. 206; *Stevens v. Gray*, 2 Harr. (Del.) 347; *Fountain v. Harrington*, 3 Harr. (Del.) 22; *Wright v. Wright*, 5 Cow. 197; *Brown v. Hankerson*, 2 Cow. 70; *Lyle v. Rodgers*, 5 Wheat. 394; *Schuyler v. Van der Veer*, 2 Caines, 235; *Gibson v. Powell*, 5 Smedes & M. 712; *Solomons v. McKinstry*, 13 Johns. 27; *Sessions v. Barfield*, 2 Bay, 94; *Bean v. Farnam*, 6 Pick. 269; *Merrill v. Gardner*, 40 Me. 282; *French v. Richardson*, 5 Cush.

450; *Tracy v. Herrick*, 25 N. H. 381; *Brown v. Brown*, 4 Jones, 123; *Sweet v. Mathewson*, 1 R. I. 420; *Buckley v. Ellmaker*, 13 Serg. & R. 71; *Wooden v. Little*, 3 McCord, 487; *Brown v. Davis*, 2 Brev. 468; *Perkins v. Kershaw*, 1 Hill Eq. 344; *Sutton v. Dickinson*, 9 Leigh, 142; *Morris v. Morris*, 9 Gratt. 637; *Black v. Hickey*, 48 Me. 545; *Hubbell v. Bissell*, 13 Gray, 298; *Allen v. Galpin*, 9 Barb. 246; *Young v. Young*, 6 N. J. Eq. 450; *Ott v. Schroepel*, 7 Barb. 431; *Hazen v. Addis*, 14 N. J. L. 333; *Borrow v. Millbank*, 5 Abb. Pr. 28; *Duncan v. Duncan*, 1 Ired. 466; *Cullifer v. Gilliam*, 9 Ired. 466; *Dunlap v. Campbell*, 5 W. Va. 195; *Squires v. Anderson*, 54 Mo. 193; *Waller v. Shannon*, 44 Conn. 480; *Burns v. Hendrix*, 54 Ala. 78.

<sup>2</sup> *Carson v. Carson*, 1 Met. (Ky.) 434.

<sup>3</sup> *Lampshire v. Cowan*, 39 Vt. 420; *Myers v. R. R. Co.*, 2 Curt. 28; *Haynes v. Forskoll*, 31 Me. 112; *Richardson v. Huggins*, 23 N. H. 106; *Fiske v. South Wilbraham*, 7 Allen, 476.

<sup>4</sup> *Reynolds v. Reynolds*, 15 Ala. 398; *Blair v. Wallace*, 21 Cal. 317; *Hubbard v. Firman*, 29 Ill. 90; *Clement v. Comstock*, 2 Mich. 359; *Parsons v. Aldrich*, 6 N. H. 264.

trators cannot arrange a purchase and sale of the property: *Robinson v. Moore*, 17 N. H. 479. The submission was of the question whether goods sold by sample, and delivered, correspond to the sample, and must be accepted. *Held*, not to authorize the arbitrators to award damages for a refusal to accept the goods: *Leach v. Weeks*, 2 Abb. Pr., N. S., 269. A submission authorizes the arbitrators to determine the amount due from one party to another. *Held*, to give no authority to impose a condition upon the payment of the amount awarded: *Mayor etc. of New York v. Butler*, 1 Barb. 325.

**§ 3340. Powers of Arbitrator—To Order Acts to be Done.**—The arbitrator has power to order either or both parties to perform certain acts in the future only where such authority is expressly or impliedly given in the submission. Such power is either permissive or compulsory. If the former, he may exercise it, or not, in his discretion; if the latter, he must exercise it, and to fail to do so will avoid the award.<sup>1</sup> An arbitrator in general may award that one party pay to the other money,<sup>2</sup> or other chattels;<sup>3</sup> or that one person apologize to another.<sup>4</sup> An arbitrator cannot award that two persons shall intermarry;<sup>5</sup> or that a person shall do a criminal or an illegal act.<sup>6</sup>

**§ 3341. Powers of Arbitrator—To Order Conveyances.**—Where disputes as to the title or boundaries of lands are submitted to arbitration, the arbitrator has power to order the execution of conveyances to give effect to the award.<sup>7</sup>

<sup>1</sup> *Morse on Arbitration and Award*, 198; *Angus v. Radford*, 2 Dowl., N. S., 735; *Nicholls v. Jones*, 6 Ex. 373; *Morgan v. Smith*, 1 Dowl., N. S., 617; *Crump v. Adney*, 1 Crump. & M. 355; *Boynton v. Frye*, 33 Me. 216; *Berkshire Woolen Co. v. Day*, 12 Cush. 128; *Stratton v. Mason*, 15 Pick. 508.  
<sup>2</sup> *Morse on Arbitration and Award*, 180.

<sup>3</sup> *Bac. Abr.*, tit. Arbitration, E; *Puralow v. Bailly*, 2 Ld. Raym. 1039; *In re Gillon v. Mersey etc. Nav. Co.*, 3 Barn. & Adol. 493.

<sup>4</sup> *Glover v. Barrie*, 1 Salk. 71.

<sup>5</sup> *Bac. Abr.*, tit. Arbitration, E, 3;

*Roll. Abr.*, tit. Arbitration, I, 10, p. 252.

<sup>6</sup> *Wood v. Griffith*, 1 Swanst. 55; *Turner v. Swainson*, 1 Mees. & W. 572; *Russell on Arbitration and Award*, 391.

<sup>7</sup> *Williams v. Warren*, 21 Ill. 541; *Preston v. Whitcomb*, 11 Vt. 47; *Caldwell v. Dickenson*, 13 Gray. 365. In *Penniman v. Rodman*, 13 Met. 382, a bill was filed in equity to compel a specific performance of such an award; and the defendant demurred. The plaintiff had judgment; *Wilde, J.*, saying: "The defendant demurs to the bill, and the first cause of demurrer is,

§ 3342. Powers of Arbitrator—To Order Releases.—

An arbitrator has power to order a release as to any claim embraced in the submission.<sup>1</sup> Under a general submission general releases may be ordered,<sup>2</sup> but not under a special submission.<sup>3</sup>

§ 3343. Powers of Arbitrator—To Award Costs.—

While it is held in some states that arbitrators have no implied power to award the costs of the arbitration to be paid by one of the parties,<sup>4</sup> the best considered cases are

that the court has no jurisdiction of the subject-matter of the bill. But the question of jurisdiction in this case is not distinguishable from that of *Jones v. Boston Mill Corporation*, 4 Pick. 507, 16 Am. Dec. 358, a case which was very well considered; and the decision seems to us to be well founded on principle and on the authorities: See 2 Story's Eq. Jur., sec. 1458. By the submission, the parties agree that the award of the arbitrators shall be final as to the matters submitted; which is virtually a contract between them, by which each party agrees to perform whatever the arbitrators shall lawfully direct to be done and performed by them respectively: *Wood v. Griffith*, 1 Swanst. 54; *Blundell v. Brettargh*, 17 Ves. 241. The other ground of defense is, that the arbitrators had no authority to award and direct conveyances of real estate. The bill alleges that, at the time of the submission, there was a controversy, or conflicting claims, between the parties respecting real estate, and that these claims were laid before the arbitrators. It is clear, therefore, that the parties intended to submit their claims against each other as to the real estate in controversy, and the words of the submission are sufficiently comprehensive to embrace these claims. The terms of the submission are general, and embrace all accounts, claims, and demands which the parties had against each other at the time of the submission. That their claims concerning real as well as personal property were designated by these general terms is, we think, unquestionable, and that the arbitrators were thereby authorized

to direct the conveyances mentioned in their award. It is not necessary that the arbitrators should be specially, and in terms, authorized to direct such conveyances, if the general terms are sufficient to show that the parties intended to give them such authority. So it was decided in *Sellick v. Addams*, 15 Johns. 197; and that decision is supported by the cases there cited. See also *Byers v. Van Deusen*, 5 Wend. 268. We think, therefore, there is no ground for saying that the arbitrators have exceeded their authority so that the defendant is not bound to perform their award."

<sup>1</sup> *Morse on Arbitration and Award*, 192; *Roberts v. Marriett*, 2 Saund. 190; *Boyes v. Bluck*, 13 Com. B. 652; *Portland v. Brown*, 43 Me. 223; *Mo-Nil v. Magee*, 5 Mason, 244; *Guarrant v. Smith*, 48 Miss. 90.

<sup>2</sup> *Cable v. Rogers*, 3 Bulst. 311.

<sup>3</sup> *Williams v. Richardson*, 8 Taunt. 677.

<sup>4</sup> *Vose v. How*, 13 Met. 243; *Harrington v. Brown*, 9 Allen, 579; *Maynard v. Frederick*, 7 Cush. 247; *Shirley v. Shattuck*, 4 Cush. 470; *Peters v. Pierce*, 8 Mass. 398; *Gordon v. Tucker*, 6 Me. 247; *Day v. Hooper*, 51 Me. 178; *Harrison v. Webber*, 40 Ma. 194; *Porter v. R. R. Co.*, 32 Me. 539; *Dundon v. Starin*, 19 Wis. 261; *Morrison v. Buchanan*, 32 Vt. 289; *Griffin v. Hadley*, 8 Jones, 82. A provision in the submission that the award shall be "pursuant to law" does not necessarily imply an authority to award costs: *Akely v. Akely*, 17 How. Pr. 21. Referees cannot award costs where the law says they shall not be given: *Lewis v. England*, 4 Binn. 5.

to the effect that, although the question of costs is not mentioned in the submission, the power of awarding them is incident to the authority of the arbitrators;<sup>1</sup> and if the submission is of a pending cause, it seems agreed that the arbitrator or referee has power to award concerning the costs of the suit.<sup>2</sup> The successful party to an arbitration is not entitled to costs, unless either the agreement to submit to arbitration expressly imposes them, or the arbitrators, under implied authority from the terms of the agreement, expressly award them.<sup>3</sup> In Massachusetts if the award made under a rule of court is silent on the subject of costs, the prevailing party is entitled to recover them.<sup>4</sup> If arbitrators should award costs, without designating the amount, or prescribing any mode by which the amount

<sup>1</sup> *Nichols v. Rensselaer Ins. Co.*, 22 Wend. 127; *Cox v. Jagger*, 2 Cow. 638; 14 Am. Dec. 522; *Strang v. Ferguson*, 14 Johns. 161; *Spofford v. Spofford*, 10 N. H. 254; *Ailing v. Munson*, 2 Conn. 691; *Chase v. Strain*, 15 N. H. 535; *Joy v. Simpson*, 2 N. H. 179; *Chapin v. Boody*, 25 N. H. 285; *Brown v. Mathes*, 5 N. H. 229; *Andrews v. Foster*, 42 N. H. 376; *Hawley v. Hodges*, 7 Vt. 237; *Bowman v. Downer*, 23 Vt. 532; *Harden v. Harden*, 11 Gray, 485; *Dudley v. Thomas*, 23 Cal. 365; *Dickerson v. Tyner*, 4 Blackf. 253; *Young v. Shook*, 4 Rawle, 302; *Hewitt v. Furman*, 16 Serg. & R. 135; *Burnell v. Everson*, 50 Vt. 449; *Wade v. Powell*, 31 Ga. 1.

<sup>2</sup> *Austin v. Snow*, 2 Dall. 157; *Vose v. How*, 13 Met. 243; *Bacon v. Crandon*, 15 Pick. 79; *Nelson v. Andrews*, 2 Mass. 164; *Brown v. Mathes*, 5 N. H. 229; *Joy v. Simpson*, 2 N. H. 79; *Chapin v. Boody*, 25 N. H. 285; *School District v. Aldrich*, 13 N. H. 140. In *Jones v. Carter*, 8 Allen, 430, the court says: "The power of arbitrators appointed under a rule of court to award on the subject of costs is perfectly well settled in this commonwealth: *Nelson v. Andrews*, 2 Mass. 164; *Bacon v. Crandon*, 15 Pick. 79. This power is not interfered with or controlled by any statute provisions: Gen. Stats., c. 156, sec. 21. Nor can there be any doubt that it includes an authority to

determine concerning the costs of arbitration as well as the costs of court: *Vose v. How*, 13 Met. 244. The fees of arbitrators, and the expenses attending the hearing before them, are the necessary costs of the cause, incurred by the consent of parties before the tribunal of their own selection, and are deemed to be included in the power given by the rule to determine the cause as incident thereto, and forming an essential part of the final determination thereof. But this power cannot be extended further, so as to authorize an award of costs to either party for fees or items of charge not expressly authorized by law. No consent to such allowance can be implied from the reference of the cause. Beyond the award of their own fees and the necessary expenses of the reference, such as the charges for the place of meeting and the cost of stationery, arbitrators can include no costs in their award except those which are expressly authorized by law to be taxed as legal costs. This would include the fees for attendance of witnesses before the arbitrators, and other similar charges."

<sup>3</sup> *Akely v. Akely*, 17 How. Pr. 21; *Anonymous*, 2 N. J. L. 228; *Hamilton v. Wort*, 7 Blackf. 348; *Harralson v. Pleasants*, Phill. (N. C.) 365.

<sup>4</sup> *Woolson v. R. R. Co.*, 103 Mass. 580.

is to be ascertained, that part of their award would be void for want of certainty.<sup>1</sup>

§ 3344. **Powers of Arbitrator—To Order as to Terms of Payment—Interest.**—The arbitrator has power, in awarding A to pay B a sum of money, to order when and where payment is to be made.<sup>2</sup> He may also order that the amount shall be payable in installments;<sup>3</sup> or that it be made in negotiable paper;<sup>4</sup> or a bond given to secure it.<sup>5</sup> But an authority to find a sum due does not give the arbitrator power to order payment in something else than money.<sup>6</sup> So an arbitrator has power to award interest in his discretion.<sup>7</sup>

§ 3345. **Appointment of Substitute.**—Arbitrators have no power to name a substitute for one unable or unwilling to act, unless so authorized by the submission.<sup>8</sup> In Massachusetts, upon a reference by rule of court, the award must be made by the arbitrators named in the rule. Even if the parties, by writing indorsed on the rule, substitute an arbitrator in place of one of those named, and waive all exceptions, no judgment can be rendered on the award.<sup>9</sup>

**ILLUSTRATIONS.**—By the conditions of a lease, the time when the rent for the leased premises should commence was to be determined by two arbitrators therein named, and it was further provided that if either of the arbitrators named should refuse, or be unable to perform such duties, a successor should be appointed in a certain way. *Held*, that the absence of one of the arbitrators in Europe was sufficient evidence of his inability to act to justify the appointment of another: *Binsse v. Wood*, 37

<sup>1</sup> *School District v. Aldrich*, 13 N. H. 139.

<sup>2</sup> *In re Morphett*, 2 Dowl. & L. 967; *Freeman v. Bernard*, 1 Salk. 69; *Armitage v. Walker*, 2 Kay & J. 211. But see *Emery v. Wase*, 8 Ves. Jr. 504 a.

<sup>3</sup> *Kockill v. Witherell*, 2 Keb. 838.

<sup>4</sup> *Booth v. Garnett*, 2 Strange, 1082.

<sup>5</sup> *Cook v. Whorwood*, 2 Saund. 337.

<sup>6</sup> *State v. Jones*, 2 Gill, 49.

<sup>7</sup> *Sherry v. Oke*, 3 Dowl. 349; *Morgan v. Mather*, 2 Ves. Jr. 15; *In re Badger*, 2 Barn. & Ald. 691; *In re Morphett*, 3 Dowl. & L. 967; *Armitage v. Walker*, 2 Kay & J. 211.

<sup>8</sup> *Morse on Arbitration and Award*, 205; *Russell v. Gray*, 6 Serg. & R. 145; *Potter v. Sterrett*, 24 Pa. St. 411; *Norton v. Savage*, 10 Me. 455; *Ross v. Pleasants, Wythe*, 147.

<sup>9</sup> *Woodbury v. Proctor*, 9 Gray, 18.

N. Y. 526. Three persons were appointed arbitrators, it being provided that "if either of them do not attend, another or others shall be chosen in their room." One of the three died. *Held*, that the parties, and not the surviving arbitrators, must appoint the substitute: *Potter v. Sterrett*, 24 Pa. St. 411.

§ 3346. **Powers of Arbitrator — To Permit Amendments.**—Where a pending suit is submitted to a referee or arbitrator, he may allow such amendments as might have been made to the pleadings in court to bring before him all the matters in controversy.<sup>1</sup> But a new subject-matter or cause of action cannot be thus introduced.<sup>2</sup>

§ 3347. **Effect of Making Unenforceable Order.**—If arbitrators order a thing to be done which is beyond their power to order, the award will be void so far as it is dependent upon such order, or based upon it as a consideration.<sup>3</sup> But if the person execute the order, or offer to do so, this will render the award founded on it good.<sup>4</sup>

§ 3348. **How Defense that Arbitrators Exceeded Authority may be Availed of.**—That the arbitrator has acted without authority at all, or in excess of his authority, may be pleaded as a defense to a suit upon the bond and award;<sup>5</sup> or it may be set up in opposition to a motion to enter judgment on the award.<sup>6</sup> Only the party prejudiced can object to the arbitrator's exceeding his authority.<sup>7</sup>

<sup>1</sup> *Sumner v. Brown*, 34 Vt. 194; *Fulton v. Wiley*, 32 Vt. 712; *Merrill v. Gold*, 1 Cush. 457; *Meyers v. R. R. Co.*, 2 Curt. 28; *York etc. R. R. Co. v. Myers*, 18 How. 246; *Secor v. Law*, 9 Bosw. 163; *Van Buskirk v. Stow*, 42 Barb. 9; *Ford v. Ford*, 53 Barb. 525; *South Carolina R. R. Co. v. Barrett*, 12 S. C. 173; *Knapp v. Fowler*, 30 Hun, 512; *Oregon Steam Co. v. Otis*, 59 How. Pr. 254; *Mason v. Johnson*, 13 S. C. 20.

<sup>2</sup> *Morse on Arbitration and Award*, 204; *Nichols v. Rensselaer Ins. Co.*, 22 Wend. 129.

<sup>3</sup> *Smith v. Sweeney*, 35 N. Y. 291; *Schuyler v. Van der Veer*, 2 Caines, 235.

<sup>4</sup> *Woodbury v. Northy*, 3 Greenl. 85; *Relea v. Ramsay*, 2 Wend. 602; *Boston Water Power Co. v. Gray*, 6 Met. 131.

<sup>5</sup> *Berkshire Woolen Co. v. Day*, 12 Cush. 128; *Boston v. R. R. Co.*, 14 Gray, 253; *Merrill v. Gold*, 1 Cush. 457.

<sup>6</sup> *Lyman v. Arms*, 5 Pick. 213; *Galvin v. Thompson*, 13 Me. 367.

§ 3349. **All of Several Arbitrators must Act.**—Where the submission is to several arbitrators, all must be present and act together throughout the proceedings,<sup>1</sup> and this is so even where a majority is authorized by the submission to make the award.<sup>2</sup> A statutory provision that “all the arbitrators must meet and hear all the proofs” renders a less number absolutely incompetent to sit.<sup>3</sup> But although a statute requires all the arbitrators to be present at each meeting, the absence of one of them from a meeting at which no final action was taken, if not objected to at the time by a party to the arbitration, cannot afterwards be objected to.<sup>4</sup> Where the award is silent as to whether all the arbitrators met, it will be presumed that they did so.<sup>5</sup>

<sup>1</sup> *Plews v. Middleton*, 6 Q. B. 845; *Smith v. Smith*, 28 Ill. 56; *Thompson v. Mitchell*, 35 Me. 281; *Howard v. Conro*, 2 Vt. 492; *Blin v. Hay*, 2 Tyler, 304; 4 Am. Dec. 738; *Moore v. Ewing*, 1 N. J. L. 144; 1 Am. Dec. 195; *Hoff v. Taylor*, 5 N. J. L. 829; *Hoffman v. Hoffman*, 26 N. J. L. 175; *McInroy v. Benedict*, 11 Johns. 402; *Harris v. Norton*, 7 Wend. 534; *Ackley v. Finch*, 7 Cow. 290; *Brower v. Kingsley*, 1 Johns. Cas. 334; *Short v. Pratt*, 6 Mass. 496; *Henderson v. Bulkley*, 14 B. Mon. 236; *Tuscorora Bridge Co. v. Jemison*, 33 Ala. 476; *McCrary v. Harrison*, 36 Ala. 577; *Green v. Miller*, 6 Johns. 39; 5 Am. Dec. 184; *Norfleet v. Southall*, 3 Murph. 189; *Byard v. Harkrider*, 108 Ind. 376. Where a submission is to five as arbitrators, and three only concur in making the award, it cannot be upheld: *Oakley v. Anderson*, 93 N. C. 108. In *Blin v. Hay*, 2 Tyler, 304, 4 Am. Dec. 738, it is said: “Parties to an arbitrament, without any improper motives, may have a peculiar and reasonable predilection for a particular person or persons to sit as arbitrators. The subject-matter in dispute may be better comprehended by some than others, owing to their particular avocations in life. When a person submits a controversy to five arbitrators, he has reason to expect that all will be present at the hearing

of his cause, or at least that all will be notified of the time and place of meeting; for the absence of one might materially affect the award. His superior judgment in the matter in controversy may have been relied upon by the party in preference to that of all the others, and might have altered the opinion of the others; and although a majority, after a candid discussion, may make the award, yet all the arbitrators to whom the matters in controversy have been submitted, in the terms of the present submission, ought to be present at the hearing, or at least it should appear that they were notified of the time and place of meeting, if not present.”

<sup>2</sup> *Batley v. Button*, 13 Johns. 187; *Bulson v. Lohnes*, 29 N. Y. 291; *Kingston v. Kincaid*, 1 Wash. C. C. 448; *People v. Coghill*, 47 Cal. 361.

<sup>3</sup> *Bowen v. Lazalere*, 44 Mo. 353; *Shores v. Bowen*, 44 Mo. 396.

<sup>4</sup> *Glass-Pendery Consolidated Mining Co. v. Meyer Mining Co.*, 7 Col. 51.

<sup>5</sup> *Yates v. Russell*, 17 Johns. 461; *Schultz v. Halsey*, 3 Sand. 405; *Maynard v. Frederick*, 7 Cush. 247; *Brower v. Kingsley*, 1 Johns. Cas. 334; *Ackley v. Finch*, 7 Cow. 290. *Contra*, *Blin v. Hay*, 2 Tyler, 304; 4 Am. Dec. 738; *Short v. Pratt*, 6 Mass. 496.

**§ 3350. Unless One Withdraws or Refuses to Act.**—Where one of the arbitrators withdraws or refuses to act with the others, the latter, where the submission gives authority to a majority to make the award, may go on without the dissentient.<sup>1</sup> If a reference be made to three, or any two of them, and after many meetings one cannot agree with the other two, and requests not to be called upon at future meetings, and the other two meet and agree upon a report, this is good.<sup>2</sup> If the withdrawal or refusal to act occurs before the proceedings are begun, it seems that the others cannot go on.<sup>3</sup> This has been expressly decided in the case of referees,<sup>4</sup> even after one report and a recommitment,<sup>5</sup> unless the second report is identical with the first unanimous one.<sup>6</sup>

**§ 3351. All of Several Arbitrators must Unite in Award—When Award of Majority Binding.**—“Unless the statute or the submission under which the arbitrators

<sup>1</sup> *Cumberland v. North Yarmouth*, 4 Greenl. 468; *Schultz v. Halsey*, 3 Sand. 405; *Maynard v. Frederick*, 7 Cush. 247; *Bulson v. Lohnes*, 29 N. Y. 291; *Green v. Miller*, 6 Johns. 39; 5 Am. Dec. 184; *Crofoot v. Allen*, 2 Wend. 495; *King v. Grey*, 31 Tex. 22; *Dodge v. Brennan*, 59 N. H. 138. In *Carpenter v. Wood*, 1 Met. 412, the court said: “No particular form of words is necessary to constitute a refusal to act, or a withdrawing from any further participation in a trust of this nature. In *Kingston v. Kincaid*, 1 Wash. C. C. 448, it appeared, on examination of the referees, that the three often met upon the subject, but as one could not agree with the others on important points of dispute, he said it was unnecessary to call upon him again, and he withdrew; and the award of the majority without any further notice to the third referee was not held objectionable on that account: 1 U. S. Digest, Arbitrament, etc., 246. In *Cumberland v. North Yarmouth*, 4 Greenl. 468, Mellen, C. J., said: ‘If after a joint hearing of the parties and their proofs, in the

first instance, and before a recommitment, one of the referees absent himself immediately, or refuse to consult with his brethren, or to give any opinion, then the other two have full power to decide the cause upon the evidence previously produced, and heard by all.’ And so in *Kunckle v. Kunckle*, 1 Dall. 364, an award signed by two of the three referees, without notice to the third, was sustained, where they agreed upon the substance of their report in the presence of the third referee, who declared his disagreement, and said the others could make the report without him. Having said that, it became unnecessary for the two to give him any further notice before they made and signed the report.”

<sup>2</sup> *Kingston v. Kincaid*, 1 Wash. C. C. 448.

<sup>3</sup> Morse on Arbitration and Award, 159.

<sup>4</sup> *Boardman v. England*, 6 Mass. 70.

<sup>5</sup> *Cumberland v. North Yarmouth*, 4 Greenl. 468.

<sup>6</sup> *May v. Haven*, 9 Mass. 325; *Peterson v. Loring*, 1 Greenl. 64.

act and derive their authority provide to a contrary effect, or unless a contrary intention of the parties can be clearly and unmistakably gathered from the submission and attendant facts, the rule is general and imperative that all the arbitrators must unite in the award in order to render it valid."<sup>1</sup> The submission need not expressly authorize an award by a majority of the arbitrators; if the language implies such a power, it will be sufficient.<sup>2</sup> Where one

<sup>1</sup> *Morse on Arbitration and Award*, 162; *Maynard v. Frederick*, 7 Cush. 247; *Nettleton v. Gridley*, 21 Conn. 531; 56 Am. Dec. 378; *Rhodes v. Baird*, 16 Ohio St. 573; *Mackey v. Neill*, 8 Jones, 214; *Quimby v. Melvin*, 28 N. H. 250; *Knowlton v. Homer*, 30 Me. 552; *Towne v. Jaquith*, 6 Mass. 46; 4 Am. Dec. 84; *Smith v. Walden*, 26 Ga. 249; *Jeffersonville etc. R. R. Co. v. Mounts*, 7 Ind. 669; *Eames v. Eames*, 41 N. H. 177; *Russell v. Gray*, 6 Serg. & R. 145; *Patterson v. Leavitt*, 4 Conn. 50; 10 Am. Dec. 98; *Payne v. Moore*, 2 Bibb, 163; 4 Am. Dec. 689; *Reeves v. Gaff*, 2 N. J. L. 143; *Patton v. Collins*, *Sneed*, 153; *Hoffman v. Hoffman*, 26 N. J. L. 175; *Tetter v. Rapesnyder*, 1 Dall. 293; *Welty v. Zentnyer*, 4 Watts, 75; *Baker v. Farmbrough*, 43 Ind. 240; *Harryman v. Harryman*, 43 Md. 140; *Memphis etc. R. R. Co. v. Pillow*, 9 Heisk. 248; *Hills v. Home Ins. Co.*, 129 Mass. 345; *Lorenzo v. Deery*, 26 Hun, 447. *Contra*, *Black v. Pearson*, 1 McCord, 137; *Spencer v. Curtis*, 57 Ind. 221. In *Green v. Miller*, 6 Johns. 39, 5 Am. Dec. 184, the court said: "A controversy between these parties was submitted to five arbitrators. The submission did not provide that a less number than the whole might make an award. All the arbitrators met and heard the proofs and allegations of the parties, but four only agreed on the award made; and whether this award be binding is the question now before the court. No case has been cited by the counsel where this question has been directly decided. I am, however, satisfied that as a submission to arbitrators is a delegation of power for a mere private purpose, it is necessary that all

the arbitrators should concur in the award, unless it is otherwise provided by the parties. In matters of public concern a different rule seems to prevail; there the voice of the majority shall govern. In the case of *Grindley v. Barker*, 1 Bos. & P. 236, *Eyre, C. J.*, says: 'It is now pretty well established that where a number of persons are intrusted with power, not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole.' The same principle was recognized by the court of king's bench, in the case of *King v. Beeston*, 3 Term Rep. 592, which arose under the statute 9 George I., which enables the church-wardens and overseers to contract for the providing for the poor. It was held that it was not necessary that all the church-wardens and overseers should concur, as the contract of the majority of them would bind the rest. Lord Kenyon, however, observes that this was very different from the case of trustees in settlements, who are generally chosen by the different branches of the family, in which case it is necessary that they should all concur in every act, in order that each may protect the interest he was appointed to guard. These cases, I think, warrant the conclusion that where the trust or authority delegated is for mere private purposes, the concurrence of all interested with the power is necessary to its due execution."

<sup>2</sup> *Battay v. Button*, 13 Johns. 187; *Maynard v. Frederick*, 7 Cush. 247; *Phippen v. Stickney*, 3 Met. 384; *Sweeney v. Vaudrey*, 2 Mo. App. 352.

of the parties to an agreement to name arbitrators refuses to name his part, an award made by those named by the other party is irregular and void.<sup>1</sup> An award signed by two of three arbitrators in the presence of each other, but not in that of the third, and by the third, at a different time and place, in the presence of only one of the others, is invalid.<sup>2</sup> The report of a majority of several referees is, however, valid.<sup>3</sup> If a cause be, by a rule of court, referred to certain arbitrators, or a majority of them, an award made by a majority of the referees named will not be vitiated by other persons not named in the rule of reference joining in and signing the award.<sup>4</sup> A referee's report need not be signed by a person chosen by the parties to advise and assist the referee.<sup>5</sup>

**§ 3352. Final Unanimity only Necessary.**—If all the arbitrators agree in the final award, it is immaterial that they were not unanimous on every incidental question which may have arisen.<sup>6</sup> And the process by which they came to their agreement is not to be inquired into.<sup>7</sup> The dissent of one arbitrator from the finding of the others must be expressed at or before the time of publication of the award.<sup>8</sup>

**§ 3353. Arbitrator must Exercise Judicial Judgment and Discretion—Cannot Delegate Authority.**—Each arbitrator must exercise his best judgment and discretion in coming to a conclusion,<sup>9</sup> and cannot delegate the decision to another, be he a fellow-arbitrator or a stranger.<sup>10</sup> But

<sup>1</sup> *Copper v. Wells*, 1 N. J. Eq. 10.

<sup>2</sup> *French v. Butler*, 39 Mich. 79; *Daniels v. Ripley*, 10 Mich. 237.

<sup>3</sup> *Billington v. Sprague*, 22 Me. 34; *Lockart v. Kidd*, 2 Mill Const. 217; *In re Farwell*, 2 N. H. 123; *Eastman v. Burleigh*, 2 N. H. 484. *Contra*, *Tetter v. Rapeanyder*, 1 Dall. 293.

<sup>4</sup> *Carter v. Laws*, 4 Dev. & B. 182.

<sup>5</sup> *Daggy v. Cronnelly*, 20 Ind. 474.

<sup>6</sup> *Campbell v. Western*, 3 Paige, 124; *Bean v. Wendell*, 22 N. H. 582.

<sup>7</sup> *Campbell v. Western*, 3 Paige, 124; *Bean v. Wendell*, 22 N. H. 582.

<sup>8</sup> *Campbell v. Western*, 3 Paige, 124; *Jackson v. Gager*, 5 Cow. 383; *Cox v. Jagger*, 2 Cow. 638; 14 Am. Dec. 522.

<sup>9</sup> *Eads v. Williams*, 24 L. J. Ch. 531; *Brown v. Bellows*, 4 Pick. 179.

<sup>10</sup> *Lingood v. Eads*, 2 Atk. 501; *Proctor v. Williamson*, 29 L. J. Com. P. 157; *Little v. Newton*, 9 Dowl. 437; *Haff v. Blossom*, 5 Bosw. 559; *Whitemore v. Smith*, 5 Hurl. & N. 824; 7 Hurl. & N. 509.

an arbitrator may take the opinion of a third person whose judgment and ability he relies upon, and adopt it as his own.<sup>1</sup> He may consult men of science, or call in a valuer to assist him, unless prohibited by the terms of the submission.<sup>2</sup> And an act not judicial, but merely ministerial, may be delegated.<sup>3</sup> Thus an arbitrator to whom is referred a suit for an accounting and the settlement of a copartnership may employ other persons to examine the books.<sup>4</sup> There being no proof that the award as drawn does not contain just what the arbitrators agreed on, the fact that it was drawn by the claimant's attorney is no ground of objection.<sup>5</sup>

**ILLUSTRATIONS.**—Arbitrators were empowered to decide on what terms a building lease held by an individual under a corporation should be renewed. They awarded that the corporation should put the premises in "good tenantable repair, to the satisfaction of M., builder." *Held*, that this reference of repairs to the judgment of a third person was not within the authority of the arbitrators, and made the award bad: *Tomlin v. Fordwich*, 6 Nev. & M. 594; 5 Ad. & E. 147. And see *Johnson v. Latham*, 1 Lown. M. & P. 348; 19 L. J. Q. B. 329.

### § 3354. Irregularities in Proceedings may be Waived.

—Irregularities in the proceedings of arbitrators may be waived by the parties.<sup>6</sup> Thus by appearing and proceeding in the cause, knowing the facts, the party will be

<sup>1</sup> *Soulsby v. Hodgson*, 3 Burr. 1474; *Emery v. Wase*, 5 Ves. Jr. 846; *Caledonian R. R. Co. v. Lockhart*, 3 Macq. 808; *Hopcraft v. Hickman*, 2 Sim. & St. 130; *Eads v. Williams*, 24 L. J. Ch. 531; *Chaplin v. Kirwin*, 1 Dall. 187.

<sup>2</sup> *Caledonian R. R. Co. v. Lockhart*, 3 Macq. 808.

<sup>3</sup> *Russell on Arbitration and Award*, 204; *Morse on Arbitration and Award*, 169; *Thorp v. Cole*, 2 Crompt. M. & R. 367; *Harvey v. Shelton*, 7 Beav. 455; *Moore v. Barnett*, 17 Ind. 349; *Moore v. Ewing*, 1 N. J. L. 144; 1 Am. Dec. 195; as drawing up the award.

<sup>4</sup> *Moore v. Barnett*, 17 Ind. 349.

<sup>5</sup> *Kane v. Fond du Lac*, 40 Wis. 495; *Baker v. Cotterell*, 7 Dowl. & L. 20; 14 Jur. 1120; 18 L. J. Q. B. 345.

<sup>6</sup> *Morse on Arbitration and Award*, 171; *Brown v. Leavitt*, 25 Me. 251; *Hall v. Morris*, 30 Tex. 280; *Cogswell v. Cameron*, 136 Mass. 518. In *Graham v. Graham*, 12 Pa. St. 128, it is said: "That the doctrine of waiver is applicable to proceedings before arbitrators is not only agreeable to reason, but is shown by a variety of instances. An umpire may not be chosen by lot, yet a choice by lot will be sustained if the parties knowingly proceed to a hearing before him. So where two arbitrators mistakingly appoint an umpire instead of a third, a party who has attended the meetings will not be allowed to impeach the award. There are other waivers of irregularity, which it would be superfluous to specify."

estopped from taking advantage of irregularities which otherwise would be fatal;<sup>1</sup> as, for example, that the arbitrator was not qualified;<sup>2</sup> that the witnesses were not sworn;<sup>3</sup> that the award should be in writing, as required by the submission;<sup>4</sup> that matters not included in the submission were heard and decided;<sup>5</sup> that the appointment of the third arbitrator was not made, as required, in writing;<sup>6</sup> that another person had been substituted as arbitrator;<sup>7</sup> that he had not received notice.<sup>8</sup> So defects in the proceedings are waived by ratifying the award and executing its requirements.<sup>9</sup>

**§ 3355. When Umpire may be Appointed — Distinguished from Third Arbitrator.**—An umpire is a person whom two or more arbitrators, authorized by the submission, select to decide the matter in controversy, concerning which the arbitrators are unable to agree. His duty is to determine the issue submitted to the arbitrators, on which they have failed to agree, and to make the award himself. He differs from a third arbitrator in this, that the latter must act with the other arbitrators, while the umpire is a sole arbitrator.<sup>10</sup> An umpire is not to be

<sup>1</sup> *Brooke v. Bannon*, 3 Watts & S. 382; *Perry v. Moore*, 3 E. D. Smith, 32; *Norton v. Savage*, 10 Me. 456; *Valle v. R. R.* 37 Mo. 445; *Cutter v. Whittemore*, 10 Mass. 442; *Dorman v. Turnpike Co.*, 3 Watts, 126; *Tracy v. Herrick*, 25 N. H. 381; *Browning v. McManus*, 1 Whart. 177; *Bamus v. Clarke*, 29 Pa. St. 251; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Christman v. Moran*, 9 Pa. St. 487; *Sellick v. Adams*, 15 Johns. 177; *Brown v. Bellows*, 4 Pick. 179; *Akridge v. Patillo*, 44 Ga. 586; *Deering v. Saco*, 68 Me. 322.

<sup>2</sup> *Brown v. Leavitt*, 26 Me. 251; *Fox v. Hazleton*, 10 Pick. 275. Or not properly appointed: *Mitchell v. Wilhelm*, 6 Watts, 259. Or not chosen in time limited by the submission: *McIntague v. Smith*, 13 Mass. 396.

<sup>3</sup> *Maynard v. Frederick*, 7 Cush. 247; *Bergh v. Pfeiffer*, Hill & D. 110; *Pierce v. Perkins*, 2 Dev. Eq. 250.

<sup>4</sup> *French v. New*, 20 Barb. 481; *Tudor v. Scovill*, 20 N. H. 174.

<sup>5</sup> *Woods v. Page*, 37 Vt. 252.

<sup>6</sup> *Knowlton v. Horner*, 30 Me. 552.

<sup>7</sup> *Hill v. Hill*, 19 Miss. 616; *Hicks v. McDonnell*, 99 Mass. 459.

<sup>8</sup> *Page v. Ranstead*, 10 Allen, 295; *Dickerson v. Hays*, 4 Blackf. 44; *Shockey v. Glasford*, 6 Dana, 9; *Newton v. West*, 3 Met. 24; *Madison Ins. Co. v. Griffin*, 3 Ind. 277. See *ante*, § 3331.

<sup>9</sup> *McShane v. Gray*, 13 Iowa, 504; *Reynolds v. Roebuck*, 37 Ala. 408; *Henneigh v. Kramer*, 50 Pa. St. 530; *Hoogs v. Morse*, 31 Cal. 128. The giving of a note for the amount of an award is a waiver of irregularities in the arbitration proceedings: *Miller v. Brumbaugh*, 7 Kan. 343.

<sup>10</sup> *Haven v. Winnisimmet Co.*, 11 Allen, 377; 87 Am. Dec. 723; *Bassett v. Cunningham*, 9 Gratt. 684; *Shields*

called in until the original arbitrators have differed, and then only to decide the points on which they differ. If he is called in before they disagree, and he decides upon the whole case, the award is bad.<sup>1</sup> But when, by the terms of the submission, in case of the disagreement of the arbitrators, the decision is devolved upon an umpire clothed with all the power of an arbitrator, his duties extend to the determination of all the questions submitted.<sup>2</sup> Where an umpire is provided to decide points upon which the arbitrators may disagree, it is not necessary that the arbitrators and umpire shall sign one award.<sup>3</sup> But a stipulation that each party shall elect one or two arbitrators, who shall choose a third or a fifth one, does not imply that the award will be valid if all do not join therein.<sup>4</sup>

**ILLUSTRATIONS.**—A submission provided that each party should choose one referee, and in case they did not agree, the two referees to choose a third one, and that the parties should be heard before said referees. *Held*, that the third referee was

*v. Renno*, 1 Over. 313; *Mullins v. Arnold*, 4 Sneed, 262; *Rison v. Berry*, 4 Rand. 275; *Butler v. Mayor of New York*, 1 Hill, 489; *Scudder v. Johnson*, 5 Mo. 551; *Graham v. Graham*, 12 Pa. St. 128; *Keans v. Rankin*, 2 Bibb, 88; *Lyon v. Blossom*, 4 Duer, 318; *Day v. Hammond*, 57 N. Y. 479; 15 Am. Rep. 522. For one of the arbitrators to join in the umpire's award is mere surplusage, and does not affect it: *Boyer v. Amand*, 2 Watts, 74; *King v. Cook*, 1 T. U. P. Charlt. 286; 4 Am. Dec. 715; *Rison v. Berry*, 4 Rand. 275; *Frissell v. Fickles*, 27 Mo. 557; *Kile v. Chapin*, 9 Ind. 150; *Tyler v. Webb*, 10 B. Mon. 123. In *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522, it is said: "The cases sometimes refer indiscriminately to these two classes of persons. In the course of the discussion the cases of both classes will be considered, and, also, whether there is any substantial distinction between them. A distinction between a 'third arbitrator' and an 'umpire' is taken in *Lyon v. Blossom*, 4 Duer, 318, 325. It is there said, 'When an umpire has

been duly appointed, and in consequence of a disagreement of the arbitrators, has entered on the performance of his duties, the authority to make a final decision is vested exclusively in him; the original powers of the arbitrators have ceased to exist. They are *functi officio*. . . . But when two arbitrators, unable to agree, exercise a power given by the submission by appointing a third, the authority to make an award is vested in them jointly; and even when an award made by only two of them is good, it must be shown to be the result of their joint deliberations."

<sup>1</sup> *Traverse v. Beall*, 2 Cranch C. C. 113; *Royse v. McCall*, 5 Bush, 695; *Crawford v. Orr*, 84 N. C. 246. And see *Haff v. Blossom*, 5 Bosw. 559; *Mullins v. Arnold*, 4 Sneed, 262.

<sup>2</sup> *Crabtree v. Green*, 8 Ga. 8.

<sup>3</sup> *Powell v. Ford*, 4 Lea, 278. And see *Scudder v. Johnson*, 5 Mo. 551; *Quay v. Westcott*, 60 Pa. St. 163.

<sup>4</sup> *Willis v. Higginbotham*, 61 Miss. 164.

a joint arbitrator, and not an umpire: *Gaffy v. Hartford Bridge Co.*, 42 Conn. 143. A building contract provided that in case of a disagreement between the parties respecting extra work, it should be appraised by two persons, and if the appraisers disagreed, then an umpire should decide. *Held*, that an award of the umpire was conclusive as to the amount: *Butler v. Mayor etc.*, 1 Hill, 489; 1 Barb. 325. Several causes were referred, by order of the court, with the consent of the parties, to A and B, and in case of disagreement between them, then to an umpire, to decide such difference for their arbitrament and award, which, when made by them, or their umpire, and duly certified by them, should be entered as the judgment of the court. *Held*, that on the disagreement of A and B, the whole matter was to be adjudged by the umpire, and that his decision was conclusive, though he differed from both the arbitrators: *Bassett v. Cunningham*, 9 Gratt. 684.

§ 3356. **Appointment of Umpire.**—Arbitrators have no inherent power to appoint an umpire; it must be given them by the submission; otherwise the award of the umpire would be a nullity.<sup>1</sup> The umpire must be appointed by the arbitrators agreeing upon a particular person. It will not do to choose him by lot.<sup>2</sup> If they name an umpire, and he refuse to act, they may go on appointing another, or others, until some one accepts.<sup>3</sup> If the submission is by parol, the appointment of umpire may be by parol.<sup>4</sup> The arbitrators may make choice of an umpire before they have heard the case or have disagreed.<sup>5</sup> So they may appoint the umpire after the time

<sup>1</sup> *Daniel v. Daniel*, 6 Dana, 98; *Sharp v. Lipsey*, 2 Bail. 113; *McMahan v. Spinning*, 51 Ind. 187. In a submission providing that certain claims shall "be referred to the final decision and arbitration" of parties named, "and an umpire, if needful," the arbitrators thus appointed are authorized to appoint an umpire in case of their disagreement: *Smith v. Morse*, 9 Wall. 76.

<sup>2</sup> *In re Cassell*, 9 Barn. & C. 624; *Ford v. Jones*, 3 Barn. & Adol. 248; *Graham v. Graham*, 12 Pa. St. 128. Though it seems that if each arbitrator names a person to whom the others do not object, the choice may be by lot:

*Neale v. Ledger*, 16 East, 51. When two persons are appointed arbitrators, and it is provided in the submission that they may select an umpire, it must appear on the face of the award that the appointment of the umpire was the concurrent act of both arbitrators: *Crisp v. Love*, 65 N. C. 128.

<sup>3</sup> *Cloud v. Sledge*, 1 Bail. 105.

<sup>4</sup> *Elemendorf v. Harris*, 23 Wend. 628; 35 Am. Dec. 587. See *Sharp v. Lipsey*, 2 Bail. 113.

<sup>5</sup> *Rigden v. Martin*, 6 Har. & J. 403; *Butler v. Mayor*, 1 Hill, 489; *Alexandria Canal Co. v. Swann*, 5 How. 90; *Van Cortlandt v. Underhill*, 17 Johns. 406; *McKinstry v. Solomons*, 2 Johns.

for making their award has expired, if before the time within which the umpire's award is to be made.<sup>1</sup>

**§ 3357. Umpire must Examine Case Himself—May Order Rehearing.**—The umpire must himself examine the whole case; it will not do for him simply to hear the conflicting opinions of the arbitrators and decide between them.<sup>2</sup> The parties have the same right to introduce their evidence and to be heard before an umpire that they had before the arbitrators.<sup>3</sup> In some early cases it was held that the umpire must rehear the whole case.<sup>4</sup> But the better rule now adopted is, that the umpire may examine the evidence taken, without ordering a rehearing, unless one of the parties ask for it.<sup>5</sup> He should give notice to the parties of the hearing.<sup>6</sup> Arbitrators may award as to part of several matters submitted, and the umpire as to the residue.<sup>7</sup> It is essential to the validity of the umpire's

57; 13 Johns. 27; *Bigelow v. Maynard*, 4 Cush. 317; *Bassett v. Cunningham*, 9 Gratt. 684; *Dudley v. Thomas*, 23 Cal. 365; *Newton v. West*, 3 Met. (Ky.) 24; *Peck v. Wakely*, 2 McCord, 279; *Woodrow v. O'Connor*, 28 Vt. 776; *Stevens v. Brown*, 82 N. O. 460.

<sup>1</sup> *Russell on Arbitration and Award*, 218; *Morse on Arbitration and Award*, 244; *Richards v. Brockenbrough*, 1 Rand. 449.

<sup>2</sup> *Crabtree v. Green*, 8 Ga. 8; *Taber v. Jenny Sprague*, 315; *Frissell v. Fickles*, 27 Mo. 557; *Ingraham v. Whitmore*, 75 Ill. 24. *Contra*, *Kile v. Chapin*, 9 Ind. 150; *Blood v. Shine*, 2 Fla. 127. In *Haven v. Winnisimmet Co.*, 11 Allen, 377, 87 Am. Dec. 723, the court say: "An umpire is a person whom two arbitrators, appointed and duly authorized by parties, select to decide the matter in controversy, concerning which the arbitrators are unable to agree. His province is to determine the issue submitted to the arbitrators on which they have failed to agree, and to make an award thereon, which is his sole award. Neither of the original arbitrators is required to join in the award in order to make it valid and binding on the parties. In the absence of any

agreement or assent by the parties to the controversy, dispensing with a full hearing by the umpire, it is his duty to hear the whole case, and to make a distinct and independent award thereon, as the result of his judgment. He stands, in fact, in the same situation as a sole arbitrator, and he is bound to hear and determine the case in like manner as if it had been originally submitted to his determination: *Watson on Arbitration and Award*, 3d ed., 100; *McKinstry v. Solomons*, 2 Johns. 57; 13 Johns. 27; *Bates v. Cooke*, 9 Barn. & C. 407; *In re Salkeld and Slater*, 12 Ad. & E. 767; *Passmore v. Pettit*, 4 Dall. 271."

<sup>3</sup> *Daniel v. Daniel*, 6 Dana, 93; *Small v. Courtney*, 1 Brev. 205.

<sup>4</sup> *Falconer v. Montgomery*, 4 Dall. 232; *Passmore v. Pettit*, 4 Dall. 271.

<sup>5</sup> *Ranney v. Edwards*, 17 Conn. 309; *Knowlton v. Horner*, 30 Me. 552; *Graham v. Graham*, 9 Pa. St. 254; 49 Am. Dec. 557; *Daniel v. Daniel*, 6 Dana, 93.

<sup>6</sup> *Elmendorf v. Harris*, 23 Wend. 628; 35 Am. Dec. 587; *Day v. Hammond*, 57 N. Y. 479; 15 Am. Rep. 522; *Walker v. Walker*, 23 Ga. 140; *Thorton v. Chapman*, 2 Cranch C. C. 244.

<sup>7</sup> *Finney v. Miller*, 1 Bail. 81.

award that it should be signed by the umpire selected. An award signed by the two arbitrators named, and stating that they had, by the appointment of A B as third and final arbitrator, decided, etc., is not an award upon which the court will order judgment.<sup>1</sup> But the fact that an arbitrator adds his signature to the award of an umpire does not vitiate it as an award of the umpire.<sup>2</sup> An award made by an umpire before the day appointed for the arbitrators to make their award is good.<sup>3</sup> Upon a motion to set aside the award of an umpire, in a case where the arbitrators had disagreed, the court will not regard any irregular and improper acts of the arbitrators.<sup>4</sup>

<sup>1</sup> Jackson v. Merritt, 11 Abb. Pr. 370; Daniel v. Daniel, 6 Dana, 93.

<sup>2</sup> Jenkins v. Meagher, 46 Miss. 84.

<sup>3</sup> Richards v. Brockenbrough, 1 Rand. 449.

<sup>4</sup> Crabtree v. Green, 8 Ga. 8.

## CHAPTER CLXIII.

## DURATION OF AUTHORITY OF ARBITRATOR—REVOCATION OF SUBMISSION.

- § 3358. Arbitration limited as to time—Power of arbitrators expires with that time.
- § 3359. Authority of arbitrators expires with making of award.
- § 3360. Submission revocable before award made.
- § 3361. Revocation by act of law.
- § 3362. Party revoking submission liable in damages.

§ 3358. **Arbitration Limited as to Time—Power of Arbitrators Expires with that Time.**—If the submission or rule appointing the arbitrators specifies a time within which an award or report is to be made, their authority ceases with the expiration of that time, and they have no power at all after that to do anything in the matter.<sup>1</sup> If the submission is silent as to when the award is to be made, the arbitrators may take their own time.<sup>2</sup> But on the request of either party they must make their award within a reasonable time;<sup>3</sup> otherwise their authority may be revoked.<sup>4</sup> So although a submission requires an award by a certain day, if the time is extended by consent of both parties, an award after the day named will be sustained.<sup>5</sup>

<sup>1</sup> *Brower v. Kingsley*, 1 Johns. Cas. 334; *White v. Kimble*, 3 N. J. L. 461; *White v. Puryear*, 10 Yerg. 441; *Hall v. Hall*, 3 Conn. 308; *Marshall v. Powell*, 9 Q. B. 779; *Burnam v. Burnam*, 6 Bush, 389; *Robinson v. O'Connor*, 12 Neb. 405. *Contra*, *Shaw v. Pearce*, 4 Binn. 485; *Keller v. Sutrick*, 22 Cal. 471; *Deitrichs v. R. R. Co.*, 13 Neb. 43.

<sup>2</sup> *Small v. Thurlow*, 37 Me. 504; *Harrington v. Rich*, 6 Vt. 666; *Harding v. Wallace*, 8 B. Mon. 536; *White v. Puryear*, 10 Yerg. 441; *Tyson v. Robinson*, 3 Ired. 333. And being delivered to a party with the signature of only one arbitrator, it may afterwards be signed by the other, and will thereupon be good: *Saunders v. Heaton*,

12 Ind. 20; *Nichols v. Rensselaer Ins. Co.*, 22 Wend. 125; *Small v. Thurlow*, 37 Me. 504. But an award made twelve years after the submission was held invalid in *Hook v. Philbrick*, 23 N. H. 288.

<sup>3</sup> In *Rogers v. Tatum*, 25 N. J. L. 285, the court said: "The third objection is, that the submission is void because no time is specified within which the award shall be made. It is not necessary. Either party in such case may request the arbitrators to proceed within a reasonable time."

<sup>4</sup> *Small v. Thurlow*, 37 Me. 504; *White v. Puryear*, 10 Yerg. 441; *Curtis v. Potts*, 3 Maule & S. 145.

<sup>5</sup> *Buntain v. Curtis*, 27 Ill. 374.

ILLUSTRATIONS.—A submission was made to three arbitrators, with the provision that the award should be in writing, signed by the three, "or any two of them," and ready for delivery by a certain day fixed. Only two of the three arbitrators met and heard the parties. The third had due notice of the hearing, and appeared, but declined taking any part in the proceedings. The award was afterwards made by the two who heard the case. *Held*, that the award was null: *Bulson v. Lohnes*, 29 N. Y. 291. The condition of an arbitration bond was silent as to the time when the award should be rendered. An acknowledgment in the penal part of the bond that the obligors bound themselves to pay to the obligee in three months from date was *held*, not to limit the power of the arbitrators, and make an award void, which was rendered after three months had elapsed: *Armstrong v. Robinson*, 5 Gill & J. 412. The submission did not expressly fix the time for making the award, but provided that the party who should be found indebted should pay the other by a certain day. *Held*, that it implied a limitation on the arbitrator's power, and that their subsequent proceedings, without a written enlargement of the time, were not a proceeding under the statute: *People v. Townsend*, 5 How. Pr. 315.

§ 3359. **Authority of Arbitrators Expires with Making of Award.**—The authority of the arbitrator or referee expires with the making and publishing of his award or report. After that he can do nothing more in reference to the subject-matter or his award or report.<sup>1</sup> He cannot alter it, even to correct mistakes. But a certificate in

<sup>1</sup> *Woodbury v. Northy*, 3 Greenl. 85; 14 Am. Dec. 214; *Aldrich v. Jessiman*, 8 N. H. 516; *Indiana etc. R. R. Co. v. Bradley*, 7 Ind. 49; *Lansdale v. Kendall*, 4 Dana, 613; *Cleveland v. Dixon*, 4 J. J. Marsh. 226; *Smith v. Smith*, 28 Ill. 56; *Butler v. Bogles*, 10 Humph. 155; 61 Am. Dec. 697; *French v. Moseley*, 1 Litt. 248; *Fitzgerald v. Fitzgerald*, *Hardin*, 227; *Clement v. Rohraback*, 15 Pa. St. 116; *Doke v. James*, 4 N. Y. 568; *Ward v. Gould*, 5 Pick. 291; *Bigelow v. Maynard*, 4 Cush. 317; *Thompson v. Mitchell*, 35 Me. 286; *Bodge v. Hull*, 59 Me. 228; *Goodell v. Raymond*, 27 Vt. 241; *Patton v. Baird*, 7 Ired. Eq. 222; *Eaton v. Eaton*, 8 Ired. Eq. 102. *Contra*, *Hazeltine v. Smith*, 3 Vt. 535. "Arbitrators exhaust their power when

they make a final determination on the matters submitted to them. They have no power, after having made an award, to alter it; the authority conferred on them is then at an end": *Bayne v. Morris*, 1 Wall. 97. In *Irvine v. Elmon*, 8 East, 54, Lord Ellenborough said that "the arbitrator's authority, having been once completely exercised pursuant to the terms of the reference, was at an end, and could not be revived again, even for the purpose of correcting a mistaken calculation of figures." Matters which have occurred subsequent to the making of an award cannot be set up against the award by way of answer to a rule to show cause why judgment should not be rendered on the award: *Beeber v. Bevan*, 80 Ind. 31.

regard to costs attached subsequently will be treated as surplusage.<sup>1</sup> So he may, after delivery, correct a mere clerical error of omission not affecting the merits.<sup>2</sup> There is no objection to arbitrators making first a preliminary, then a final, award, where the circumstances of the case render it proper, and the submission is broad enough to warrant such course.<sup>3</sup> And the power of arbitrators is not terminated by delivery to the parties of an informal statement of their conclusions.<sup>4</sup> The vacating of the award does not revive the arbitrator's authority.<sup>5</sup>

ILLUSTRATIONS. — Arbitrators, having made and delivered their award, discovered afterwards that they had passed on matters not submitted to them. They thereupon made a new and correct award. *Held*, that the latter was a nullity, their powers being at an end on the making of the first: *Doke v. James*, 4 N. Y. 568. Arbitrators, after signing, sealing, and reading their award, but before delivery, reconsidered the award, upon the objection of one of the parties interested, and reduced the amount, and again signed, sealed, and delivered it. *Held*, that the latter award was the true one: *Byars v. Thompson*, 12 Leigh, 550.

**§ 3360. Submission Revocable before Award Made. —**

Before the award is made the arbitrator's authority may be revoked. Any of the parties to the submission, whether it be by deed or by parol, may at any time before the award is made revoke it,<sup>6</sup> even if the submission provides that it shall be irrevocable.<sup>7</sup> If the submission

<sup>1</sup> *Dudley v. Thomas*, 23 Cal. 365; *Lansdale v. Kendall*, 4 Dana, 613; *Aldrich v. Jessiman*, 8 N. H. 516; *Woodbury v. Northy*, 3 Me. 85.

<sup>2</sup> *Goodell v. Raymond*, 27 Vt. 241; *Henley v. Menefee*, 10 W. Va. 771.

<sup>3</sup> *Truesdale v. Straw*, 58 N. H. 207.

<sup>4</sup> *Bodge v. Hull*, 59 Me. 225.

<sup>5</sup> *Calvert v. Carter*, 18 Md. 73; *Morse on Arbitration and Award*, 228.

<sup>6</sup> *Aspinwall v. Tousey*, 2 Tyler, 328; *Tyson v. Robinson*, 3 Ired. 333; *Peter v. Craig*, 6 Dana, 307; *Bank of Monroe v. Widner*, 11 Paige, 529; 43 Am. Dec. 768; *Leonard v. House*, 15 Ga. 473; *Erie v. Tracy*, 2 Grant Cas.

20; *Allen v. Watson*, 16 Johns. 205; *Power v. Power*, 7 Watts, 205; *Marseilles v. Kenton*, 17 Pa. St. 238; *Wallis v. Carpenter*, 13 Allen, 19; *Marsh v. Packer*, 20 Vt. 198; *Davis v. Maxwell*, 27 Ga. 368; *Johnson v. Andress*, 5 Phila. 8; *Bray v. English*, 1 Conn. 198; *Keyes v. Fulton*, 42 Vt. 159; *Seely v. Felton*, 63 Ill. 101; *Dilks v. Hammond*, 86 Ind. 563; *People v. Nash*, 112 N. Y. 310; 7 Am. St. Rep. 747; *Jones v. Harris*, 59 Miss. 214; *Com. U. A. Co. v. Hooking*, 115 Pa. St. 407; 2 Am. St. Rep. 562.

<sup>7</sup> *Tobey v. County of Bristol*, 3 Story, 800; *Power v. Power*, 7 Watts, 205. An agreement in a submission

be under seal, so also must the revocation, and a submission in writing must be revoked in writing, while a verbal submission may be revoked verbally.<sup>1</sup> The revocation must be express and positive, and coupled with no conditions whatever.<sup>2</sup> But when it is done by writing, it is sufficient if enough appear to show an intention to revoke.<sup>3</sup> Notice of the revocation must be given to the arbitrators, to make it effective.<sup>4</sup> An agreement to refer to arbitration a matter upon which an award has been made under a previous agreement is presumed to be a waiver of the first award, and no action will lie upon that award, although no valid award is made under the second agreement.<sup>5</sup> Where a covenant to arbitrate does not make the decision of the arbitrators binding, while an agreement to submit does, the award must be deemed to follow the agreement, not the covenant, and the submission is revocable before award made.<sup>6</sup> A notice of revocation should be served on the arbitrators before their award has been agreed upon. Subsequent service, though made before the award has been reduced to writing, is of no effect.<sup>7</sup>

A reference by rule of court is not revocable except by the court;<sup>8</sup> nor is a submission after it is made a rule of court.<sup>9</sup> In New York the submission cannot be revoked after the cause has been finally submitted,<sup>10</sup> nor in

that the arbitrators may proceed *ex parte* if either party neglects to appear does not make the submission irrevocable: *Boston etc. R. R. Co. v. R. R. Co.*, 139 Mass. 463.

<sup>1</sup> *Relyea v. Ramsay*, 2 Wend. 602; *Howard v. Cooper*, 1 Hill, 44; *Sutton v. Tyrrell*, 10 Vt. 91; *Mullins v. Arnold*, 4 Sneed, 262; *Brown v. Leavitt*, 26 Me. 251; *Van Antwerp v. Stewart*, 8 Johns. 125; *McFarlane v. Cushman*, 21 Wis. 401; *Evans v. Cheek*, 3 Hayw. (Tenn.) 42; *Shroyer v. Bash*, 57 Ind. 349.

<sup>2</sup> *Goodwine v. Miller*, 32 Ind. 419.

<sup>3</sup> *Frets v. Frets*, 1 Cow. 335.

<sup>4</sup> *Allen v. Watson*, 10 Johns. 205; *Brown v. Leavitt*, 26 Me. 251.

<sup>5</sup> *Rollins v. Townsend*, 118 Mass. 224.

<sup>6</sup> *Sherman v. Cobb*, 15 R. I. 570.

<sup>7</sup> *Buckwalter v. Russell*, 119 Pa. St. 495.

<sup>8</sup> *Dexter v. Young*, 40 N. H. 130; *Haskell v. Whitney*, 12 Mass. 47; *Cumberland v. North Yarmouth*, 4 Greenl. 459; *Tyson v. Robinson*, 3 Ired. 333; *Bray v. English*, 1 Conn. 498; *Phillips v. Shipley*, 1 Bland, 516; *Keavy v. Shisler*, 8 Phila. 54; *Master-son v. Kidwell*, 2 Cranch C. C. 669.

<sup>9</sup> *Frets v. Frets*, 1 Cow. 335.

<sup>10</sup> *Bank v. Widner*, 11 Paige, 529; 43 Am. Dec. 768; *Heath v. Gold Exchange*, 7 Abb. Pr., N. S., 251; *Bloomer v. Sherman*, 5 Faig, 576.

Ohio, after the arbitrators are sworn,<sup>1</sup> and a statutory submission is not revocable in some states.<sup>2</sup> It is always too late after the award is made.<sup>3</sup> And where, by the submission, the award was to be made and published to the parties on or before a certain day, and the arbitrator made an award before that day, but before it was published to both parties one of them revoked the submission, it was held that the revocation was too late.<sup>4</sup> A reference made in consideration of the discontinuance of proceedings in court by one of the parties, or for a consideration of some kind, is not revocable. It is in the nature of a contract which cannot be rescinded by one alone.<sup>5</sup> Thus an agreement to do certain things, and to arbitrate concerning a part of them, executed in part, cannot be rescinded as to the arbitration after a hearing and argument.<sup>6</sup> And a general agreement to refer to arbitration cannot be revoked by one of the parties.<sup>7</sup> Where several jointly sub-

<sup>1</sup> *Carey v. Montgomery Co.*, 19 Ohio, 245; *Montgomery Co. v. Carey*, 1 Ohio St. 463.

<sup>2</sup> *Bash v. Christian*, 84 Ind. 180; *Shroyer v. Bash*, 57 Ind. 349.

<sup>3</sup> *Tobey v. County of Bristol*, 3 Story, 800; *Marsh v. Packer*, 20 Vt. 198; *Clement v. Hadlock*, 13 N. H. 185.

<sup>4</sup> *Hunt v. Wilson*, 6 N. H. 36.

<sup>5</sup> *Bank of Monroe v. Widner*, 11 Paige, 529; 43 Am. Dec. 768; *Mo-Gheehen v. Duffield*, 5 Pa. St. 497; the court saying: "There can be no doubt or question about the right of a party to a submission to revoke it before it is consummated. It has been assimilated by the courts to the case of any other power which is naked and without consideration; whether upon sufficient grounds of policy or similarity, it is not for me to question. The court take the law as they find it. But in the case at bar it was not a naked power or submission. It assumed the form of a contract upon sufficient consideration, and was therefore beyond the dominion of either party after its execution. Its rescission required the consent of both: *Hunt v. Rousmanier*, 8 Wheat. 174; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205. In the

case in hand the plaintiff had instituted proceedings in chancery to compel a settlement of partnership accounts which had been for some time procrastinated, but as they approached a close, he agreed to discontinue the proceedings, which of course subjected him to the costs, and with the defendants agreed to enter into an amicable action of account render, and submit the matters in controversy to an umpire named, whose decision was to be final and conclusive without appeal, and judgment to be entered by the prothonotary. It is quite apparent that the plaintiff was induced to agree to discontinue his proceedings in chancery by the substitution of this amicable action, and that he never would have entered into the agreement if he had not believed the substituted proceedings were to be final and binding mutually. There are other matters in the agreement which give it the indelible marks of a mutual contract on sufficient consideration."

<sup>6</sup> *Haley v. Bellamy*, 137 Mass. 357.

<sup>7</sup> *Piercy v. Young*, L. R. 14 Ch. D. 200; 42 L. T., N. S., 710; *Christie v. Noble*, L. R. 14 Ch. D. 203.

mit their claim to arbitration, constituting together the party of one part, revocation can only be made by them jointly.<sup>1</sup>

§ 3361. **Revocation by Act of Law.**—The death of the arbitrator or referee, or of one of several arbitrators or referees, revokes the submission.<sup>2</sup> But not if subsequent to the award.<sup>3</sup>

The death of a party to the submission before the award is made revokes it.<sup>4</sup> But a reference of a *lis pendens* by rule of court will not abate by the death of a party after a report but before a final decree is entered;<sup>5</sup> and the reference does not abate where the action survives, or is continued by the administrator.<sup>6</sup> At common law the death of a party does not operate as a revocation of a submission, where the arbitrator is in the situation of a person appointed by vendor and purchaser to fix the value and price of an estate sold.<sup>7</sup> The death of one of several plaintiffs in a cause referred will not revoke the authority of the referees.<sup>8</sup> Where a partnership is a party

<sup>1</sup> *Robertson v. McNeil*, 12 Wend. 578. *Contra*, dictum in *Brown v. Leavitt*, 26 Me. 251.

<sup>2</sup> *Sutton v. Tyrrell*, 10 Vt. 91; *Potter v. Sterrett*, 24 Pa. St. 411, where a cause is referred by consent of parties. Otherwise where the reference is by order of court; in such case, a new referee must be appointed and the trial begun anew: *Devlin v. New York*, 62 How. Pr. 163; 9 Daly, 334.

<sup>3</sup> *Cartledge v. Outcliff*, 21 Ga. 1.

<sup>4</sup> *Marseilles v. Kenyon*, 17 Pa. St. 238; *Power v. Power*, 7 Watts, 205; *Tyson v. Robinson*, 3 Ired. 333; *Dexter v. Young*, 40 N. H. 130; *Cain v. Pullam*, 1 Hayw. (N. C.) 173; *McIntire v. Morris*, 14 Wend. 70; *Bailey v. Stewart*, 3 Watts & S. 560; 39 Am. Dec. 50; *Whitfield v. Whitfield*, 8 Ired. 163; 47 Am. Dec. 350; *Toussaint v. Hortop*, 7 Taunt. 571. A submission is not revoked by the death of a party after award made, but not confirmed by the court: *Bash v. Christian*, 77 Ind. 290.

<sup>5</sup> *Baker v. Crockett, Hardin*, 388. See *Farmer v. Frey*, 4 McCord, 160.

<sup>6</sup> *Bacon v. Crandon*, 15 Pick. 79; *Ruston v. Dunwoody*, 1 Binn. 42. And see *Moore v. Webb*, 6 Heisk. 301.

<sup>7</sup> *Caledonian R. R. Co. v. Lockhart*, 3 Macq. 808.

<sup>8</sup> *Freeborn v. Denman*, 8 N. J. L. 116. In *Freeborn v. Denman*, the court said: "The second objection urged on the part of the plaintiff in error is, that the death of one of the plaintiffs below revoked the submission, and that the subsequent proceedings were therefore erroneous and illegal. This objection is formidable, because it attacks the substance,—the authority of the referees. In support of it, the counsel has relied on the doctrine that there may be an implied as well as an express revocation of a submission to arbitration: 1 Bac. Abr. 134, Arbitration and Award, B; and upon the cases of *Potts v. Ward*, 1 Marsh. 336, and of *Toussaint v. Hartop*, 7 Taunt. 571, in which it was held that the death of the defendant

to a submission, and one of the partners dies, the survivors may proceed.<sup>1</sup>

The insanity of a party revokes the authority of the arbitrator.<sup>2</sup>

The institution of a suit upon the subject-matter of the arbitration has been held, in Kentucky and Illinois, to revoke the submission.<sup>3</sup> But a different conclusion has been reached in Vermont<sup>4</sup> and New Jersey.<sup>5</sup>

Marriage of a *feme sole*, a party to the arbitration, revokes the arbitrator's authority.<sup>6</sup> The refusal of the arbitrator to act revokes the authority.<sup>7</sup> If arbitrators with power, in case of disagreement, to appoint an additional arbitrator do not make an award in a reasonable time, but do not refuse to appoint the umpire, neither party to the reference is in a situation to revoke the submission, and the matters may therefore be considered as pending.<sup>8</sup>

before the making of the award was a revocation of the authority of an arbitrator acting under a submission by order at *nisi prius*, and where a verdict had been taken subject to the award. To these cases may be added *Cooper v. Johnson*, 2 Barn. & Ald. 394, where a similar decision was made. But in the case stated of an implied revocation by the marriage of a *feme sole*, an actual revocation was within the power of the party; and in the cases where the death was held a revocation, the party dying was the sole defendant, and not one of several defendants. No case was cited at the bar, nor have I found one in the exercise of some diligence, where the death of one of several plaintiffs or defendants has been held to affect the power of the arbitrator. Nor can the effect of the death of the sole party be considered as entirely settled in Westminster Hall; for in the case of *Bower v. Taylor*, 7 Taunt. 574, the court of king's bench refused to set aside an award made after the death of one of the parties, where a verdict had been taken subject, by an order of *nisi prius*, to a reference, although a

notice not to proceed in the reference had been given by the attorney of the plaintiff to the attorney of the defendant, and judgment was entered up with a suggestion of the death of the party."

<sup>1</sup> *Emerson v. Udall*, 8 Vt. 357.

<sup>2</sup> *Morse on Arbitration and Award*, 235; *Sutton v. Tyrrell*, 10 Vt. 91.

<sup>3</sup> *Peter v. Craig*, 6 Dana, 307; *Paulson v. Manske*, 24 Ill. App. 95. The entry of an action for the purpose of preserving the party's rights, should the arbitration be fruitless, will not have this effect: *Sutton v. Tyrrell*, 10 Vt. 91.

<sup>4</sup> *Sutton v. Tyrrell*, 10 Vt. 91.

<sup>5</sup> *Knaus v. Jenkins*, 40 N. J. L. 288; 29 Am. Rep. 237.

<sup>6</sup> *Sutton v. Tyrrell*, 10 Vt. 91; *Marceilles v. Kenton*, 17 Pa. St. 238; *Abbott v. Keith*, 11 Vt. 525; *Bailey v. Stewart*, 8 Watts & S. 560; 39 Am. Dec. 50; *McCan v. Ferrall*, 8 Clark & F. 30.

<sup>7</sup> *Relyea v. Ramsay*, 2 Wend. 602; *Chapman v. Seecomb*, 36 Me. 102; *Crawshay v. Collins*, 3 Swanst. 90; *Brown v. Welcker*, 1 Cold. 197.

<sup>8</sup> *Small v. Thurlow*, 37 Me. 504.

§ 3362. **Party Revoking Submission Liable in Damages.**—The party revoking the submission is liable to the other in damages as for a breach of contract,<sup>1</sup> who is entitled to recover all damages arising from the revocation, including loss of time, trouble and expenses incurred, his expenses for witnesses, and counsel fees.<sup>2</sup>

<sup>1</sup> *Dexter v. Young*, 40 N. H. 130; *Brown v. Leavitt*, 26 Me. 251; *Frets v. Frets*, 1 Cow. 335; *Hawley v. Hodge*, 7 Vt. 237; *Blaisdell v. Blaisdell*, 14 N. H. 78; *Craftsbury v. Hill*, 28 Vt. 763. The party revoking a submission forfeits his bond to abide by the award: *Brown v. Leavitt*, 26 Me. 251.

<sup>2</sup> *Miller v. Junction Canal Co.*, 53 Barb. 590; *Call v. Harper*, 69 Me. 521.

## CHAPTER CLXIV.

### THE AWARD.

- § 3363. Form of award—No technical form necessary.
- § 3364. Award may be oral—Exceptions.
- § 3365. Need not be sealed or witnessed—Signing.
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- § 3401. Or enforced as judgment by rule of court.
- § 3402. Award may be set aside or corrected in equity.
- § 3403. Or vacated on motion.

**§ 3363. Form of Award—No Technical Form Necessary.**—Where the submission requires no form, no particular form of language in making the award is necessary. "Any form of words which amounts to a decision of the questions submitted is good as an award; no technical expressions are necessary, nor any introductory recitals."<sup>1</sup> It is not necessary that the award should expressly declare that the arbitrators have decided the questions submitted; it is sufficient that this should appear from the contents of the award, or can be implied from its language.<sup>2</sup> Thus an award of costs to one side, without more, is equivalent to a finding of the issue in his favor.<sup>3</sup> And the following have been held sufficient: "I am of opinion that A is entitled to claim of B" a certain sum;<sup>4</sup> "G. P. is to give up the note which he holds against N. S. & Co.";<sup>5</sup> "I have surveyed and estimated the several works necessary to be done in repairing the dilapidations to the house, etc., and find the same amount to the sum of," etc.<sup>6</sup>

**§ 3364. Award may be Oral—Exceptions.**—An award may be orally made,<sup>7</sup> even where the submission is in writing or by deed.<sup>8</sup> A written award may be necessary, though not called for in the submission in express terms;<sup>9</sup>

<sup>1</sup> *Ott v. Schroepfel*, 5 N. Y. 483; 255; 36 Am. Dec. 718; *McManus v. Price v. Hollis*, 1 Maule & S. 106; *McCulloch*, 6 Watts, 357; *Jones v. Smith v. Hartley*, 10 Com. B. 800; *Dewey*, 17 N. H. 596; *Gay v. Waltman*, 89 Pa. St. 453; *Phelps v. Dolan*, 75 Ill. 90.

*Coxe v. Lundy*, 1 N. J. L. 255; *Platt v. Smith*, 14 Johns. 368; *Rogers v. Tatum*, 25 N. J. L. 281; *Munro v. Alaire*, 2 Caines, 320.

<sup>2</sup> *Caldwell v. Dickinson*, 13 Gray, 365; *Hanson v. Webber*, 40 Me. 194.

<sup>3</sup> *Buckland v. Conway*, 16 Mass. 396; *Stickles v. Arnold*, 1 Gray, 418; *Rixford v. Nye*, 20 Vt. 132; *Lamphire v. Cowan*, 39 Vt. 420.

<sup>4</sup> *Matson v. Trower*, Ryan & M. 17.

<sup>5</sup> *Platt v. Smith*, 14 Johns. 368.

<sup>6</sup> *Whitehead v. Tattersall*, 1 Ad. & E. 491.

<sup>7</sup> *Valentine v. Valentine*, 2 Barb. Ch. 430; *Philbrick v. Preble*, 18 Me.

<sup>8</sup> *Marah v. Packer*, 20 Vt. 198;

*Goodell v. Raymond*, 27 Vt. 241.

*Mr. Morse (Morse on Arbitration and Award, 256)* lays it down that an oral award is good except in three cases: 1. Where it is required to be in writing by statute; 2. Where the submission calls for a written award. 3. Where the right to be disposed of is by its own nature capable of being disposed of only by a sealed instrument.

<sup>9</sup> *Morse on Arbitration and Award*, 257.

as, for example, where the award is required to be "signed" by the arbitrators.<sup>1</sup> An award which determines the title to or disposes of any interest in real estate must be in writing.<sup>2</sup> Where the submission requires the award to be in writing, and there is a written award as to part and a parol award as to the remainder of the matters submitted, the awards are insufficient.<sup>3</sup> The fact that one party, by consenting to a verbal award, induced the arbitrators to make such an award does not estop him from objecting that the matters in controversy could not be determined by a verbal award.<sup>4</sup>

**§ 3365. Need not be Sealed or Witnessed — Signing.**— An award need not be sealed<sup>5</sup> nor witnessed.<sup>6</sup> The fact that a submission to arbitration is under seal does not make it necessary that the award should also be under seal. It is never necessary that an award should be under seal, unless it is required by the terms of the submission or by statute.<sup>7</sup> But if the submission requires that the award shall be under seal, the omission of a seal renders it void.<sup>8</sup> If an award in writing is not signed by the arbitrators, it is not binding on the parties.<sup>9</sup>

<sup>1</sup> *Morse on Arbitration and Award*, 257.

<sup>2</sup> *Philbrick v. Preble*, 18 Me. 255; 36 Am. Dec. 718; *Jones v. Dewey*, 17 N. H. 596. See *Peabody v. Rice*, 113 Mass. 31.

<sup>3</sup> *Tudor v. Scovell*, 20 N. H. 174.

<sup>4</sup> *French v. New*, 2 Abb. App. 209.

<sup>5</sup> *Owen v. Boerum*, 23 Barb. 187; *McAdams v. Stilwell*, 13 Pa. St. 90. If required by statute, the seal may be annexed after delivery: *Fower v. Coffman*, 23 Gratt. 871. And see *Price v. Kirby*, 1 Ala. 184.

<sup>6</sup> *Valle v. R. R. Co.*, 37 Mo. 445; *Hedrick v. Judy*, 23 Ind. 548. *Aliter* by statute: *New Albany etc. R. R. Co. v. McPheters*, 12 Ind. 472; *Estep v. Larsh*, 16 Ind. 82; *Newman v. Labeaume*, 9 Mo. 29; *Field v. Oliver*, 43 Mo. 200. But the attestation is a formality which may be afterwards

supplied: *Tucker v. Allen*, 47 Mo. 488. An award required by the terms of the submission to be attested by a subscribing witness signed by three arbitrators, but attested as to two of them only, was sustained as being valid as the award of those two, in *Ott v. Schroepfel*, 5 N. Y. 482; 4 Barb. 250.

<sup>7</sup> *White v. Fox*, 29 Conn. 570; *Crabtree v. Green*, 8 Ga. 8.

<sup>8</sup> *Price v. Thomas*, 4 Md. 514; *Stanton v. Henry*, 11 Johns. 133; *Rea v. Gibbons*, 7 Serg. & R. 204. But one seal for all the arbitrators has been held sufficient: *Cheney v. Gates*, 12 Vt. 565. In West Virginia an award valid in other respects is not invalid because not made under seal, though required to be so made by the submission: *Mathews v. Miller*, 25 W. Va. 817.

<sup>9</sup> *State v. Gurnee*, 14 Kan. 111.

§ 3366. **Award need not Give Reasons nor Recite Proceedings.** — The award must contain the actual decision of the arbitrators, but not necessarily the reasons for the decision,<sup>1</sup> nor the processes by which they arrived at their findings of fact.<sup>2</sup> Arbitrators are not bound to find the facts, or to state them separately from their conclusions of law;<sup>3</sup> nor to supplement the general finding by special answers to specific questions dictated by counsel.<sup>4</sup> The duty of arbitrators is best discharged by a simple announcement of the result of their investigations.<sup>5</sup> They are not bound, though requested to do so, to make the evidence a part of their award.<sup>6</sup> The award need not recite the submission, nor any portion of it;<sup>7</sup> nor the facts necessary to give the award validity;<sup>8</sup> as that notice of the time and place of meeting was given;<sup>9</sup> or that the arbitrators were sworn, or that the parties appeared before them;<sup>10</sup> or the presence of all the arbitrators at the time of making the award.<sup>11</sup> Even an erroneous recital will not vitiate the award,<sup>12</sup> or an erroneous statement of fact.<sup>13</sup>

§ 3367. **May Give Gross Sum or Award on Each Claim.** — The award may, even when there are several items or claims submitted, award a sum in gross,<sup>14</sup> or it may pass

<sup>1</sup> *Patterson v. Baird*, 7 Ired. Eq. 255; *Blossom v. Armitage*, 63 N. C. 65; *Lamphire v. Cowan*, 39 Vt. 420; *Stewart v. Cass*, 16 Vt. 663; 42 Am. Dec. 534; *State v. Pettigrew*, 19 Mo. 373.

<sup>2</sup> *Dolan v. Merritt*, 18 Hun, 27.

<sup>3</sup> *Keener v. Goodson*, 89 N. C. 273. But see *Wench v. Cook*, 39 Mich. 134; *Brinkright v. Brown*, 16 S. O. 155.

<sup>4</sup> *Odd Fellows v. Morrison*, 42 Mich. 521.

<sup>5</sup> *Clanton v. Price*, 90 N. C. 96.

<sup>6</sup> *Allen v. Miles*, 4 Harr. (Del.) 234; *Vaughan v. Smith*, 69 Ala. 92.

<sup>7</sup> *Morse on Arbitration and Award*, 276.

<sup>8</sup> *Leominster v. R. R. Co.*, 7 Allen, 38; *Houghton v. Burroughs*, 18 N. H. 499; *Rixford v. Nye*, 20 Vt. 132; *Baker v. Hunter*, 16 Mees. & W. 672; *Spence v. R. R. Co.*, 7 Dowl. 697;

*Davies v. Pratt*, 17 Com. B. 183; *Hoffman v. Hoffman*, 26 N. J. L. 175.

<sup>9</sup> *Rigden v. Martin*, 6 Har. & J. 403; *Upshaw v. Hargrove*, 14 Miss. 286.

<sup>10</sup> *Negley v. Stewart*, 10 Serg. & R. 207.

<sup>11</sup> *Rogers v. Tatum*, 25 N. J. L. 281.

<sup>12</sup> *Diblee v. Best*, 11 Johns. 103; *Caldwell v. Dickinson*, 13 Gray, 365.

<sup>13</sup> *Morse on Arbitration and Award*, 278.

<sup>14</sup> *Lamphire v. Cowan*, 39 Vt. 420; *Strong v. Strong*, 9 Cush. 560; *Shirley v. Shattuck*, 4 Cush. 470; *Bigelow v. Maynard*, 4 Cush. 317; *Sides v. Brendlinger*, 14 Neb. 491. Under a submission of all matters, it is to be presumed, unless the contrary appears, that an award of a gross sum embraces all matters: *McCullough v. McCullough*, 12 Ind. 487.

on and award each item separately.<sup>1</sup> Where the matter submitted to arbitration consists of cross-money demands, the award need not show on its face how each item was disposed of. The award of a gross sum of money will be sufficient in such case.<sup>2</sup> An award under an oral submission may be valid if it clearly states the amount due from one party to the other, although not otherwise answering subordinate questions in dispute.<sup>3</sup>

**ILLUSTRATIONS.**—Plaintiffs had two suits in their joint names against the defendant, and each had an individual suit against him, all of which were referred to an arbitrator, the defendant and his surety giving a bond to “pay to the plaintiffs such sums of money as should be awarded to be paid them by defendant.” *Held*, in a suit on the bond, that the award was not invalid because a consolidated one finding a single sum due to the plaintiffs jointly: *Vannah v. Carney*, 69 Me. 221. A referee in his report, in an action involving mutual accounts, allowed certain of the plaintiff’s and defendant’s items by name, and found a balance due the plaintiff. *Held*, that his failure to allow the items not named was an adjudication against them: *Griffiths v. Reimert*, 24 Kan. 226.

**§ 3368. Delivery of Award.**—Delivery of a copy of an award to the parties is not necessary where the submission contains no such stipulation, and where the parties were present when it was signed, and understood its provisions.<sup>4</sup> Where the submission requires the award to be “delivered” within a certain time, actual delivery within that time is necessary.<sup>5</sup> But if the condition is that it is to be “ready for delivery” on a certain day, it is sufficient if it is made and executed on that day.<sup>6</sup> The delivery must be of the original award,<sup>7</sup> and should be made

<sup>1</sup> *Id.*; *Spofford v. Spofford*, 10 N. H. 254; *Kendrick v. Tarbell*, 26 Vt. 416.

<sup>2</sup> *Stearns v. Cope*, 109 Ill. 340.

<sup>3</sup> *Blackwell v. Goss*, 116 Mass. 394.

<sup>4</sup> *Crawford v. Orr*, 84 N. C. 246.

<sup>5</sup> *Russell on Arbitration and Award*, 238; *Morse on Arbitration and Award*, 280. But arbitrators are not bound to deliver their award until their fees have been paid: *Ott v. Schroepfel*, 3 Barb. 56.

<sup>6</sup> *Rundell v. La Fleur*, 6 Allen, 480; *Houghton v. Burroughs*, 18 N. H. 499; *Owen v. Boerum*, 23 Barb. 187; *Bloomer v. Sherman*, 5 Paige, 575; *Willard v. Bickford*, 39 N. H. 536. It is not necessary that the arbitrators should prepare a duplicate until it is demanded: *Martin v. McCormick*, 34 N. J. L. 23.

<sup>7</sup> *Sellick v. Addams*, 15 Johns. 197; *Morse on Arbitration and Award*, 280.

to the winning party.<sup>1</sup> A copy need not be delivered to each party unless the submission calls for it.<sup>2</sup> But if the submission requires that the award be delivered to the "parties," duplicates must be prepared so that each party can have one.<sup>3</sup> A delivery to one of the parties is not a compliance, and the award is a nullity.<sup>4</sup> An oral award is delivered by pronouncing it to the parties.<sup>5</sup> When it is stipulated that the award shall be made in writing, and ready to be delivered on a certain day, this stipulation is complied with if before that day the award is made, signed, delivered to one of the arbitrators, and by him read to the parties.<sup>6</sup>

§ 3369. **Publication of Award.**—Publication of the award is frequently called for by the submission.<sup>7</sup> This means that it shall be notified to the parties; and is satisfied by a delivery of the award or a duplicate thereof to

But where sworn copies of the award are delivered to the parties by the arbitrators, and received without objection, this will be deemed a waiver of their right to receive the original award: *Sellick v. Addams*, 15 Johns. 197.

<sup>1</sup> *Houghton v. Burroughs*, 18 N. H. 499; *Buck v. Wadsworth*, 1 Hill, 321; *Pratt v. Hackett*, 6 Johns. 14; *Conrad v. Johnson*, 25 Ind. 487.

<sup>2</sup> *Wade v. Powell*, 31 Ga. 1; *Houghton v. Burroughs*, 18 N. H. 499; *Tracy v. Herrick*, 25 N. H. 381. See *Burnap v. Losey*, 1 Lans. 111.

<sup>3</sup> *Gidley v. Gidley*, 65 N. Y. 169. In *Buck v. Wadsworth*, 1 Hill, 321, it was said: "The words of the bond made it a condition that the award should be ready for delivery on or before the 1st of June, to Wadsworth as well as Buck. It was ready for delivery to the latter, but not to the former. The arbitrators did not even suppose an award was necessary for Wadsworth, and they accordingly never signed a counterpart. Even if Goff had the power, he did nothing which can be construed into a waiver of the right to insist on the delivery of an award to his principal. The only

method by which an award made under the condition of a bond such as this can be rendered binding is by the arbitrators executing and delivering two parts, unless the party shall expressly discharge them of that necessity; as by telling them they need make no counterpart, for he will not receive it; or, as in *Sellick v. Addams*, 15 Johns. 197, accepting sworn copies, in lieu of the original, without objection: See *Perkins v. Wing*, 10 Johns. 143. In short, nothing like a waiver exists in this case; and without that, it is entirely settled that the award is a nullity for want of its being ready within the terms of the condition: *Pratt v. Hackett*, 6 Johns. 14."

<sup>4</sup> *Buck v. Wadsworth*, 1 Hill, 321.

<sup>5</sup> *Oates v. Bromhill*, 6 Mod. 176.

<sup>6</sup> *Rundell v. La Fleur*, 6 Allen, 480.

<sup>7</sup> *Caldwell v. Dickinson*, 13 Gray, 365; *Hunt v. Wilson*, 6 N. H. 36. Publication is necessary only where the submission expressly stipulates that it shall be published: *Parsons v. Aldrich*, 6 N. H. 264. An award furnishes no ground of action unless it is published to the parties: *Kingley v. Bill*, 9 Mass. 198.

them;<sup>1</sup> or by a notice to the losing party;<sup>2</sup> or by reading it to the parties.<sup>3</sup> The "publication" of an award required by the Wisconsin statute is the filing of the submission and award in the office of the clerk of court.<sup>4</sup>

**§ 3370. Formalities Required by Submission or Statute must be Observed.**—But, as to all these matters, if the submission contain instructions as to the form or execution of the award, they must be followed;<sup>5</sup> as, for example, that the award shall be in writing;<sup>6</sup> or under seal;<sup>7</sup> or be attested by witnesses;<sup>8</sup> or shall find separately as to each item;<sup>9</sup> or shall be delivered to the parties.<sup>10</sup> So in a statutory arbitration, an award must conform to the statutory requirements.<sup>11</sup> But an award defective in this way may sometimes be upheld as a common-law award.<sup>12</sup> Strict compliance with the requirements of the submission as to the award may be waived by the parties;<sup>13</sup> and also, it seems, may statutory requirements.<sup>14</sup>

<sup>1</sup> *Plummer v. Morrill*, 48 Me. 184; *Rixford v. Nye*, 20 Vt. 132; *Low v. Nolte*, 16 Ill. 475; *Morse v. Stoddard*, 23 Vt. 445.

<sup>2</sup> *Knowlton v. Homer*, 30 Me. 553; *Thompson v. Mitchell*, 35 Me. 281; *Jones v. Dewey*, 17 N. H. 596.

<sup>3</sup> *Rundell v. La Fleur*, 6 Allen, 480; *Pancoast v. Curtis*, 6 N. J. L. 415; holding that the publication of a referee's report is the reading and filing it in court: *Perkins v. Wing*, 10 Johns. 143.

<sup>4</sup> *Russell v. Clark*, 60 Wis. 284.

<sup>5</sup> *Pratt v. Hackett*, 6 Johns. 14; *Tudor v. Scovell*, 20 N. H. 174; *Montague v. Smith*, 13 Mass. 396; *Bloomer v. Sherman*, 2 Edw. Ch. 452. "The parties had a perfect right to give to the arbitrators such powers as they pleased, and to dictate the manner in which the award should be made. They might have directed it to be written on parchment, or engraved upon brass, or that the arbitrators should cause it to be printed, and if the arbitrators did not choose to do as they were authorized, their acts would not bind the parties."

<sup>6</sup> *Thompson v. Mitchell*, 35 Me. 281; *Everard v. Paterson*, 6 Taunt. 625; *Caldwell v. Dickinson*, 13 Gray, 365.

<sup>7</sup> *Sallours v. Girling*, Cro. Jac. 278 a; *Stanton v. Henry*, 11 Johns. 133.

<sup>8</sup> *Bloomer v. Sherman*, 5 N. Y. 482.

<sup>9</sup> *Houston v. Pollard*, 9 Met. 164.

<sup>10</sup> *Sellick v. Addams*, 15 Johns. 197; *Perkins v. Wing*, 10 Johns. 143.

<sup>11</sup> *Darling v. Darling*, 16 Wis. 644; *Steel v. Steel*, 1 Nev. 27; *Higgins v. Kinneady*, 20 Iowa, 474.

<sup>12</sup> *Darling v. Darling*, 16 Wis. 644.

<sup>13</sup> *Sellick v. Addams*, 15 Johns. 197; *Perkins v. Wing*, 10 Johns. 143; *Tudor v. Scovell*, 20 N. H. 174; *Coulter v. Coulter*, 81 Ind. 542.

<sup>14</sup> *Morse on Arbitration and Award*, 264. Where the parties to an arbitration waive the swearing of the arbitrators and witnesses, the award cannot be assailed on the ground of their failure to be sworn, and this is the case notwithstanding such swearing is required by the statute. No is it material to such waiver that the parties did not know that the statute required the oath: *Cochran v. Bartle*, 91 Mo. 636.

§ 3371. **Mistake of Law in Award.**—As to the effect of a mistake, either of law or of fact, not appearing on the face of the award, but made, or alleged to have been made, by the arbitrator or arbitrators in coming to a decision, the decisions are not at all uniform. The text-writers, both American and English, who have paid special attention and given special study to the law of arbitration and award, and the adjudications of the courts thereon, have criticised this lack of harmony,<sup>1</sup> and have repeated the expressions of able judges to the same effect.<sup>2</sup> The best-considered of the cases nevertheless hold—and in doing so undoubtedly stand by the correct rule to be applied to the decisions of arbitrators—that where the parties intend to leave the whole question of law and fact to the arbitrators, their award is conclusive, though they may have mistaken the law. To hold otherwise, as well said by Mr. Justice Grier,<sup>3</sup> “would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.”<sup>4</sup> Subject to exceptions to be noted hereafter, arbitrators, then, are the judges of the law as well as of the facts, and their decision cannot be appealed from, revised, or set aside because they have mistaken the law.<sup>5</sup>

<sup>1</sup> Mr. Russell says (Russell on Arbitration and Award, 292): “One uniform principle has not been adhered to as to the consequences of a mistake”; while Mr. Morse (Morse on Arbitration and Award, 292) holds that “the only certain element” in them “is the entire uncertainty.”

<sup>2</sup> Lord Ellenborough, in *Chace v. Westmore*, 13 East, 356. In *Jones v. Boston Mill Corp.*, 6 Pick. 148, Parker, C. J., said: “There seems to be considerable contrariety of opinion in courts of law and equity upon this subject, and it is not easy to reconcile the opinions and reasonings of different judges thereon.”

<sup>3</sup> *Burchell v. Marsh*, 17 How. 344.

<sup>4</sup> See cases cited, *ante*, § 3336; Boston

*Water Power Co. v. Gray*, 6 Met. 131, quoted from at length, *ante*, § 3336; *Jones v. Boston Mill Corp.*, 6 Pick. 148; *Indiana Cent. R. R. Co. v. Bradley*, 7 Ind. 49; *De Long v. Stanton*, 9 Johns. 38.

<sup>5</sup> *Ewing v. Beauchamp*, 2 Bibb, 456; 3 Bibb, 41; *Campbell v. Western*, 3 Paige, 124; *Greenough v. Rolfe*, 4 N. H. 357; *Beane v. Wendell*, 22 N. H. 582; *Hodgkinson v. Fernie*, 3 Com. B., N. S., 189; *York etc. R. R. Co. v. Myers*, 18 How. 246; *Locke v. Filley*, 14 Hun, 139; *Riddle's Estate*, 19 Pa. St. 431; *Moore v. Barrett*, 17 Ind. 349; *Burroughs v. David*, 7 Iowa, 154; *Fudickar v. Guardian etc. Ins. Co.*, 62 N. Y. 392; 45 How. Pr. 462; *Merritt v. Merritt*, 11 Ill. 565; Jack-

The first exception to the above principle is where the parties in the submission stipulate and require that the hearing shall be carried on or the decision made according to the rules and principles of law. Here the arbitrators must do so, and if they mistake the law, their award will be set aside.<sup>1</sup> An award of arbitrators is void when by the terms of the submission they were to decide upon equitable as well as upon legal grounds, if the award shows that equitable considerations, which would have led to a different result, were by mistake wholly disregarded.<sup>2</sup> The next exception is where the arbitrators mistake their authority, and either refuse to allow a claim because they wrongly believe it not to be embraced in the submission, or consider a claim which they wrongly believe to be included in the submission.<sup>3</sup> The next exception is where the submission requires that the court shall "approve" the award,<sup>4</sup> or that the decision of the

son v. Ambler, 14 Johns. 96; Cranston v. Kenny, 9 Johns. 212; Mitchell v. Bush, 7 Cow. 185; Bigelow v. Newell, 10 Pick. 348; Gensnam v. Germain, 11 Moore, 1; Fuller v. Fenwick, 3 Com. B. 705; Bell v. Price, 25 N. J. L. 578; Jocelyn v. Donnel, Peck, 274; 14 Am. Dec. 753; Pollard v. Lumpkin, 6 Gratt. 398; 52 Am. Dec. 128; Morris v. Ross, 2 Hen. & M. 418; Valle v. R. R. Co., 37 Mo. 445; Eaton v. Eaton, 8 Ired. 102; Spear v. Bidwell, 44 Pa. St. 23; Jenkins v. Meagher, 46 Miss. 84; McCullough v. Mitchell, 42 Ga. 495; Sanborn v. Murphy, 50 N. H. 65; Sabin v. Angell, 44 Vt. 523; Carter v. Carter, 109 Mass. 309; Willoughby v. Thomas, 24 Gratt. 521; Mitchell v. Curran, 1 Mo. App. 453; Halstead v. Seaman, 52 How. Pr. 415; King v. Falls Mfg. Co., 79 N. C. 360; De Castro v. Brett, 56 How. Pr. 484; Portsmouth v. Norfolk Co., 31 Gratt. 727; Adams v. Rengo, 79 Ky. 211; Kent v. Brown, 59 N. H. 236. As has been stated above, all the reported cases in the American reports do not hold to the rule set out in the text. A large number of authorities are opposed to that rule, but they lay down no prin-

ciple capable of a logical statement. The only point to be extracted from these cases is, that the court will set the award aside for mistake, either of law or fact, if it thinks it best to do so. The following cases support this idea: Williams v. Paschall, 4 Dall. 285; Morris v. Ross, 2 Hen. & M. 408; Brown v. Green, 7 Conn. 536; Bumpass v. Webb, 4 Port. 65; 29 Am. Dec. 274; Sumptner v. Murrell, 2 Bay. 450; Askew v. Kennedy, 1 Bail. 46; Hartshorne v. Cuttrell, 2 N. J. Eq. 297; Cleaveland v. Dixon, 4 J. J. Marsh. 226. See also English cases cited in Morse on Arbitration and Award, 322-325; Allen v. Miles, 4 Harr. (Del.) 234; State v. Williams, 9 Gill, 172.

<sup>1</sup> Greenough v. Rolfe, 4 N. H. 357; Boston Water Power Co. v. Gray, 6 Met. 131. See Mickles v. Thayer, 14 Allen, 114; Bigelow v. Newell, 10 Pick. 348; Estes v. Mansfield, 6 Allen, 69.

<sup>2</sup> Prescott v. Fellows, 41 N. H. 9; 77 Am. Dec. 752.

<sup>3</sup> Boston Water Power Co. v. Gray, 6 Met. 131; Heutt v. State, 6 Har. & J. 95; 14 Am. Dec. 259.

<sup>4</sup> Allen v. Miles, 4 Harr. (Del.) 234.

arbitrator shall be subject to review as to questions of law by the court.<sup>1</sup> The next exception is where the arbitrator, though authorized by the submission to decide all matters of law and fact, nevertheless expressly refers the questions of law to the court. Here his decision will be reviewed.<sup>2</sup> The next exception is where the arbitrator distinctly states in the award his intention to decide according to legal principles. In this case, if in trying to apply the law he mistakes it, the court will revise his finding.<sup>3</sup> The next exception is where the arbitrator recites in his award the grounds of his decision.<sup>4</sup> Here the award and the reasons given "so clearly indicate the purpose of the arbitrator to decide by the strict rules of law that it justifies the judicial mind in supposing that the arbitrator would have made a different award had he known that the judicial tribunals held a different view of the questions of law arising in the case from those entertained by himself."<sup>5</sup> Finally, it has been held in one case

<sup>1</sup> *Com. v. City of Roxbury*, 9 Gray, 451.

<sup>2</sup> *Morse on Arbitration and Award*, 304; *Cushman v. Wooster*, 45 N. H. 410.

<sup>3</sup> *Johnson v. Noble*, 13 N. H. 286; 38 Am. Dec. 485; *Boston Water Power Co. v. Gray*, 6 Met. 131; *Ward v. American Bank*, 7 Met. 486; *Johns v. Stevens*, 3 Vt. 308; *United States v. Ames*, 1 Wood. & M. 76; *Pleasants v. Ross*, 1 Wash. (Va.) 156; 1 Am. Dec. 449; *Muldrow v. Morris*, 2 Cal. 74; 56 Am. Dec. 313; *Greenough v. Rolfe*, 4 N. H. 357; *Crissman v. Crissman*, 5 Ired. 498; *Roosevelt v. Thurman*, 1 Johns. Ch. 220; *State v. Ward*, 9 Heisk. 100. *Contra*, *Learned v. Belows*, 8 Vt. 79. Thus where the award shows that they intended to disallow all items which were barred by the statute of limitations, but that they have allowed some to which the statute ought to have been applied, a court of equity may grant relief against the award; and may do so in a proper case, by striking out the credits improperly allowed, and allowing the award to stand for the balance,

instead of by vacating the entire award: *Moore v. Luckess*, 23 Gratt. 160.

<sup>4</sup> *Boston Water Power Co. v. Gray*, 6 Met. 131; *Johnson v. Noble*, 13 N. H. 286; 38 Am. Dec. 485; *Kleine v. Catara*, 2 Gall. 61. They must be in the award, and not in a separate paper: *Brown v. Clay*, 31 Me. 518; *Ward v. American Bank*, 7 Met. 486.

<sup>5</sup> *Smith v. R. R. Co.*, 16 Gray, 521; *Cutting v. Stone*, 23 Vt. 571. In *Fairchild v. Adams*, 11 Cush. 555, *Shaw, C. J.*, said: "But it is argued — and this is the only possible ground on which the claim for a revision of the award can be maintained — that if the arbitrators state the grounds of their award simply, and without expressing the contrary, it is to be presumed that they do mean to submit those grounds to the court. This is to be taken with some qualification. If they state the grounds of their decision avowedly for the satisfaction of the parties, or one of them, and it distinctly appears that they do not intend to submit their conclusions as matter of law to the court, then the

in this country that if the mistake is of a well-known and fundamental rule of law, a point "universally known and clear," the award will be bad.<sup>1</sup>

§ 3372. **Mistake of Fact in Award.** — "It has long since been settled that awards are conclusive on all matters of fact submitted to arbitrators."<sup>2</sup> To this rule there are also some exceptions.

The first exception is where a fact which the arbitrators take as true turns out false.<sup>3</sup> The next exception is where a mistake of fact is patent on the face of the award.<sup>4</sup> The next exception is where there is an error in calculation, or a clerical error patent on the face of the award.<sup>5</sup>

award is conclusive. The question is as to the intent of the arbitrators. Perhaps where they say nothing in regard to their intent, the presumption is that they intend to say, 'These are the grounds of our award; if they are right in point of law, we think the award is right, but we submit the question to the court.' In such a case the court might revise and set aside the award, if it were found not to be well grounded in point of law, because it would not then be the award which the arbitrators intended to make."

<sup>1</sup> Cleary v. Coor, 1 Hayw. (N. C.) 225. See Morse on Arbitration and Award, 314; citing English cases to same effect.

<sup>2</sup> Shaw, C. J., in Fairchild v. Adams, 11 Cush. 550. And see ante, § 3336; Boston Water Power Co. v. Gray, 6 Met. 131; De Long v. Stanton, 9 Johns. 98; Goldsmith v. Tilly, 1 Har. & J. 361; Weston v. Stuart, 11 Me. 326; Withington v. Warren, 10 Met. 431; Bell v. Price, 22 N. J. L. 578; Cromwell v. Owings, 6 Har. & J. 10; Jolley v. Blanchard, 1 Wash. 252; Kleine v. Catara, 2 Gall. 61; Curley v. Dean, 4 Conn. 259; 10 Am. Dec. 140; Brown v. Bellows, 4 Pick. 179. If there is any evidence to support a referee's findings, his report will not be disturbed: Botsford v. Sweet, 49 Mich. 120; Adleman v. Steel, 13 Phila. 529.

<sup>3</sup> Morse on Arbitration and Award,

317. Arbitrators appointed to measure land use a measure which they think perfect, but which turns out to be imperfect, one link being gone. This is a mistake which will avoid the award: Boston Water Power Co. v. Gray, 6 Met. 131. See this case, ante, § 40. The mistake of fact which is a ground for setting aside an award must be a wrong assumption made by the arbitrators, not a wrong conclusion drawn by them: American Screw Co. v. Sheldon, 12 R. I. 324. A referee's conclusions as to the weight to be given to conflicting testimony do not bind a court as do similar conclusions of a jury: Nason v. Ludington, 13 Abb. N. C. 401. But in Massachusetts it is said that an award of arbitrators is to be treated as a substitute for and as having the same effect as the verdict of a jury: Leonard v. Wading River Reservoir Co., 113 Mass. 235.

<sup>4</sup> Jocelyn v. Donnel, Peck, 274; 14 Am. Dec. 753; Mitchell v. Curran, 1 Mo. App. 453; Conger v. James, 2 Sued. 213; Nance v. Thompson, 1 Sued. 321.

<sup>5</sup> Boston Water Power Co. v. Gray, 6 Met. 131, quoted at length, ante, § 3336; Klein v. Catara, 2 Gall. 61; Brown v. Hellaby, 26 L. J. Ex., N. S., 217; In re Hall, 2 Man. & G. 847; Smith v. Cutler, 10 Wend. 589; 25 Am. Dec. 580. An arbitrator made an award which was larger by a given sum than it should have been, owing to an error

§ 3373. **Misconduct or Fraud of Arbitrator.**—Misconduct or fraud in the arbitrators, or one of them, is a good ground for setting aside the award.<sup>1</sup> A common-law or statutory award is assailable for corruption or misbehavior of the arbitrators, notwithstanding the parties have agreed that there shall be no exceptions or appeal.<sup>2</sup> A court does not, in a case of fraud, correct an award, or revise the decision of the arbitrators, but holds it to be against conscience to take advantage of the award by seeking to enforce it, or by using it as a plea to bar a defense.<sup>3</sup> And the following acts have been held misconduct in the arbitrator within this rule, viz.: Acting as attorney for one of the parties, stopping witnesses from testifying, and showing a deep interest in one party's success;<sup>4</sup> acting as an arbitrator while in a state of intoxication;<sup>5</sup> making an award on Sunday;<sup>6</sup> receiving *ex parte* communica-

merely in computation, and which could be made certain by mathematical calculation. Held, that the error did not render the award void, but that it might be obviated by a remittal: *Clement v. Foster*, 69 Me. 318.

<sup>1</sup> *Strong v. Strong*, 9 Cush. 560; *In re Hare*, 6 Bing. N. C. 153; *Mitchell v. Curran*, 1 Mo. App. 453; *Hyeronimus v. Allison*, 52 Mo. 102; *Smith v. Cooley*, 5 Daly, 401; *Newland v. Douglass*, 2 Johns. 62; *Beam v. Macomber*, 33 Mich. 127; *Dickinson v. R. R. Co.*, 7 W. Va. 390; *Lutz v. Linthicum*, 8 Pet. 178; *Smith v. Cutler*, 10 Wend. 589; 25 Am. Dec. 580; *Bumpass v. Webb*, 4 Port. 65; 29 Am. Dec. 274; *Rand v. Reddington*, 13 N. H. 72; *Torrance v. Amsden*, 3 McLean, 509; *Lee v. Patillo*, 4 Leigh, 436. In *Morse on Arbitration and Award*, 539, it is said as to this: "Fraud or corruption upon the part of an arbitrator, whenever discovered, will furnish a sufficient cause for vacating the award. These may be of two kinds,—either positive, as by some act that can be proved; or inferential, where the circumstances so strongly point to dishonesty that the court will consider the presumption of its existence thus raised to be conclusive. A common case of inferential fraud or corruption

is where the award is obviously and extremely unjust. An erroneous or excessive award is not for that sole reason necessarily to be set aside. Yet, if the error or excess be gross and palpable, and if the injustice be great and irremediable, these facts, either alone, or taken in connection with other corroborative circumstances, may amount to virtual proof of dishonesty. In such an event the court will imperatively presume the corruption or misconduct of the arbitrators, and will vacate their award, upon proceedings in equity instituted for that purpose: *Tracy v. Herrick*, 25 N. H. 381; *Rand v. Reddington*, 13 N. H. 72; *Van Cortlandt v. Underhill*, 17 Johns. 405; *In re Hall v. Hinds*, 2 Man. & G. 847; *Ashton v. Pointer*, 2 Dowl. 651; *Baker's Heirs v. Crockett*, Hardin, 383; *Bumpass v. Webb*, 4 Port. 65; 29 Am. Dec. 274. The same causes may be a sufficient ground for a court of law to vacate the award, provided the award was required by law to be returned into the court."

<sup>2</sup> *Speer v. Bidwell*, 44 Pa. St. 23.

<sup>3</sup> *Hardin v. Brown*, 27 Ga. 314.

<sup>4</sup> *Bash v. Christian*, 77 Ind. 290.

<sup>5</sup> *Smith v. Smith*, 28 Ill. 56.

<sup>6</sup> *Strong v. Elliott*, 8 Cow. 27; 18 Am. Dec. 423.

tions from one of the parties;<sup>1</sup> refusing to hear a party's witnesses;<sup>2</sup> taking money as payment for services from one party.<sup>3</sup>

But an award will not be set aside for misconduct of the arbitrators, unless it appear to have been intentional or gross.<sup>4</sup> The fact that the damages assessed by arbitrators are very much larger than the court would probably give, and that they are divided very disproportionably, and apparently arbitrarily, between two defendants, does not constitute evidence of fraud, or corruption, or improper conduct on the part of the arbitrators so decisive that a court of equity would set aside the award.<sup>5</sup> But where an award gives nearly three times the amount claimed, it is so manifestly erroneous on its face that it must be set aside.<sup>6</sup>

§ 3374. **Fraud of Party in Obtaining Award.** — Fraud on the part of either of the parties in procuring the award constitutes a ground for setting aside the award.<sup>7</sup> An at-

<sup>1</sup> *Sisk v. Garey*, 27 Md. 401; *Conrad v. Massasoit Ins. Co.*, 4 Allen, 20; *Bassett v. Harkness*, 9 N. H. 164.

<sup>2</sup> *Van Cortlandt v. Underhill*, 17 Johns. 405; *Halstead v. Seaman*, 82 N. Y. 27; 37 Am. Dec. 537; *Fudickar v. Ins. Co.*, 62 N. Y. 392; *Miller v. Noel*, 43 Ind. 324; *Fluharty v. Beatty*, 22 W. Va. 698.

<sup>3</sup> *Shephard v. Brand, Cas. & Hardw.* 53.

<sup>4</sup> *Cutter v. Carter*, 29 Vt. 72. See *Shear v. Mosher*, 8 Ill. App. 119.

<sup>5</sup> *Burchell v. Marsh*, 17 How. 344.

<sup>6</sup> *South Carolina R. R. Co. v. Moore*, 28 Ga. 398; 73 Am. Dec. 778; *Smith v. Cooley*, 5 Daly, 401.

<sup>7</sup> *Morse on Arbitration and Award*, 541; *South Sea Co. v. Bumstead*, 2 Eq. Cas. Abr. 80; *Mitchell v. Harris*, 2 Ves. Jr. 129 a; *Cutter v. Carter*, 29 Vt. 72; *Payne v. Moore*, 2 Bibb, 163; 4 Am. Dec. 689; *Mitchell v. Curran*, 1 Mo. App. 453; *Spurck v. Crook*, 19 Ill. 415; *Bulkley v. Starr*, 2 Day, 552; *Baird v. Crutchfield*, 6 Humph. 171; *Chambers v. Crook*, 42 Ala. 171; 94 Am. Dec. 637; *Fluharty v. Beatty*, 22

W. Va. 698. In *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604, the court said: "The kind of fraud which it is necessary to prove upon a party prevailing before arbitrators, in order to justify a court of equity in setting aside the award, it is not important, perhaps, here to consider, beyond that which is proved in the present case. It is very certain that the mere fact that the party offered and prevailed before the arbitrators upon a groundless claim is no ground of charging him with fraud. This he might have done with perfect innocence and sincerity. It is necessary something more should be shown. And I feel very confident that the fact that the party making the claim considered it one of doubtful equity, or even that he might honestly have believed that the claim was not well founded, either in law or equity, if all the facts known to him were fairly laid before the arbitrators, and they allowed the claim, is no such fraud as will justify a court of equity in interfering. The party must, either by suggestion of falsehood, or

tempt improperly to influence an arbitrator by making a statement in the absence of the adverse party is ground for setting aside the award, without regard to whether the arbitrator was in fact influenced or not.<sup>1</sup> But merely submitting a groundless claim is not such fraud,<sup>2</sup> nor the concealment of a fact not material to the case.<sup>3</sup> Fraud of this kind is a question of fact for a jury.<sup>4</sup>

**ILLUSTRATIONS.**—A matter in litigation between two brothers and their father was referred to arbitrators. One of the brothers threatened the other that if he did not strike out certain items from his account he would prosecute his father for perjury. The threatened brother, believing his father liable to such a prosecution, though in fact he was not, struck out the items. *Held*, that the award should be set aside for having been obtained by fraud: *Mathews v. Mathews*, 1 Heisk. 669.

**§ 3375. Variance in Duplicate Report or Award.**—Where the arbitrators execute their award in duplicate, but each copy differs materially from the other, both are void,<sup>5</sup> unless the variance is a mere verbal one, and does not substantially affect the award.<sup>6</sup>

**§ 3376. Court cannot Modify or Alter Award or Report.**—The court has no power to alter or modify in any way an award or a report, unless authorized to do so by statute<sup>7</sup> or by the submission.<sup>8</sup> It must either confirm, reject, or recommit.<sup>9</sup> A court of equity will not affirm an

the suppression of truth, have presented to the arbitrators a state of facts in regard to the merits of the claim which were factitious, and which the party at the time believed to be such. And it is questionable even how far such a case will justify a court of equity in setting aside the award. Some cases of good authority seem to justify such a course. It is certain nothing short of this would justify it."

<sup>1</sup> *Catlett v. Dougherty*, 114 Ill. 568. See *Johnson v. Holyoke Water Power Co.*, 107 Mass. 472.

<sup>2</sup> *Emerson v. Udell*, 13 Vt. 477; 37 Am. Dec. 604.

<sup>3</sup> *Newburyport Ins. Co. v. Oliver*, 8 Mass. 402.

<sup>4</sup> *Wakeman v. Dalley*, 44 Barb. 498; *Duren v. Getchell*, 55 Me. 241.

<sup>5</sup> *Green v. Lundy*, 1 N. J. L. 435.

<sup>6</sup> *Platt v. Smith*, 14 Johns. 368; *Spofford v. Spofford*, 10 N. H. 254.

<sup>7</sup> *Smith v. Cutler*, 10 Wend. 589; 25 Am. Dec. 580.

<sup>8</sup> *Com. v. City of Roxbury*, 9 Gray, 451.

<sup>9</sup> *Com. v. Pejepscut Proprs.*, 7 Mass. 399. See *Lathrop v. Arnold*, 25 Me. 136; 43 Am. Dec. 256. In Missouri, the court may adopt a referee's report with modifications, and not adopt or reject *in toto*: *Smith v. Paris*, 70 Mo. 615.

award so far as it extends, and supply its omissions and defects, but will enforce it as made, or set it aside if defective.<sup>1</sup>

§ 3377. **Recommitment of Report or Award.**—Where an award or report is returnable into court, the court may, in its discretion,<sup>2</sup> recommit it to the arbitrators for the purpose of their correcting errors in form,<sup>3</sup> or for a new finding or hearing.<sup>4</sup> An award may be recommitted on the ground of newly discovered evidence, or for any other reasons that would justify a new trial, or an arrest of judgment.<sup>5</sup> Where the recommitment is not simply to correct a clerical error, but to rehear, it must be of the whole case, and not of a single issue.<sup>6</sup> The arbitrator has, as a rule, the same power on the recommitment as on the original submission.<sup>7</sup>

§ 3378. **Extrinsic Evidence to Impeach Award.**—Where there is no charge of corruption or misconduct in the arbitrators, and the award on its face is final, nothing extrinsic to the award can be pleaded or given in evidence to invalidate it;<sup>8</sup> and no agreement or understanding outside the award that it was still to be

<sup>1</sup> Carnochan v. Christie, 11 Wheat. 446.

<sup>2</sup> Walker v. Sanborn, 8 Greenl. 288; Cumberland v. North Yarmouth, 4 Greenl. 459. But otherwise the arbitrator's power entirely ends with the making of the award: Smith v. Smith, 28 Il. 156; Evans v. Sheldon, 69 Ga. 100. See ante, § 3359.

<sup>3</sup> Brann v. Inhabitants, 50 Me. 64; Blood v. Robinson, 1 Cush. 389; Kleine v. Catara, 2 Gall. 61; Bird v. Pennice, 6 Mees. & W. 754; Heslop v. Bush, 80 Pa. St. 70; Yeaton v. Brown, 52 N. H. 14; Bowers v. Worrell, 1 Browne, (Pa.) 170; Snyder v. Hoffman, 1 Binn. 43; Thompson v. Warder, 4 Yeates, 336; Shaw v. Pearce, 4 Binn. 485.

<sup>4</sup> Cumberland v. North Yarmouth, 4 Greenl. 459; Boardman v. England, 6 Mass. 70; Treasurer v. Norton, 1 Ohio,

270; Whitney v. Cook, 5 Mass. 143; Johnston v. Paul, 22 Minn. 17; Mast v. Lockwood, 59 Wis. 48. Where the report of one referee is not responsive to the issues, the case should be referred to another, or tried by jury: Union Pacific R. R. Co. v. Wilson, 1 Wyo. Ter. 307.

<sup>5</sup> Depew v. Davis, 2 G. Greene, 260.

<sup>6</sup> Smith v. Warner, 14 Mich. 152.

<sup>7</sup> French v. Richardson, 5 Cush. 450; McRae v. McLean, 2 El. & B. 946.

<sup>8</sup> Todd v. Barlow, 2 Johns. Ch. 551; Cromwell v. Owings, 6 Harr. & J. 10; Lewis v. Wildman, 1 Day, 153; Head v. Muir, 3 Rand. 122; Shermer v. Beale, 1 Wash. 11; Jocelyn v. Donnel, 1 Peck, 274; 14 Am. Dec. 753; Dorsay v. Jeoffray, 3 Har. & McH. 121; Brown v. Green, 7 Conn. 536; Ebert v. Ebert, 5 Md. 353.

considered open for further proof can be set up.<sup>1</sup> An unambiguous award cannot be shown by their own or other parol evidence to mean other than what is expressed on its face.<sup>2</sup> But the court can look into the testimony for the purpose of determining, from the evidence and other circumstances, whether the errors were so gross or palpable as to show misbehavior or corruption in the arbitrators.<sup>3</sup> The discovery of material evidence which, by using due diligence, the party might have discovered before, is not a sufficient reason to set aside an award.<sup>4</sup> But new evidence may be so decisive, and have been so suppressed by the other party, that an award, though binding at law, will be set aside in equity.<sup>5</sup> And evidence is admissible to show that the arbitrators refused to consider and pass upon a claim submitted to them by defendant.<sup>6</sup>

**§ 3379. Testimony of Arbitrator—To Explain or Alter Award.**—The testimony of the arbitrator is not admissible to alter or explain the meaning of the award;<sup>7</sup> nor is evidence of his oral statements admissible.<sup>8</sup> An arbitrator will not be permitted to impeach the integrity of his own conduct, or that of his co-arbitrators, in making the award, either as to its execution, delivery, or the binding effect it is to have.<sup>9</sup> But arbitrators may testify upon the

<sup>1</sup> *Todd v. Barlow*, 2 Johns. Ch. 551; *Bumpass v. Webb*, 4 Port. 65; 29 Am. Dec. 274; *Shermer v. Beale*, 1 Wash. 11; *Head v. Muir*, 3 Rand. 122; *Wheatley v. Martin*, 6 Leigh, 62.

<sup>2</sup> *Cobb v. Dortch*, 52 Ga. 548.

<sup>3</sup> *Boring v. Boring*, 2 W. Va. 297.

<sup>4</sup> *Aubel v. Ealer*, 2 Binn. 582, note; *Allen v. Ranney*, 1 Conn. 569.

<sup>5</sup> *Lankton v. Scott, Kirby*, 356.

<sup>6</sup> *Gaylord v. Norton*, 130 Mass. 74; *Osborne v. Colvert*, 86 N. C. 170.

<sup>7</sup> *Kingston v. Kincaid*, 1 Wash. C. C. 448; *Patterson v. Baird*, 7 Ired. Eq. 255; *Aldrich v. Jessiman*, 8 N. H. 516; *Ward v. Gould*, 5 Pick. 291; *Ward v. American Bank*, 7 Met. 486;

*Campbell v. Western*, 3 Paige, 124; *Withington v. Warren*, 10 Met. 431; *Leavitt v. Comer*, 5 Cush. 129; *King v. Jennison*, 33 Ala. 499; *Bigelow v. Maynard*, 4 Cush. 317; *French v. New*, 20 Barb. 481; *Mulligan v. Perry*, 64 Ga. 567. An arbitrator may be examined as a witness to sustain, but not to impeach, his award: *Stone v. Atwood*, 28 Ill. 30.

<sup>8</sup> *Caldwell v. Dickinson*, 13 Gray, 365; *Clark v. Burt*, 4 Cush. 396; *Hubbell v. Bissell*, 2 Allen, 196; *Leggo v. Young*, 16 Conn. B. 626; *Strong v. Strong*, 9 Cush. 560.

<sup>9</sup> *Tucker v. Page*, 69 Ill. 179. But see *Huntsman v. Nichols*, 116 Mass. 521.

question whether a certain demand was included in their deliberations and award,<sup>1</sup> or to prove the facts submitted to them, and the grounds of their award.<sup>2</sup> So the affidavit or testimony of an arbitrator is admissible to show a mistake in an award not apparent on its face.<sup>3</sup> "But the kind of mistake which can be shown in this way is limited to cases where the error has occurred in making up or expressing the opinion or judgment. The fact of a miscalculation or of an accidental or unintentional omission might be thus made out. But no case furnishes any authority for supposing that a substantial error in judgment could be thus proved. No arbitrator could be allowed to testify that he thought he had made a mistaken decision, or that he had misunderstood or misapplied the rules of law. Testimony of the arbitrators to impeach their own award is inadmissible."<sup>4</sup>

§ 3380. **Effect of Setting Aside Report.**—Where a report is set aside, the cause remains as though it had never been referred;<sup>5</sup> the court cannot again refer it to the same referees without the consent of the parties.<sup>6</sup>

§ 3381. **Award must be Co-extensive with Submission.**—Formerly, where several matters were submitted, the award might determine one of them only, and it would be good for that, unless what was known as the *ita quod* clause had been inserted in the submission or bond.<sup>7</sup>

<sup>1</sup> *Stevens v. Gray*, 2 Harr. (Del.) 347; *Hale v. Huse*, 10 Gray, 99; *Spurck v. Crook*, 19 Ill. 415; *Roop v. Brubacker*, 1 Rawle, 304; *Williams v. Wood*, 1 Dev. 82.

<sup>2</sup> *Allen v. Miles*, 3 Harr. (Del.) 234; *Cole v. Blunt*, 2 Bosw. 116.

<sup>3</sup> *Morse on Arbitration and Award*, 336; *Robertson v. McNeil*, 12 Wend. 578; *Pulliam v. Pensoneau*, 3 Ill. 375.

<sup>4</sup> *Morse on Arbitration and Award*, 337; *Bigelow v. Maynard*, 4 Cush. 317; *Withington v. Warren*, 10 Met. 431; *Ward v. American Bank*, 7 Met. 486.

<sup>5</sup> *Rice v. Benedict*, 18 Mich. 75.

<sup>6</sup> *Smith v. Smith*, 28 Ill. 56. Nor to a new referee: *Smith v. Warner*, 14 Mich. 152.

<sup>7</sup> The *ita quod* clause was in full as follows: *Ita quod arbitrium fiat de præmissis*,—provided the award be made upon and concerning the premises: See *Morse on Arbitration and Award*, 340, citing the English cases; *Wright v. Wright*, 5 Cow. 197. In *Ott v. Schroepel*, 5 N. Y. 486, the court say: "If the submission is made conditional by the clause of *ita quod arbitrium fiat de præmissis*, and recites several distinct matters which are

But the rule not well settled is, that whatever the parties submit, the arbitrators must decide, and that, unless it appears that the intention was that all should not be decided, the award, unless it determines all the matters submitted to them by the submission, will be void.<sup>1</sup> So where arbitrators expressly decline deciding on some of the matters submitted, their award is void.<sup>2</sup> But while an award not determining all matters submitted may not be binding, a subsequent promise to perform may ratify the award.<sup>3</sup> So a party cannot set up the absence of a decision as to matters which, though submitted, he objected to being considered at the hearing,<sup>4</sup> or which were withdrawn by consent.<sup>5</sup> Though an award does not in terms decide all the matters submitted to the arbitrators, yet if the thing awarded necessarily includes the other things and matters mentioned in the submission, it is sufficient.<sup>6</sup>

specifically referred, and the arbitrators omit to decide one of the matters, and there are no general words in the award which can be construed to embrace a decision on such particular matter, the whole award is bad: *Baspole's Case*, 8 Coke, 97; *Randale v. Randale*, 7 East, 83; *Jackson v. Ambler*, 14 Johns. 96; *Willes*, 268; *Wright v. Wright*, 5 Cow. 199; *Russell on Arbitration and Award*, 250, 251, 255; *Rider v. Fisher*, 3 Bing. N. C. 874; *Simmonds v. Swaine*, 1 Taunt. 549, per *Chambre, J.*; 1 *Saund.* 32, note 1; *Ross v. Boards*, 8 Ad. & E. 290; 1 *Bac. Abr.*, tit. *Arbitration*, E. 216; *Cro. Eliz.* 838; *Lutw.* 545. Where the submission containing the *ita quod* clause is general, but the adjudication applies in terms only to a particular matter, the award, if it purports to be made concerning the matters submitted, will be presumed good until it is proved that there were other matters before the arbitrator which he neglected or refused to decide: *Russell on Arbitration and Award*, 258, 261, 264; *Ingram v. Milnes*, 8 East, 444; *Baspole's Case*, 8 Coke, 97; 5 Cow. 199; 9 Ad. & E. 522; 1 *Burr.* 277.

<sup>1</sup> *James v. Thurston*, 1 *Cliff.* 367;

*Edwards v. Stevens*, 1 *Allen*, 315; *Varney v. Brewster*, 14 N. H. 49; *Wrightson v. Bywater*, 3 *Mees. & W.* 199; *McNear v. Bailey*, 18 *Me.* 251; *Ott v. Schroepel*, 5 N. Y. 482; *Richards v. Drinker*, 6 N. J. L. 307; *Harker v. Hough*, 7 N. J. L. 428; *Carnochan v. Christie*, 11 *Wheat.* 446; *Wright v. Wright*, 5 Cow. 197; *Buntain v. Curtis*, 27 *Ill.* 374; *Tudor v. Scovell*, 20 N. H. 171; *Muldrow v. Morris*, 12 *Cal.* 331; *Karthans v. Ferrer*, 1 *Pet.* 222; *Young v. Kinney*, 48 *Vt.* 22; *Jones v. Welwood*, 16 N. Y. Sup. Ct. 106; 71 N. Y. 208; *Parker v. Chase*, 104 *Mass.* 431; *Davis v. Dyer*, 54 N. H. 146; *Boston and Lowell R. R. Co. v. R. R. Co.*, 139 *Mass.* 463; *Gooch v. McKnight*, 10 *Humph.* 229. A report of referees that does not embrace all the subjects of submission will be recommitted: *Boardman v. England*, 6 *Mass.* 70; *Kleine v. Catara*, 3 *Gall.* 61.

<sup>2</sup> *Richards v. Drinker*, 6 N. J. L. 307; *Harker v. Hough*, 7 N. J. L. 428; *Smith v. Potter*, 27 *Vt.* 304; 65 *Am. Dec.* 198.

<sup>3</sup> *Belt v. Poppleton*, 11 *Or.* 201.

<sup>4</sup> *Page v. Foster*, 7 N. H. 392.

<sup>5</sup> *Varney v. Brewster*, 14 N. H. 49.

<sup>6</sup> *Smith v. Demarest*, 8 N. J. L. 195.

So where a matter is not expressly passed upon, but the award purports to be "in full of all matters referred."<sup>1</sup> And it seems that the omission to embrace in the award a few articles of small value will not vitiate it.<sup>2</sup> And an award is good which settles the deputed question, though it does not at the same time award the damages claimed.<sup>3</sup>

ILLUSTRATIONS.—Arbitrators were appointed to determine the value of land taken for a railroad, and also the damage which the owner would sustain from the road passing across his farm. Both subjects were considered, though but one sum was specified. *Held*, valid: *Wood v. Auburn etc. Co.*, 8 N. Y. 160. Pending an action of ejectment, in pursuance of an agreement of parties to refer to arbitrators the value of the land in controversy, an order of court was made submitting to the referees all matters in dispute between the parties. The award only determined the value of the land. *Held*, sufficient: *Clarke v. Reins*, 12 Gratt. 98. Two suits were brought at the same time between the same parties,—one on the law and the other on the chancery side of the court,—and the same order was entered in both cases, referring each to an arbitrator "to take and settle all accounts between the plaintiff and defendant, and finally to determine their claims in full against each other." *Held*, that an award on the matters involved in one case only was invalid: *Bean v. Bean*, 25 W. Va. 604.

§ 3382. **Award must be Certain.**—An award must be certain; it must have such a degree of fullness and precision that no reasonable doubt as to the meaning and intention of the arbitrator can be entertained by intelligent men acquainted with the subject-matter.<sup>4</sup> And the

<sup>1</sup> *Mickles v. Thayer*, 14 Allen, 114.

<sup>2</sup> *Backus v. Fobes*, 20 N. Y. 204.

<sup>3</sup> *Moore v. Gherkin*, Busb. 73; *Holyoke Machine Co. v. Franklin Paper Co.*, 97 Mass. 150.

<sup>4</sup> *Morse on Arbitration and Award*, 408; *Russell on Arbitration and Award*, 276; *Jackson v. Ambler*, 14 Johns. 96; *Perkins v. Giles*, 53 Barb. 342; *Butler v. Mayor*, 1 Hill, 489; *Purdy v. Delavan*, 1 Caines, 304; *Schuyler v. Van der Veer*, 2 Caines, 235; *Akely v. Akely*, 16 Vt. 450; *Strong v. Strong*, 9 Cush. 560; *Hendrickson v. Remback*, 33 Ill. 299; *Hollingsworth v. Pickering*, 24 Ind.

435; *Colcord v. Fletcher*, 50 Me. 398;

*Murray v. Bruner*, 6 Serg. & R. 276;

*Jackson v. De Long*, 9 Johns. 43;

*Parker v. Eggleston*, 5 Blackf. 128;

*Barnett v. Gilson*, 3 Serg. & R. 340;

*Carnochan v. Christie*, 11 Wheat. 446;

*Lyle v. Rodgers*, 5 Wheat. 394; *Zeiger*

*v. Sailor*, 6 Binn. 24; *Sicard v. Peter-*

*son*, 3 Serg. & R. 468; *Thomas v.*

*Molier*, 3 Ohio, 266; *Walsh v. Gilmour*,

3 Har. & J. 383; 6 Am. Dec. 503;

*Gratz v. Gratz*, 4 Rawle, 411; *Borretts*

*v. Patterson*, Tayl. 37; 1 Am. Dec.

576; *King v. Cook*, T. U. P. Charl.

288; *Gonsales v. Devens*, 2 Yeates,

539; *Grier v. Grier*, 1 Dall. 173;

arbitrators cannot remedy an award void for uncertainty by making a second and more precise award.<sup>1</sup> The degree of uncertainty required to avoid an award is the same as that required to avoid any contract.<sup>2</sup> An award to do some act other than the payment of money should be so certain that a specific performance could be decreed.<sup>3</sup> And a referee's finding must state facts with the certainty, precision, and fullness of a special verdict.<sup>4</sup>

Carter v. Ross, 2 Root, 507; Parkhurst v. Powers, 2 Root, 531; Hazeltine v. Smith, 3 Vt. 535; Burkholder v. McFerran, 3 Serg. & R. 422; Spalding v. Irish, 4 Serg. & R. 322; James v. Thurston, 1 Cliff. 367; Howard v. Babcock, 21 Ill. 259; Pierson v. Norman, 2 Cal. 539; Gibson v. Powell, 5 Smedes and M. 712; Lee v. Oustott, 1 Ark. 206; McCracken v. Clarke, 31 Pa. St. 498; McKeen v. Oliphant, 18 N. J. L. 442; Cauthorn v. Courtney, 6 Gratt. 381; Pettibone v. Perkins, 6 Wis. 616; Myers v. R. R. Co., 2 Curt. 28; Kingston v. Kincaid, 1 Wash. C. C. 448; Etnier v. Shope, 43 Pa. St. 381; Hendrickson v. Remback, 33 Ill. 299; Farr v. Johnson, 25 Ill. 522; Kurtner v. State, 3 Ind. 86; Northern Central R. R. Co. v. Canton Co., 24 Md. 492; Pike v. Gage, 29 N. H. 461; Carson v. Carter, 64 N. C. 332; Burrows v. Guthrie, 61 Ill. 70; Ingraham v. Whitmore, 75 Ill. 24; Boughton v. Seamans, 16 N. Y. Sup. Ct. 392; Comer v. Thompson, 54 Ala. 265. In *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. Rep. 486, the court say: "An award must be so certain that not only the intention of the arbitrators shall be clearly apparent, but that it can be easily comprehended and be carried into execution without reference to or the aid of extrinsic and independent circumstances: *Howard v. Babcock*, 21 Ill. 59. And where a sum to be paid does not appear from the award itself, unless that sum may be easily ascertained by reference to a rule or provision of law, or some fixed, ascertained, and well-understood standard, or by arithmetical calculation, the award as to that sum is void: *School District v. Aldrich*, 13 N. H. 145; *Waite v. Barry*, 12 Wend. 380; *Brown v. Hunkerson*, 3 Cow. 72;

*Price v. Popkins*, 10 Ad. & E. 145; *Parker v. Eggleston*, 5 Blackf. 128. Therefore it was held, in *Wright v. Smith*, 19 Vt. 110, that an award that a party should pay the 'taxable costs' of a pending suit was sufficiently certain, because the precise amount of the taxable costs was ascertainable by reference to the statute. And so in *Andrews v. Foster*, 42 N. H. 376. But in *Winter v. Garlick*, Salk. 75, where the award was that one party should pay the other ten pounds and the costs of a suit pending in an inferior court, and there to give mutual releases, the court said: 'To pay such costs as the master shall tax is good; for, *Id certum est quod certum reddi potest*; but this is uncertain, and carries it further than has hitherto been allowed.' An award that one shall give a bond, without saying in what sum, is bad: *Samon's Case*, 6 Coke, 77, 80. And and so of an award that one should pay as much as a quarter of malt should be worth: 1 Roll. Abr., Arbitration, E, pl. 7. Or so much as the land is worth: *Skin*, 247, 248; *Tipping v. Smith*, Strange, 1024; *Knott v. Long*, Strange, 1025; *Lincoln v. Whittenton Mills*, 12 Met. 31; *Schuyler v. Van der Veer*, 2 Caines, 240. And in *School District v. Aldrich*, 13 N. H. 145, *Parker, C. J.*, said: 'There would have been no certainty if the arbitrators had awarded costs, unless they specified the amount or provided a mode by which it was to be ascertained, for there was no tribunal to tax them.'

<sup>1</sup> *Fallon v. Kelehar*, 16 Hun, 266.

<sup>2</sup> *Akley v. Akely*, 16 Vt. 450.

<sup>3</sup> *Banks v. Adams*, 23 Me. 259.

<sup>4</sup> *Harris v. Hay*, 111 Pa. St. 562.

An award which fixed no definite sum to be paid, and furnishes no *data* from which the amount to be paid can be computed, is void for uncertainty.<sup>1</sup>

But all that is required at the present day is certainty to a common intent.<sup>2</sup> To render an award invalid for uncertainty, it must be the decision which is left uncertain, not the reasoning which led to the decision.<sup>3</sup> So an award is sufficiently certain if the matters concluded by it can be ascertained by looking into the whole proceedings, as well before the reference as after.<sup>4</sup> An award will not be deemed void because it does not state the amount due at its date, if it contains all the elements necessary to ascertain such amount by a simple calculation.<sup>5</sup> An award is none the less certain because it refers in general terms to a previous report by a commissioner, and concurs with it, without specifying the particulars or substance thereof.<sup>6</sup> An award which provides that certain amounts shall be paid in proportion to the interests of the parties, which are specially stated in the bill and admitted in the answer, is sufficiently certain.<sup>7</sup> An award requiring conveyances to be made of certain portions of land "up to the original claim lines" is not invalid for uncertainty, as parol evidence is admissible to establish such lines as monuments.<sup>8</sup> If two parts of an award are irreconcilable, the first prevails.<sup>9</sup>

ILLUSTRATIONS.—AWARDS HELD VOID FOR UNCERTAINTY.—

An award is that one party shall pay to the other as much money as is in conscience due: *Watson v. Watson*, Style, 28. A is ordered to deliver to B "a certain bond bearing date February 17, 1821." No other description of the bond is given: *Sheppard v. Stites*, 7 N. J. L. 90. In an action on an account, one defense was the statute of limitations. The report left the time uncertain when the period of limitation began to run:

<sup>1</sup> *Hays v. Hays*, 2 Ind. 28.

<sup>2</sup> *Bush v. Davis*, 34 Mich. 190.

<sup>3</sup> *Lamphire v. Cowan*, 39 Vt. 420.

<sup>4</sup> *Blackledge v. Simpson*, 2 Hayw.

(N. C.) 30; 2 Am. Dec. 614.

<sup>5</sup> *Bush v. Davis*, 34 Mich. 190.

<sup>6</sup> *Brickhouse v. Hunter*, 4 Hen. & M. 363; 4 Am. Dec. 528.

<sup>7</sup> *Gudgell v. Pettigrew*, 26 Ill. 306.

<sup>8</sup> *Williams v. Warren*, 21 Ill. 541.

<sup>9</sup> *Cox v. Jagger*, 2 Cow. 638; 14 Am. Dec. 522.

*Doyle v. Reilly*, 18 Iowa, 108; 85 Am. Dec. 582. An award was in favor of the plaintiff for \$30.73, with the exception of an allowance, as made by the plaintiff, for hauling 620 staves: *Parker v. Eggleston*, 5 Blackf. 128. An award was to deliver books, papers, and accounts, and a small chest of wearing apparel, without any further description: *Thomas v. Molier*, 3 Ohio, 266. An award was to finish the house, or to pay for the stove, without stating what house, or what stove: *Schuyler v. Van der Veer*, 2 Caines, 235. C., as agent of O., entered into a submission with A. to refer certain matters under the statute. The award was in favor of A., without stating against whom: *Callahan v. McAlexander*, 1 Ala. 366. An award required a railroad to pay four hundred dollars for a right of way, at any time fixed by the company, upon giving the land-owner three days' notice of the time and place of payment, he to deliver a deed thereof: *Alfred v. R. R. Co.*, 92 Ill. 609. An award was that B pay to A the sum of, etc., "within the space of sixty days," and that A, on the receipt of that sum, do deliver up a certain bond bearing date the tenth day of December, 1836": *McKeen v. Allen*, 17 N. J. L. 506. An award stated that the arbitrators "decide the case in favor of the defendants, and the costs of reference taxed,—seventy-five dollars, and the costs of court taxed by the court, and all costs, paid by the plaintiffs": *Leominster v. R. R. Co.*, 7 Allen, 38. An award was that a party pay the difference between a tax receipt and a note. It did not set out said papers, was not accompanied by them, nor refer to them by date or amount: *Hollingsworth v. Pickering*, 24 Ind. 435. An award determined "certain matters and accounts now in dispute and undetermined between the parties." It did not show what matters and accounts were in dispute: *Turpin v. Banton*, Hardin, 312. An award was that A should deliver "the said farm" to B, etc., and that B should pay A a certain sum. It did not describe the farm by reference or otherwise: *Brown v. Hankerson*, 3 Cow. 70. The submission was to settle the ground rent of certain lots. The award stated that a certain abatement should be allowed until a party be put in possession, the time whereof was not determined: *Evans v. Sheldon*, 69 Ga. 100. An award adjudged that the defendants had the right to maintain their dam at a certain height, except in times of "freshet": *Harris v. Social Mfg. Co.*, 9 R. I. 99; 11 Am. Rep. 224.<sup>1</sup>

<sup>1</sup> The court said: "It is not necessary to a complete award that it should execute itself. That is not always possible. But it should be in its terms reasonably certain; it should, as a general rule, leave nothing to be per-

formed but the mere ministerial acts needed to carry it into effect. It should end controversy, and not leave its own meaning open to future controversy. It should be certain as a judgment of court. A judgment of

ILLUSTRATIONS CONTINUED.—AWARDS HELD SUFFICIENTLY CERTAIN.—An award was in favor of the plaintiff for “the amount of the note” in controversy: *Coze v. Gent*, 1 McMull. 302. Arbitrators, authorized to decide to whom a certain piece of fence belonged, awarded that the defendant might take away the rails and stakes put into the fence by one M., a former owner: *Whittemore v. Mason*, 14 Ill. 392. An award was for a sum certain and “the costs”: *Brown v. Warnock*, 5 Dana, 492. An award under a submission of all matters at variance between the parties was that one should pay the other a sum certain, and that each party should be equally bound to pay certain debts due to third persons: *Coulter v. Hitchens*, 3 Harr. (Del.) 70. An award, in a controversy between partners, provided that the partnership should be dissolved from the date of the award, and stating the amount due from each one to the firm, and that the one should recover from the other half the difference between those amounts: *Carsley v. Lindsay*, 14 Cal. 390. An award directed one party to pay to the other a certain sum within a certain time after the date of the award, with interest till paid: *Skeels v. Chickering*, 7 Met. 316. An award was in favor of a plaintiff in ejectment, “agreeable to the decision of the board of property,” there having been a decision of that board between the same parties, concerning the land in dispute: *Santee v. Keister*, 6 Binn. 36. An award provided that notes which were ordered by the award should be “satisfactorily secured”: *Cutter v. Cutter*, 48 N. Y. Sup. Ct. 470. An award was to pay to the “executors” of A a certain sum: *Grier v. Grier*, 1 Dall. 173. On submission of the question of boundary lines, which would be determined by the location of a certain corner, an award found two points in two lines from which a competent surveyor could locate the corner: *Rogers v. Carrothers*, 26 W. Va. 238.

court may need process to enforce it; but that could hardly be called a final judgment which requires another judgment to determine its meaning. The object of an arbitration is to prevent future dispute. This object can hardly be said to be carried into effect when, in defining rights of the parties, terms are used which might require another lawsuit to fix their meaning, and still less if left open to continual lawsuits, at the pleasure or ill-will of the parties. It should leave no doubt as to the nature or extent of the duties imposed by it upon the parties: *Russell on Arbitration and Award*, 277. It may require future ministerial acts to be done by the arbitrators or others, but cannot reserve any judi-

cial act to be done: *Id.* 274. His duty is to make a complete and final determination, and it is a breach of that duty to leave anything to be determined hereafter: *Id.* 722. The word ‘freshet’ varies in its meaning in various rivers, in various years, and in various seasons of the year. If any mode had been provided in the award settling its meaning, then, perhaps, according to the maxim, *Id certum est quod certum reddi potest*, the award might be considered sufficiently certain; but in case of a suit, a jury could only decide that the state of the water, in the particular case before them, did or did not constitute a freshet, and this would necessitate constant litigation.”

§ 3383. **Award must be Entire.**—An award must be entire. This is said to be an imperative rule, and to mean that it must have unity and completeness. "There can be but one award, and that award must be perfect and complete."<sup>1</sup>

§ 3384. **Award must be Final.**—An award must be final; i. e., it must so thoroughly determine and dispose of the controversies submitted that they cannot become the basis of future litigation.<sup>2</sup> Thus if two parties having

<sup>1</sup> *Morse on Arbitration and Award*, 369; *Gould v. Staffordshire Potteries*, 5 Ex. 214, 223; *Winter v. Munton*, 2 Moore, 723; *Day v. Laffin*, 6 Met. 280; *Russell on Arbitration and Award*, 247; *Stephenson v. Price*, 30 Tex. 715.

<sup>2</sup> *Waite v. Barry*, 12 Wend. 377; *McKee v. Oliphant*, 18 N. J. L. 442; *Young v. Shook*, 4 Rawle, 299; *Dundon v. Starin*, 19 Wis. 261; *Colcord v. Fletcher*, 50 Me. 398; *In re Williams*, 4 Denio, 194; *Paine v. Paine*, 15 Gray, 299; *Lamphire v. Cowan*, 39 Vt. 420; *Wilkinson v. Page*, 1 Hare, 276; *Bhear v. Harradine*, 7 Ex. 269; *Cockburn v. Newton*, 2 Man. & G. 899; *Lincoln v. Whittenton Mills*, 12 Met. 31; *McKinstry v. Solomons*, 2 Johns. 57; 13 Johns. 27; *Semple v. Hutchinson*, 4 Phila. 249; *McCrary v. Harrison*, 36 Ala. 577; *Jones v. Welwood*, 9 Hun, 166; *Cox v. Jagger*, 2 Cow. 638; 14 Am. Dec. 522; *Calvert v. Carter*, 6 Md. 135; *Morse v. Hale*, 27 Vt. 660; *Coupland v. Anderson*, 2 Call, 106; *Akely v. Akely*, 16 Vt. 450; *Williams v. Landon*, 14 Serg. & R. 338; *Waugh v. Mitchell*, 1 Dev. & B. Eq. 510; *Jacob v. Ketcham*, 37 Cal. 197; *Coghill v. Hord*, 1 Dana, 350; 25 Am. Dec. 148; *Byars v. Thompson*, 12 Leigh, 530; 37 Am. Dec. 680; *Purdy v. Delevan*, 1 Caines, 304; *Karthaus v. Ferrer*, 1 Pet. 222; *Spofford v. Spofford*, 10 N. H. 254; *Manuel v. Campbell*, 3 Ark. 324; *Lee v. Onstett*, 1 Ark. 206; *Carter v. Calvert*, 4 Md. Ch. 199; *Gonsales v. Deavens*, 2 Yeates, 539; *Archer v. Williamson*, 2 Har. & G. 62; *Patton v. Baird*, 7 Ired. Eq. 255; *Smith v. Potter*, 27 Vt. 304; 65 Am. Dec. 198; *Ingraham v. Wilmore*, 75 Ill. 24; *Rhodes v. Hardy*, 53 Miss. 587; *McGregor* etc.

*R. R. Co. v. R. R. Co.*, 49 Iowa, 604; *Hiscock v. Harris*, 74 N. Y. 108. In *Morse on Arbitration and Award*, 385, the author says: "It is one of the cardinal rules in the law concerning arbitration that the award must be final; that is to say, it must constitute a complete and final disposition and determination of the matter submitted. The very sweeping character and operation of this rule will become obvious upon a moment's reflection. Without stretching the phrase beyond its ordinary meaning, the requisition of finality may be made to include a large proportion of all the characteristics essential to a valid award. Thus an award which is not certain is not final; for where there is doubt there can be no finality. An award which is not consistent is not final. An award which does not dispose of all the matters which the arbitrators are under obligation to dispose of, or which, in other words, is not co-extensive with the submission, is evidently not final. An award which neglects to give directions which are indispensable to the fulfillment of its decision is not final. As, for example, it is a rule that an award concerning the title to real estate is not sufficient by itself to pass the title to the land, but a subsequent conveyance must be made by the party in whom the legal title is outstanding. Consequently, if an award finds that the title is in a person other than him in whose name it legally stands, or if an award makes a partition of lands held in common (*Johnson v. Wilson*, Willes, 248), or runs a disputed boundary line, and does not order conveyances, it may be

mutual suits submit both to arbitration, an award on one suit only is wanting in finality.<sup>1</sup> A reservation of a future power by the arbitrators in their award, if it affect the whole of the award, will render it totally void.<sup>2</sup> Therefore an award which is expressly made subject to future alterations upon the suggestion of errors by the parties does not constitute a valid award.<sup>3</sup> But an award is final though the question of its propriety in point of law is submitted by the arbitrators to the court.<sup>4</sup> So an award finding the facts in dispute, and directing a certain sale, "if it be competent for an arbitrator to do so," is final.<sup>5</sup> Where an award leaves nothing to be done to dispose of the whole matter in controversy, except mere ministerial acts, the award cannot be objected to on the ground of want of finality.<sup>6</sup> An award of payment of a specific sum is final and sufficient, without directing a release from the party to whom it is paid.<sup>7</sup> An award is not void because it is in the alternative, and contingent; nor because one of the alternatives requires the party to do an act in con-

bad for want of finality. This inclusion of other traits in the grand trait of finality will be noticed in the language of many of the decisions. Often a defect will be displayed, and the courts will say, as though the phrases were interchangeable, that by reason of it the award is neither certain nor final, or that it is not final and does not dispose of the matters which the arbitrators were bound to dispose of." In *Strong v. Strong*, 9 Cush. 567, Cushing, J., said: "When it is laid down as a principle of law that an award should be final, the meaning is, not that nothing shall remain to be done to complete the execution of the award, but that the thing to be done shall have been determined and defined to a reasonable certainty. Thus an award is bad which requires A to give bonds to B, with such sureties as B shall approve, because that commits everything to the discretion of B: Com. Dig., tit. Arbitration, E, 15. But an award that the property of a pump is in A, and that B has a right to use it,

and that it shall be repaired at their joint expense, has been adjudged to be final: *Boodle v. Davies*, 3 Ad. & E. 200. Yet in this last-named case many things remained to be done to give effectual execution to the award, about which things it was quite possible for litigation to arise. But the respective rights of the parties being determined by the award, it is to be taken as valid; for the law furnishes the appropriate remedies for the enforcement of those rights."

<sup>1</sup> *Morse v. Hale*, 27 Vt. 660; *Coupland v. Anderson*, 2 Call. 106.

<sup>2</sup> *Calvert v. Carter*, 6 Md. 135.

<sup>3</sup> *McCrary v. Harrison*, 36 Ala. 577; *Hooker v. Williamson*, 60 Tex. 524.

<sup>4</sup> *Brickhouse v. Hunter*, 4 Hen. & M. 363; 4 Am. Dec. 528.

<sup>5</sup> *Waugh v. Mitchell*, 1 Dev. & B. Eq. 510.

<sup>6</sup> *Owen v. Boerum*, 23 Barb. 187; *Carter v. Calvert*, 4 Md. Ch. 199.

<sup>7</sup> *McKinstry v. Solomons*, 2 Johns. 57; *Byers v. Van Deusen*, 5 Wend. 268.

junction with another not a party to the award, and over whom he has no control.<sup>1</sup> It is not necessary that the same acts, in the same unqualified matter, should be awarded on each side, to render an award mutual. Nor is it an objection that one party is to perform something on his part before the other releases, when matter is awarded to be done by that other, independent of the releases.<sup>2</sup>

**ILLUSTRATIONS.**—An award directed that one of the parties should pay to another a certain sum as the value of stock held by the latter in a corporation, on the ground that the former had converted to his own use the effects of the corporation. The award did not direct a transfer of the stock to the party charged with its value. *Held*, bad, because not final: *In re Williams*, 4 Denio, 194. A reference was made to one as “special referee,” to make a report, stating the facts, his conclusions of law, and his recommendations. The report did not make a final finding of the matters referred, but professed to be only a recommendation. *Held*, invalid: *Strong v. Barbour*, 1 Mackey, 209. A reference to arbitrators required them to make a settlement of the accounts between the plaintiff and the defendant. The award declared that the defendant and another are entitled to certain credits on their account with the plaintiff. *Held*, invalid: *Jacob v. Ketcham*, 37 Cal. 197. Arbitrators determined that the plaintiffs should be entitled to a credit of a certain sum, on account of sales of lands to the defendant, provided “they shall grant, or cause to be granted, to W. C., the defendant, a clear, unencumbered, and satisfactory title” to the lands. It did not limit any time within which the title should be made. *Held*, invalid: *Carnochan v. Christie*, 11 Wheat. 446.

**§ 3385. Award must be Mutual.**—An award must be mutual; i. e., not give an advantage to one party without an equivalent to the other. “But this mutuality is nothing more than that the thing awarded to be done should be a final discharge of all future claim by the party in whose favor the award is made against the other for the causes submitted, or in other words, that it shall be final.”<sup>3</sup>

<sup>1</sup> *Thornton v. Carson*, 7 Cranch, 596; *Commonwealth v. Pejepscut Proprietors*, 7 Mass. 399. And see next section.

<sup>2</sup> *Munro v. Alaire*, 2 Caines, 320.

<sup>3</sup> *Purdy v. Delavan*, 1 Caines, 304; *Karthauss v. Ferrer*, 1 Pet. 222; *MoKinstry v. Solomons*, 2 Johns. 57;

An award is not objectionable for want of mutuality which directs the payment of a sum of money by one party to the other without prescribing any act to be done by the other.<sup>1</sup> If one party is not bound by the award, it is not mutual.<sup>2</sup> But although an infant or a *feme covert* cannot bind themselves to submit to an award, yet if a person enter into a submission with a person so incapacitated, knowing the fact, he will be bound, though the other party is not.<sup>3</sup> An arbitration entered into between the consignee and master of a vessel, which is not binding on the charterer, in whose favor the decision is given, is not binding on the owner.<sup>4</sup>

ILLUSTRATIONS.—A, B, and the C company submitted the separate demands of A against B and the company, and the arbitrators charged B with the value of the stock owned by A in the company, on the ground that B had converted the effects of the company to his own use, but they did not order A to convey the stock to B. *Held*, that the award was void, because not mutual and final: *Matter of Williams*, 4 Denio, 194.

§ 3386. **Award must be Possible.**—The award must be possible; i. e., possible on its face.\* Thus awards as to the following are said to be impossible and void; e. g., to pay money on a day already past;<sup>5</sup> to turn aside the course of the Thames.<sup>6</sup> So of an award requiring A to procure a certain person to become his surety for the payment of the award;<sup>7</sup> or of an award that A is to convey property

Munro v. Alaire, 2 Caines, 320; Blackridge v. Simpson, 3 Hayw. (Tenn.) 30; Miller v. Moore, 7 Serg. & R. 164; Hanson v. Webber, 40 Me. 194; Lamphire v. Cowan, 30 Vt. 420; Borretts v. Patterson, Tayl. 37; 1 Am. Dec. 576; Doolittle v. Malcom, 8 Leigh, 608; 31 Am. Dec. 671; Russell on Arbitration and Award, 285; Morse on Arbitration and Award, 377; McKeen v. Oliphant, 18 N. J. L. 442; Power v. Power, 7 Watts, 205; Gibson v. Powell, 5 Smedes & M. 712.

<sup>1</sup> Reynolds v. Reynolds, 15 Ala. 398.

\* Furbish v. Hall, 8 Me. 315.

<sup>2</sup> Morse on Arbitration and Award, 381; Palmer v. Davis, 28 N. Y. 242.

<sup>3</sup> Belmont v. Tyson, 3 Blackf. 530.

<sup>4</sup> Morse on Arbitration and Award, 375; Lee v. Elkins, 12 Mod. 585; Card v. Wallace, 7 Dana, 190; 32 Am. Dec. 85; Russell on Arbitration and Award, 247.

<sup>5</sup> Russell on Arbitration and Award, 288.

<sup>6</sup> Bac. Abr., tit. Arbitration, E, 4.

<sup>7</sup> Oldfield v. Wilmer, 1 Leon. 140; Thursby v. Helbot, 3 Mod. 272.

to which he has no title, or to pay money out of a fund not his.<sup>1</sup>

§ 3387. **Awards are Liberally Construed.**—Awards are liberally construed by the courts, who will, if they can, consistently with legal principles, give effect and operation to the intention of the arbitrators.<sup>2</sup> Thus where several claims are referred by a general submission, an award for the plaintiff on one or more, and silent as to the others, will be taken to be against him on the latter.<sup>3</sup> So if the subject-matter of a suit at law is submitted to arbitration, an award that the plaintiff shall pay all the costs of the suit is by necessary implication a finding that he shall recover no damages.<sup>4</sup> The terms "heirs at law," in an award respecting personal estate, may be construed to mean all a testator's children living, and the child or children of any of them who died in his lifetime.<sup>5</sup> Where "all demands" were submitted, an award of a certain sum in full of "all accounts" to them submitted was held to be the same as of all demands.<sup>6</sup> But an award cannot be extended beyond the things submitted; and even if the language of the submission be broad enough to cover a claim subsequently sought to be enforced, yet if it be clearly made to appear that the claim was not before the arbitrators, and was not passed upon by them, the award will not bar it.<sup>7</sup>

<sup>1</sup> Adams v. Staley, 2 Show. 61.

<sup>2</sup> Archer v. Williamson, 2 Har. & J. 62; Butler v. Mayor, 1 Hill, 489; James v. Thurston, 1 Cliff. 367; Purdy v. Delevan, 1 Caines, 304; Smith v. Smith, 4 Rand. 95; Rixford v. Nye, 20 Vt. 132; Schuyler v. Van der Veer, 2 Caines, 235; Jackson v. Ambler, 14 Johns. 96; Walker v. Merrill, 13 Me. 173; Spear v. Hooper, 22 Pick. 144; Kanouse v. Kanouse, 36 Ill. 439; Skillings v. Coolidge, 14 Mass. 43; Richardson v. Huggins, 23 N. H. 106; Bacon v. Wilber, 1 Cow. 117; Burns v. Hendrix, 54 Ala. 78; Maryland etc. R. R. Co. v. Porter, 19 Md. 458; Ross

v. Watt, 16 Ill. 99; Lewis v. Burgess, 5 Gill, 129; Garites v. Carter, 16 Md. 309; Greer v. Greer, 1 Dall. 174; Inness v. Miller, 1 Dall. 188; Kunckle v. Kunckle, 1 Dall. 365; Gonsales v. Deavens, 2 Yeates, 539; Joy v. Simpson, 2 N. H. 179; Mueller v. Cravat, 2 Bay, 370; Sumpter v. Murrell, 2 Bay, 450.

<sup>3</sup> Engleman v. Engleman, 1 Dana, 437.

<sup>4</sup> Sears v. Vincent, 8 Allen, 507.

<sup>5</sup> Smith v. Smith, 4 Rand. 95.

<sup>6</sup> Kendall v. Bates, 35 Me. 357.

<sup>7</sup> Lee v. Dolan, 39 N. J. Eq. 193.

§ 3388. **Presumption in Favor of Award.**—And the courts will make all reasonable presumptions in favor of the validity of an award; and the award will be sustained, unless these presumptions are overcome by full proof.<sup>1</sup> The presumption will be made that all the legal requisites to its validity have been performed by the arbitrators;<sup>2</sup> and that all matters submitted have been decided by the arbitrator, and that he has not exceeded his authority.<sup>3</sup> One who undertakes to set aside an award, if on the ground that it is contrary to evidence, must set forth all the evidence produced before the arbitrators, and show expressly that it is all, and that it clearly contradicts the law; and if on the grounds of mistake, he must show a palpable and gross mistake, not a mere error in judgment; if on the ground of fraud, he must make clear, affirmative proof of the fraud.<sup>4</sup>

§ 3389. **Award Good in Part and Bad in Part.**—An award may be good in part and bad in part; and in such a case the courts will enforce it as to the good parts, and reject those parts which are void, because unauthorized

<sup>1</sup> *Strong v. Strong*, 9 Cush. 560; *Tallman v. Tallman*, 5 Cush. 325; *Parsons v. Aldrich*, 6 N. H. 264; *Hendrickson v. Rembach*, 33 Ill. 299; *Rixford v. Nye*, 20 Vt. 132; *Lamphire v. Cowan*, 39 Vt. 420; *Hayes v. Forskoll*, 31 Me. 112; *Gonsales v. Deavens*, 2 Yeates, 539; *Fiske v. South Wilbraham Co.*, 7 Allen, 476; *Kendrick v. Tarbell*, 26 Vt. 416; *Tomlinson v. Hammond*, 8 Iowa, 40; *Dolph v. Clemens*, 4 Wis. 181; *Merritt v. Merritt*, 11 Ill. 565; *Thoreau v. Pallies*, 5 Allen, 354; *McCalmont v. Whitaker*, 3 Rawle, 84; 23 Am. Dec. 102; *Harris v. Social Mfg. Co.*, 8 R. I. 133; 5 Am. Rep. 549; *McDonald v. Amont*, 14 Ill. 58; *Richards v. Brockenbrough*, 1 Rand. 449; *Coupland v. Anderson*, 2 Call, 106; *King v. Cook*, T. U. P. Charlt. 287; 4 Am. Dec. 715; *Archer v. Williamson*, 2 Har. & G. 67; *Fryeburg Canal v. Frye*, 5 Me. 38; *Karthauss v. Ferrer*, 1 Pet.

222; *Smith v. Minor*, 1 N. J. L. 16; *Haywood v. Harmon*, 17 Ill. 477; *Rolinson v. Carson*, 8 Md. 208; *Armstrong v. Armstrong*, 1 Leigh, 491; *Ott v. Schroeppel*, 5 N. Y. 482; *Green v. Franklin*, 1 Tex. 497; *Taber v. Jenny*, Sprague, 315; *Carter v. Sams*, 4 Dev. & B. 182; *Kimble v. Saunders*, 10 Serg. & R. 193; *Stannard v. Smith*, 40 Vt. 513; *Denham v. Williams*, 39 Ga. 312; *Pollock v. Sutherland*, 25 Gratt. 78; *Phipps v. Tompkins*, 50 Ga. 641; *McDowell v. Thomas*, 4 Neb. 542; *Young v. Kinney*, 48 Vt. 22; *Darst v. Collier*, 86 Ill. 96; *Liverpool etc. Ins. Co. v. Goehring*, 99 Pa. St. 13.

<sup>2</sup> *Leominster v. R. R. Co.*, 7 Allen, 38; *Blood v. Shine*, 2 Fla. 127; *Warner v. Collins*, 135 Mass. 26; *Price v. Kirby*, 1 Ala. 184.

<sup>3</sup> *Caton v. McTavish*, 10 Gill & J. 192; *Green v. Ford*, 17 Ark. 586.

<sup>4</sup> *Overby v. Thrasher*, 47 Ga. 10.

or illegal.<sup>1</sup> If an award is for more than the arbitrators have power to make it, as, for example, where their power is limited by the amount of the penalty of a bond, the award is not necessarily void altogether, but the excess may be remitted.<sup>2</sup> An unauthorized provision for payment of costs, or of arbitrator's fees, will not vitiate an award, as respects payment of damages, if the two can be distinguished.<sup>3</sup> And so of a defect in neglecting to ascertain costs.<sup>4</sup> But if there is such a connection between the two parts that one cannot be rejected and the other allowed to stand without doing injustice, then the award will be void *in toto*.<sup>5</sup>

<sup>1</sup> Cox v. Jagger, 2 Cow. 638; 14 Am. Dec. 522; Orcutt v. Butler, 42 Me. 83; Clement v. Durgin, 1 Greenl. 300; Jackson v. Ambler, 14 Johns. 96; Martin v. Williams, 13 Johns. 264; McBride v. Hogan, 1 Wend. 326; Dake v. James, 4 N. Y. 568; Chase v. Strain, 15 N. H. 535; Day v. Hooper, 51 Me. 178; Banks v. Adams, 23 Me. 259; Carson v. Earlywine, 14 Ind. 256; Blossom v. Van Amringe, 63 N. C. 65; Rogers v. Tatum, 25 N. J. L. 281; Walker v. Walker, 28 Ga. 140; Darling v. Darling, 16 Wis. 644; Cowan v. McNeeley, 10 Ired. 5; Caton v. McTavish, 10 Gill & J. 192; Garitee v. Carter, 16 Md. 309; Reynolds v. Reynolds, 16 Ala. 398; Barrows v. Capen, 11 Cush. 37; Parmalee v. Allen, 32 Conn. 115; Cohen v. Habenicht, 14 Rich. Eq. 31; Woglam v. Burnes, 1 Binn. 109; Giddings v. Hadaway, 28 Vt. 342; Gilmore v. Hubbard, 12 Cush. 220; Tracy v. Herrick, 25 N. H. 381; Smith v. Sweeney, 35 N. Y. 291; Williams v. Walton, 9 Cal. 146; Muldrow v. Morris, 2 Cal. 74; 56 Am. Dec. 313; Rand v. Mather, 11 Cush. 1; 59 Am. Dec. 131; overruling Loomis v. Newhall, 15 Pick. 159; Nichols v. Ins. Co., 22 Wend. 417; Shearer v. Handy, 22 Pick. 417; Cromwell v. Owings, 6 Har. & J. 10; Gibson v. Broadfoot, 5 Desaus. Ch. 11; Gibson v. Powell, 5 Smedes & M. 712; Wynn v. Bellas, 34 Pa. St. 160; Gordon v. Tucker, 6 Me. 247; De Groot v. United States, 5 Wall. 419; Harrington v. Brown, 9 Allen, 579; Hoagland v.

Veghte, 23 N. J. L. 92; Babb v. Stromberg, 14 Pa. St. 397; Rixford v. Nye, 20 Vt. 132; Lawson v. Hall, 56 Me. 142; Stanwood v. Mitchell, 59 Me. 121; Hartland v. Henry, 44 Vt. 593; Richardson v. Payne, 55 Ga. 167; Bogan v. Daughrill, 51 Ala. 312; Adams v. Ringo, 79 Ky. 211; Warner v. Collins, 135 Mass. 26.

<sup>2</sup> Ehrman v. Stanfield, 80 Ala. 118.

<sup>3</sup> Day v. Hooper, 51 Me. 178; Hanson v. Webber, 40 Me. 194; Garitee v. Carter, 16 Md. 309; Hubbell v. Bisell, 2 Allen, 196; Blossom v. Van Amringe, 63 N. C. 65; Stevens v. Brown, 82 N. C. 460; Tyler v. Dyer, 13 Me. 41.

<sup>4</sup> Rixford v. Nye, 20 Vt. 132.

<sup>5</sup> Adams v. Adams, 8 N. H. 82; Hagan v. Addis, 14 N. J. L. 333; Sweet v. Matthewson, 1 R. I. 420; Culpepper v. Gilliam, 9 Ired. 126; Buckley v. Ellmaker, 13 Serg. & R. 71; Gibson v. Powell, 4 Smedes & M. 712; Shearer v. Handy, 22 Pick. 417; McCormick v. Gray, 13 How. 26; Philbrick v. Preble, 18 Me. 255; 36 Am. Dec. 718; Lyde v. Rodgers, 5 Wheat. 394; Sawyer v. Freeman, 35 Me. 542; De Groot v. United States, 5 Wall. 419; Boynton v. Frye, 33 Me. 216; Thrasher v. Haynes, 2 N. H. 429; Bullet v. Musgrave, 3 Gill, 31; Bullock v. Bergman, 46 Md. 270; White v. Arthur, 59 Cal. 33. In Nichols v. Renasselaer Ins. Co., 22 Wend. 127, it is said: "An award may be good in part and bad in part, and the vicious will not overthrow the good, unless there is such a connection between them that injustice will be

**ILLUSTRATIONS.** — An award may be binding on a portion of the parties, and not on the residue. Thus where adult and

done if one part stands while the other fails: 13 Johns. 264; 1 Cow. 117; 2 Cow. 638. If the same party is required to do several things, and as to some of them the award is bad on the ground of uncertainty, or because the arbitrators have exceeded their powers, this can furnish no good reason for holding the party discharged as to those things which are well awarded. But where the good and the bad relate to different parties, and the void part of the award is the consideration or recompense of the thing awarded on the other side, the whole award must fail. It would be manifestly unjust to compel one party to perform the award, when he cannot have the benefit or advantage which the arbitrators intended he should receive as an equivalent: *Pope v. Brett*, 2 Saund. 292, and note 1; *Schuyler v. Van der Veer*, 2 Caines, 235; *Lee v. Elkins*, 12 Mod. 587, 589; *Kyd on Awards*, 244-248, 259, 287; *Watson on Arbitration and Award*, 131, 135, 138. But in cases falling within this rule, an offer to perform that part of the award which is void for uncertainty, or because it is out of the submission, would perhaps remove the objection: *Lee v. Elkins*, 12 Mod. 587, 589; *Kyd on Awards*, 259, 287." In *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. Rep. 486, the court said: "It is an elementary principle in the law of arbitrament and award that an award may be good in part and bad in part, and that in certain conditions the valid part may be sustained, and may support an action for breach of the promise to perform the general award: *Pope v. Brett*, 2 Saund. 292; *Foster v. Durant*, 2 Cush. 544; *Caldwell on Arbitration*, 106, 130; *Lyle v. Rodgers*, 5 Wheat. 394; *Schuyler v. Van der Veer*, 2 Caines, 240. But those are cases where the subject appears clearly capable of being separated. It must clearly appear that the void part is not only disconnected and distinct from the valid parts in itself, but that it would not have affected the decision of the arbitrators in other respects, so that the void part being rejected, the remaining parts will yet express the

judgment of the arbitrators truly: *Caldwell on Arbitration*, 130, note 1, and authorities cited; or in the language of Mr. Chief Justice Marshall (5 Wheat. 409), 'if that part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void.' And he enforces the principle by this illustration: 'If A be directed to pay B one hundred dollars, and also to do some other act not well enough defined to be obligatory, there is no reason why B should not have his one hundred dollars because he cannot also get that other thing which was intended for him. But if A be directed to pay B one hundred dollars, and B to do something for the benefit of A, which is not so defined as to enable A to obtain it, there is much reason why A should not pay B the one hundred dollars, since he cannot obtain that which the arbitrators as much intended he should receive as that he should pay the sum awarded against him.' In *Pope v. Brett*, 2 Saund. 292, the award was that Pope should be paid by Brett the money due to Pope as well for task work as for day work, and then Pope should pay to Brett twenty-five pounds, and mutual releases were also awarded. It was admitted that the award of payment for task work and day work was void for uncertainty, but it was contended that the award was good for the residue. But the court said that 'if the clause of task work and day work be void, as it is admitted to be, the whole award is void; for it appears that William Pope was awarded to pay the twenty-five pounds, and to give a general release, upon a supposition by the arbitrator that he should be paid the task work and day work by virtue of that award, and that not being so, it was not the intention of the arbitrators, as appears by the award itself, that he should pay the money and give a general release, and yet receive nothing for the task work and day work, as by reason of the uncertainty of the award in that part he could not.' And in his note of this case Sergeant Williams says: 'If by the nullity of the award in any

minor heirs, the latter acting by their guardian *ad litem*, have submitted with the administrator, the latter's course of administration, to arbitrators, and approved of their award, the adults will be bound, but not the minors: *Fort v. Battle*, 21 Miss. 133.

§ 3390. **Award Final and Conclusive — Merger of Claims.**—An award, when valid, operates as a final and conclusive judgment between the parties as to all matters determined by it.<sup>1</sup> An award of arbitrators, unappealed from, has the same legal effect by way of estoppel by judgment as the verdict of a jury and a judgment thereon under an issue strictly made up.<sup>2</sup> It operates as a merger of the original claim.<sup>3</sup> But if the award is void, the original cause of action stands;<sup>4</sup> or if the award fail;<sup>5</sup> or if it was published on the express condition that neither party was to be bound;<sup>6</sup> or where the matter is not a subject of arbitration, or is a specialty, and the submission is by parol;<sup>7</sup> or where it does not appear with reasonable certainty, from a submission and award, that the rights

part, one of the parties cannot have the advantage intended him as a recompense or consideration for that which he is to do to the other, the award is void in the whole.' See also *York and Cumberland R. R. v. Myers*, 18 How. 246; *Boynton v. Frye*, 33 Me. 219; *Sawyer v. Freeman*, 35 Me. 546; *Price v. Popkin*, 10 Ad. & E. 145."

<sup>1</sup> *Coleman v. Wade*, 6 N. Y. 44; *Bannel v. Pinto*, 2 Conn. 431; *Wheeler v. Van Houton*, 12 Johns. 311; *Girdler v. Carter*, 47 N. H. 305; *Fideler v. Cooper*, 19 Wend. 285; *Varney v. Brewster*, 14 N. H. 49; *Johnson v. Noble*, 13 N. H. 286; 38 Am. Dec. 485; *Greene v. Darling*, 5 Mason, 201; *Wright v. Bolton*, 8 Ala. 548; *Shackelford v. Purket*, 2 A. K. Marsh. 435; 12 Am. Dec. 422; *Speer v. McChesney*, 2 Watts & S. 233; *Ennos v. Pratt*, 26 Vt. 630; *Rogers v. Holden*, 13 Ill. 293; *Jessiman v. Haverhill Iron Co.*, 1 N. H. 68; *Preston v. Whitcomb*, 11 Vt. 47; *Keaton v. Mulligan*, 43 Ga. 308; *Hadaway v. Kelly*, 78 Ill. 286; *Young v. Kinney*, 48 Vt. 72; *Smith v. Brandon Kaolin Co.*, 52

Vt. 469; *Auding v. Levy*, 60 Miss. 487; *Morse v. Bishop*, 55 Vt. 231. Where parties agree to have timber estimated by a surveyor, his estimate is binding, in the absence of corruption or gross negligence on his part: *Oakes v. Moore*, 24 Me. 214; 41 Am. Dec. 379.

<sup>2</sup> *Lloyd v. Barr*, 11 Pa. St. 41.

<sup>3</sup> *Coleman v. Wade*, 6 N. Y. 44; *Dinen v. Getchell*, 55 Me. 241; *Varney v. Brewster*, 14 N. H. 49; *Girdler v. Carter*, 47 N. H. 305; *Armstrong v. Masten*, 11 Johns. 189; *Curley v. Dean*, 4 Conn. 259; 10 Am. Dec. 140; *Tavis v. Tevis*, 4 T. B. Mon. 46; *Evans v. McKinsey*, 6 Litt. 262; *Briggs v. Brewster*, 23 Vt. 100; *Wiberly v. Matthews*, 91 N. Y. 648; *Groat v. Pracht*, 31 Kan. 656.

<sup>4</sup> *Mayo v. Butler*, 1 Barb. 325; *Hart v. Lauman*, 29 Barb. 410; *Morton v. Cameron*, 3 Rob. (N. Y.) 189.

<sup>5</sup> *Haggart v. Morgan*, 5 N. Y. 422; 55 Am. Dec. 350.

<sup>6</sup> *Sartwell v. Horton*, 28 Vt. 370.

<sup>7</sup> *Logsdon v. Roberts*, 3 T. B. Mon. 255.

of a party which he seeks to enforce in an action were submitted to the arbitrators, or ascertained and determined by the award.<sup>1</sup> The original cause of action will not be extinguished by an award which finds a certain sum of money to be due on a mortgage, and extends the time of its payment.<sup>2</sup> Where the award finds for a party, with a condition that the other party shall first do something, performance by the latter must be shown before the award can be pleaded in bar.<sup>3</sup>

**ILLUSTRATIONS.**—In a controversy, the parties agree to submit certain legal questions to the decision of a referee, and one of the parties afterwards sues the other, and the suit concerns the same subject-matter on which the award was rendered. *Held*, that the decision of the arbitrator is the law governing the case: *Lunsford v. Smith*, 12 Gratt. 554. An arbitrator was chosen by two partners on dissolution to complete the firm business, to collect dues and pay debts, settle all disputes between themselves, and present an account showing the amount due either partner. *Held*, that no negligence on his part as agent of both parties in failing to collect debts could affect the validity of his award: *Russell v. Smith*, 87 Ind. 457.

**§ 3391. Award Final as to All Matters Submitted—Different Rule in Some States.**—In England, after the award has been made, no action can be maintained upon any demand or matter within the scope of the submission, even though it was not presented to the arbitrators or decided by them.<sup>4</sup> In the United States the rulings on this question are not in accord. In New York it is held that the award is a bar as to demands included in the submission, but not presented to the arbitrators.<sup>5</sup> And the same

<sup>1</sup> *Hopson v. Doolittle*, 13 Conn. 236.

<sup>2</sup> *Howett v. Monical*, 25 Ill. 122.

<sup>3</sup> *Com. v. Pejepsct Props.*, 7 Mass. 399.

<sup>4</sup> *Dunn v. Murray*, 9 Barn. & C. 780; *Dicas v. Jay*, 6 Bing. 519; *Smalley v. R. R. Co.*, 2 Hurl. & N. 158; *Clegg v. Dearden*, 12 Q. B. 576; *Smith v. Johnson*, 15 East, 213. Though relief might be had in equity where the arbitrators by accident or mistake had

neglected to consider a claim: *Brophy v. Holmes*, 2 Molloy, 1.

<sup>5</sup> *Fidler v. Cooper*, 19 Wend. 235; *Wheeler v. Van Houten*, 12 Johns. 311; *Coleman v. Wade*, 6 N. Y. 44; *Howard v. Cooper*, 1 Hill, 44; *Brazill v. Isham*, 12 N. Y. 9; 1 E. D. Smith, 437; *Emmet v. Hoyt*, 17 Wend. 410; *Owen v. Boerum*, 23 Barb. 187. Thus in *Ott v. Schroepfel*, 5 N. Y. 486, it is said: "An award made under a general sub-

rule has been followed in other states.<sup>1</sup> On the other hand, in Massachusetts and some other states, the award is only a bar as to demands and matters presented to and determined by the arbitrators.<sup>2</sup>

**§ 3392. Award of Chattels Vests Title.**—An award of chattels vests the property in the party to whom they are awarded at once,<sup>3</sup> unless subject to a condition precedent to be first performed by the other.<sup>4</sup>

**§ 3393. But not Award of Land.**—But an award of land does not vest title in the party. It acts simply as an estoppel to prevent the other from setting up title.<sup>5</sup>

**§ 3394. Effect of Award as to Strangers to Submission.**—As a rule, an award is inoperative both in favor of and as

mission is final as to matters within the submission, although not brought to the notice of the arbitrator nor embraced in his award. The parties are bound to claim before the arbitrator all demands coming within the scope of the submission; and if they fail to do so, they will be concluded from ever after asserting such demands."

<sup>1</sup> *Robinson v. Morse*, 26 Vt. 392; *Briggs v. Brewster*, 23 Vt. 100; *Shackelford v. Purket*, 2 A. K. Marsh. 435; 12 Am. Dec. 432; *McJinsey v. Traverser*, 1 Stew. 244; 18 Am. Dec. 43; *Stipp v. Washington Hall Co.*, 5 Blackf. 473; *Green v. Danby*, 12 Vt. 338; *Seeley v. Pelton*, 63 Ill. 101. An award that nothing was due from either party to the other is a good defense against all claims due before the submission: *Johnson v. Knowlton*, 35 Me. 467.

<sup>2</sup> *Mt. Desert v. Tremont*, 75 Me. 252; *North Yarmouth v. Cumberland*, 6 Greenl. 21; *Birby v. Whitney*, 5 Greenl. 192; *Whitemore v. Whitemore*, 2 N. H. 26; *Webster v. Lee*, 5 Mass. 334; *Edwards v. Stevens*, 1 Allen, 315. Unless the party deliberately refuses, on request, to present a demand embraced in the submission to the arbitrators: *Warfield v. Holbrook*, 20 Pick. 531.

<sup>3</sup> *Girdler v. Carter*, 47 N. H. 305.

<sup>4</sup> *Hunter v. Rice*, 15 East, 100.

<sup>5</sup> *Sellick v. Addams*, 15 Johns. 197; *Shepard v. Ryers*, 15 Johns. 497; *Shelton v. Alcox*, 11 Conn. 240; *Gray v. Berry*, 9 N. H. 473; *Girdler v. Carter*, 47 N. H. 305; *Page v. Foster*, 7 N. H. 392; *Goodridge v. Dustin*, 5 Met. 363; overruling *Whitney v. Holmes*, 15 Mass. 152; *Cox v. Jagger*, 2 Cow. 638; 14 Am. Dec. 522. In *Jackson v. Gager*, 5 Cow. 387, it is said: "An award, whether it relates to the title, the possession, or the location or boundaries of land, has not the operation of a conveyance. But the parties are concluded by their agreement from disputing the location, or boundaries, or title, as settled by the arbitrators. Its operation is in the nature of an estoppel: *Doe v. Rosser*, 3 East, 15; *Hunter v. Rice*, 15 East, 100; *Calhoun's Lessee v. Dunning*, 4 Dall. 120; *Lessee of Dixon v. Morehead*, Addis. 216, 219. The award in such cases is not offered as evidence of title, but to prevent either party to it from setting up a title, etc., which had been negotiated by the award: *Kyd on Awards*, Phila. ed. 1808, 62, note d; *Sellick v. Addams*, 15 Johns. 197; *Shepard v. Ryers*, 15 Johns. 497, and cases there cited; *Cox v. Jagger*, 2 Cow. 650."

against a stranger to the submission. It is not admissible in evidence against him,<sup>1</sup> though it may be evidence in his favor.<sup>2</sup> An arbitrator has no authority to award as to persons not parties to the submission or their property.<sup>3</sup> Where A and B submit to arbitration a suit between C and D, an award in that suit is not binding upon the parties to the submission.<sup>4</sup> An award requiring one of the parties to the submission to cause a third person, whom it does not appear he has any right to dispossess, to deliver the possession of land to the other party, is void.<sup>5</sup> If one of the holders of a joint promissory note and one of the makers submit to arbitration the question whether the note is valid as to such maker, and the arbitrators award that it is not, the award will not bar a suit by all the holders against all the makers of the note.<sup>6</sup> If parties to a suit at law submit the subject-matter thereof to arbitration, and include in the submission separate matters, one of which affects the rights of a third person, an award in favor of the defendant as to the subject-matter of the suit will be a bar to the further prosecution of the action, although it may not be binding upon such third person.<sup>7</sup> A stranger may, however, by his acts, bring himself within the operation of an award.<sup>8</sup> Thus where persons not parties to the suit agreed in writing to the arbitration, it was held that they thereby became parties to the suit, and that the award was binding.<sup>9</sup> And if the parties comprehended in the award were in contemplation of the submission, though not directly parties to it, the

<sup>1</sup> Morse on Arbitration and Award, 519, 520; Collins v. Freas, 77 Pa. St. 493; Chapman v. Champion, 2 Day, 101; Wyatt v. Benson, 23 Barb. 327; 4 Abb. Pr. 182; Dayton v. District of Columbia, 18 Ct. of Cl. 13.

<sup>2</sup> Morse on Arbitration and Award, 519, 520.

<sup>3</sup> Morse on Arbitration and Award, 202, 203; Dale v. Mothram, 2 Barn. 291; Martin v. Williams, 13 Johns. 264.

<sup>4</sup> Vosburgh v. Bame, 14 Johns. 302.

<sup>5</sup> Martin v. Williams, 13 Johns. 264.

<sup>6</sup> Woody v. Pickard, 8 Blackf. 55.

<sup>7</sup> Sears v. Vincent, 8 Allen, 507.

<sup>8</sup> George v. Johnson, 45 N. H. 456; Humphreys v. Gardner, 11 Johns. 61; Sears v. Vincent, 8 Allen, 507; McGhee v. McGhee, 12 Ala. 83.

<sup>9</sup> Shultz v. Lempert, 55 Tex. 273.

award is good.<sup>1</sup> An award as to a bond may, by extending time of payment, release sureties not parties to the submission.<sup>2</sup> And the rights of a party under an award may pass to a stranger by assignment.<sup>3</sup> Where the submission makes no reference to the assigns of the parties thereto, an award which purports to bind a party and his assigns to an annual payment is invalid.<sup>4</sup> An award cannot be impugned by a third person.<sup>5</sup> And a party cannot object to parts of an award which affect others, and not himself.<sup>6</sup>

**§ 3395. Voidable Award may be Ratified by the Parties.**—A valid award is binding on the parties at once, and needs no ratification by them.<sup>7</sup> Even a voidable award may be ratified and made valid by the parties;<sup>8</sup> and this, without any new consideration.<sup>9</sup> Where the parties to an arbitration enter into an agreement founded on the award, they ratify it.<sup>10</sup> If a defendant defeat a suit by relying on a submission and award in the case, he cannot afterwards object in a suit upon the award that the submission was invalid.<sup>11</sup> The objection that an award is not certain or final should be made before judgment is pronounced thereon.<sup>12</sup> After long acquiescence, an award will not be set aside, though the arbitrators exceeded their authority.<sup>13</sup> So where a party has paid an award,

<sup>1</sup> *Macon v. Crump*, 1 Call, 575.

<sup>2</sup> *Coleman v. Wade*, 6 N. Y. 44.

<sup>3</sup> *Hodge v. Sanders*, 17 Pick. 470; *Shelton v. Alcox*, 11 Conn. 240.

<sup>4</sup> *Littlefield v. Smith*, 74 Me. 387.

<sup>5</sup> *Penniman v. Patchin*, 6 Vt. 325.

<sup>6</sup> *Netleton v. Buckingham*, 1 Root, 149.

<sup>7</sup> *Sears v. Vincent*, 8 Allen, 507; *Hopson v. Doolittle*, 13 Conn. 236.

<sup>8</sup> *Culver v. Ashley*, 19 Pick. 300;

*Jones v. Phoenix Bank*, 8 N. Y. 228;

*George v. Johnson*, 45 N. H. 456;

*Tyler v. Stephens*, 7 Ga. 278; *Hays v.*

*Hays*, 23 Wend. 383; *Willingham v.*

*Harrell*, 36 Ala. 583; *Christman v.*

*Moran*, 9 Pa. St. 487; *Hennigh v.*

*Kramer*, 50 Pa. St. 530; *Cross v. Cross*, 17 N. J. Eq. 288; *Noyes v. Gould*, 57

N. H. 20; *Phillips v. Couch*, 66 Mo.

219; *Reynolds v. Roebuck*, 37 Ala.

408; *Estice v. Cockerill*, 26 Miss. 127;

*Hooge v. Morse*, 31 Cal. 128; *Forqueron*

*v. Van Meter*, 9 Ind. 270. That a void

award cannot be ratified is held in

some cases: *Wiles v. Peck*, 26 N. Y.

42; *Bullitt v. Musgrove*, 3 Gill, 31.

<sup>9</sup> *Ellison v. Weathers*, 78 Mo. 115.

<sup>10</sup> *Bentley v. Davis*, 21 Neb. 685.

<sup>11</sup> *Stipp v. Washington Hall Co.*, 5

Blackf. 473.

<sup>12</sup> *Burrows v. Guthrie*, 61 Ill. 70.

<sup>13</sup> *McDaniel v. Bell*, 3 Hayw. (Tenn.)

258.

and acquiesced in it for years, chancery will not disturb it.<sup>1</sup> Newly discovered evidence is no ground for setting aside an award, where the party has been guilty of laches.<sup>2</sup> An award may be abandoned by consent of the parties, who thereupon will be remitted to their original rights.<sup>3</sup> An award repudiated by both parties cannot afterwards be set up by one of them.<sup>4</sup>

**§ 3396. Performance of Award.** — Performance of the award is required of the parties according to its orders and intent.<sup>5</sup> A demand is not necessary to sustain an action on an award, except where the award is to pay money on request.<sup>6</sup> Where it is for the payment of money unconditionally, the party becomes liable to pay after publication, without any demand.<sup>7</sup> If an award directs one of two things to be done in the alternative, and one of them is uncertain or impossible, it is incumbent on the party to perform the other.<sup>8</sup> On a parol award, if there be a tender of performance and a refusal of the tender, this is equivalent to a performance.<sup>9</sup>

**§ 3397. Where Performance by One Condition Precedent to Performance of Another.** — “Where by an award acts are to be performed by both parties, and those acts are distinct and independent, the one not a condition precedent to the other, either party is guilty of a breach of the award who does not perform all he is appointed to do, although the opposite party may have entirely neglected to obey the award on his side.”<sup>10</sup> But if the acts ordered to be done by one party are dependent on acts ordered to be done by the other, the former cannot sue until he has

<sup>1</sup> *McRae v. Buck*, 2 Stew. & P. 155; *McDaniel v. Bell*, 3 Hayw. (Tenn.) 258; *Hite v. Hite*, 1 B. Mon. 177; *Willingham v. Harrell*, 36 Ala. 583; *Clark v. Thurmond*, 46 Ga. 97.

<sup>2</sup> *Dulin v. Caldwell*, 29 Ga. 362.

<sup>3</sup> *Eastman v. Armstrong*, 26 Ill. 216.

<sup>4</sup> *Marshall v. Piles*, 3 Bush. 249.

<sup>5</sup> *Preston v. Whitcomb*, 11 Vt. 47.

<sup>6</sup> *Parsons v. Aldrich*, 6 N. H. 264.

<sup>7</sup> *Thompson v. Mitchell*, 35 Me. 281.

<sup>8</sup> *McDonald v. Arnout*, 14 Ill. 58.

<sup>9</sup> *Smith v. Stewart*, 5 Ind. 220.

<sup>10</sup> *Girdler v. Carter*, 47 N. H. 305; *Pickering v. Pickering*, 19 N. H. 389; *Loring v. Whittemore*, 13 Gray, 228; *Nichols v. Rensselaer Ins. Co.*, 22 Wend. 125.

shown performance on his part.<sup>1</sup> Where an award directs each party to release certain estate to the other, and the acts are to be done within a certain time, they are to be held concurrent, and neither can demand performance without offering performance on his own part.<sup>2</sup> But where arbitrators award a sum of money, and mutual releases between the parties, a tender of a release is not necessary before bringing an action for the money.<sup>3</sup>

ILLUSTRATIONS. — Arbitrators awarded: 1. That A pay to B a certain sum; 2. That B execute releases to A. *Held*, that the payment was a condition precedent to the release: *Hoffman v. Hoffman*, 26 N. J. L. 175. An award directed the plaintiff to pay a certain sum, and the defendant thereupon to return certain property; upon non-payment the defendant was to sell the property to raise the amount due him. *Held*, that the plaintiff could not recover the value of the property without first performing the award: *Leitch v. Beaty*, 23 Ill. 642. A lessor and lessee agreed in writing that the lessee should leave the leased premises at the end of the year, and relinquish a remaining year of his lease, and submitted to arbitration the question what damages the lessor should pay the lessee for so doing, and the arbitrators awarded a certain sum to be paid at the end of the year. *Held*, that the award was not conditional on the lessee's leaving the premises according to the agreement: *White v. Fox*, 29 Conn. 570.

**§ 3398. Award may be Enforced by Action at Law.** — An award may be enforced by action upon it at law.<sup>4</sup> So an award under a statute may be enforced at law.<sup>5</sup> The mode of proceeding by arbitration provided by statute

<sup>1</sup> *Shearer v. Handy*, 22 Pick. 417; *Pomroy v. Gold*, 2 Met. 500; *Matthews v. Matthews*, 2 Curt. 105; *Huy v. Brown*, 12 Wend. 591; *Lamphire v. Cowan*, 39 Vt. 420; *Jesse v. Cater*, 28 Ala. 475; *Lincoln v. Cook*, 3 Ill. 61; *Hugg v. Collins*, 18 N. J. L. 294.

<sup>2</sup> *McNeil v. Magee*, 5 Mason, 244.

<sup>3</sup> *Dudley v. Thomas*, 23 Cal. 365.

<sup>4</sup> *Morse on Arbitration and Award*, 574; *Dickerson v. Tyner*, 4 Blackf. 253; *Burnside v. Whitney*, 24 Barb. 632; 21 N. Y. 148; *McManus v. McCulloch*, 6 Watts, 357; *Blanchard v. Murray*, 15 Vt. 548; *Woodbury v. Northy*, 3 Greenl. 85; 14 Am. Dec.

214; *North Yarmouth v. Cumberland*, 6 Greenl. 21; *Efner v. Shaw*, 2 Wend. 517; *Bates v. Curtis*, 21 Pick. 247; *Bayne v. Morris*, 1 Wall. 97; *Searce v. Searce*, 7 Ind. 256; *Merritt v. Merritt*, 11 Ill. 565; *Day v. Hooper*, 51 Me. 178; *Pierson v. Hobbs*, 33 N. H. 27; *West v. Stanley*, 1 Hill, 69; *Parrish v. Strickland*, 7 Jones, 504; *Stevens v. Record*, 56 Me. 488. The remedy to recover the amount of an award is upon the award, and not upon the submission: *Rank v. Hill*, 2 Watts & S. 56; 37 Am. Dec. 483.

<sup>5</sup> *Low v. Nolte*, 16 Ill. 475.

is not exclusive; an award upon a submission valid at common law may support an action.<sup>1</sup> Although an unauthorized and void judgment may have been entered upon an award, the award itself may be good and valid, and in such a case an action of debt upon the award may be sustained.<sup>2</sup> Where a bond is given to abide by an award, a party, upon the rendition of the award in his favor, may sue on the award or on the bond. In such case, if he sues on the award, and obtains satisfaction, he holds the same position as regards the bond as if the award had been paid without suit.<sup>3</sup> That the submission was under seal does not render it necessary that an action to recover the amount of the award should be covenant.<sup>4</sup> An award under a statutory submission, the acceptance of which was denied by the court to which it was returnable, cannot be sued upon as an award at common law.<sup>5</sup> An action will not lie upon an award founded on the composition of a felony.<sup>6</sup> An award cannot be sued on until after publication;<sup>7</sup> but it may be enforced in part only where the parts are separable.<sup>8</sup> An award may be given in evidence under the general issue.<sup>9</sup>

ILLUSTRATIONS.—Two neighbors submit their respective claims for damages, growing out of depredations upon each others' crops by their cattle, respectively to arbitrament, and the arbitrators only consider the claims of one, and award him damages, and refuse to consider or hear evidence as to the claims of the other. *Held*, that the latter may pay the award and then maintain a suit upon his original claim: *Pritchard v. Daly*, 73 Ill. 523.

§ 3399. **Defenses to Action.**—To an action on the award the misconduct of the arbitrators cannot be set

<sup>1</sup> *Tynan v. Tate*, 3 Neb. 388.

<sup>2</sup> *Hume v. Hume*, 3 Pa. St. 144.

<sup>3</sup> *Nolte v. Lowe*, 18 Ill. 437.

<sup>4</sup> *Averill v. Buckingham*, 36 Conn. 359. *Contra*, *Tullis v. Sewell*, 3 Ohio, 511, 513.

<sup>5</sup> *Allen v. Chase*, 3 Wis. 249.

<sup>6</sup> *Levy v. Ross*, T. U. P. Charlt. 293.

<sup>7</sup> *Varney v. Brewster*, 14 N. H. 49.

<sup>8</sup> *Lamphire v. Cowan*, 39 Vt. 420; *Schuyler v. Van der Veer*, 2 Caines, 235.

<sup>9</sup> *Winne v. Elderkin*, 2 Finn. 248; 1 Chand. 219; 52 Am. Dec. 159.

up as a defense.<sup>1</sup> Such misconduct furnishes ground for an application to the court to set the award aside; but in a suit upon it, only defects and errors apparent upon the record can be pleaded.<sup>2</sup> No evidence can be given to show a mistake in an award;<sup>3</sup> and it is no defense that the amount is more than by a previous agreement was to have been paid.<sup>4</sup> But the defendant may avail himself of any defense appearing on the face of the award and submission, or any defense that would defeat any other written agreement.<sup>5</sup> He may show in defense that the arbitrators omitted to consider and pass upon certain questions submitted to them;<sup>6</sup> or that there was an error in computation.<sup>7</sup>

§ 3400. **Or Suit in Equity.**—Specific performance of an award will be enforced in equity, where no adequate remedy exists at law.<sup>8</sup> But an award for the payment of

<sup>1</sup> Morse on Arbitration and Award, 542; Hough v. Beard, 8 Blackf. 158; Morewood v. Jewett, 2 Rob. (N. Y.) 496; Finley v. Finley, 11 Mo. 624; Elkins v. Page, 45 N. H. 310; Mitchell v. Bush, 7 Cow. 185; Briggs v. Smith, 20 Barb. 409; Shepherd v. Briggs, 28 Vt. 81. *Contra*, Duren v. Getchell, 55 Me. 241; Brown v. Bellows, 4 Pick. 192; Bean v. Farnam, 6 Pick. 269; Strong v. Strong, 9 Cush. 560.

<sup>2</sup> Truesdale v. Straw, 58 N. H. 207.

<sup>3</sup> Briggs v. Smith, 20 Barb. 409.

<sup>4</sup> Saunders v. Heaton, 12 Ind. 20.

<sup>5</sup> Wilkes v. Cotter, 28 Ark. 519.

<sup>6</sup> Sharp v. Woodbury, 18 Iowa, 195.

<sup>7</sup> Robertson v. Wells, 28 Miss. 90.

<sup>8</sup> McNeil v. Magee, 5 Mason, 244; Page v. Foster, 7 N. H. 392; Smith v. Smith, 4 Rand. 95; McNear v. Bailey, 18 Me. 251; Jones v. Boston Mill Corp., 4 Pick. 507; 16 Am. Dec. 358; Bouck v. Wilber, 4 Johns. Ch. 405; Penniman v. Rodman, 13 Met. 382; Caldwell v. Dickinson, 13 Gray, 365; Ballance v. Underhill, 4 Ill. 453; Pawling v. Jackman, 6 Litt. 1; Memphis etc. R. R. Co. v. Scraggs, 50 Miss. 285; Davis v. Havard, 15 Serg. & R. 165; 16 Am. Dec. 537; Akely v. Akely,

16 Vt. 450; Brown v. Burkenmeyer, 9 Dana, 159; 33 Am. Dec. 541; Burke v. Parker, 5 W. Va. 122. In Brown v. Burkenmeyer, 9 Dana, 159, 33 Am. Dec. 541, the court say: "We can perceive no just ground to distinguish the case of an award to convey, made upon a written submission, from an agreement to convey. The same moral obligation to convey, if the award was fairly made, would seem to rest upon the defendant, in the one case as in the other. And good faith would require that he should carry into effect and perform faithfully that which he had undertaken to perform, in the one case as well as in the other. And if he has not acquiesced in an award fairly made, by judges of his own choosing, in good conscience, he ought to acquiesce, and ought to convey, if there be no equitable objections to its execution. Nor will it do to say that the party desiring an enforcement of an award has his remedy at law, upon his bond of submission; the party to an agreement to convey has his remedy at law also; but in both cases the remedy at law is often very inadequate to the ends of justice. And in both

money merely can only be enforced at law.<sup>1</sup> Equity will not enforce specific performance of an award concerning real estate until the claimant has performed all his own part of the award, nor after long delay and laches, especially where circumstances have materially changed, and defendant has been injured; nor against purchasers, even with notice, if their vendor is dead or insolvent, so that they have no remedy over;<sup>2</sup> nor will it enforce performance of an uncertain or defective award.<sup>3</sup> By filing a bill to enforce an award, the complainant treats the award as a contract; and the defendant may show a mistake of the arbitrators in making up their award.<sup>4</sup>

ILLUSTRATIONS.—A and B were engaged in the tanning business, and disagreeing, submitted their disputes to arbitration. The award was that A was to receive one half of the skins in the yard, one half of the leather, and the use of one half of the vats. *Held*, that equity would enforce the award: *Kirksey v. Fike*, 27 Ala. 383; 62 Am. Dec. 768.

**§ 3401. Or Enforced as Judgment by Rule of Court. —**

Where the submission is made under a rule of court, or under a statute, the award is usually entered as a judgment of the court in the same way as on a verdict of a jury.<sup>5</sup> It is not necessary that the court give notice to the parties, or to either of them.<sup>6</sup> Judgment may be rendered on a report for a less sum than is therein awarded, if the prevailing party release the difference on the award.<sup>7</sup> But where the award is void for want of mutuality, the court cannot correct it and render judgment on it as cor-

cases more full and complete justice may be often done by a discreet exercise of the powers of the chancellor in the enforcement, specifically, of the undertaking of the parties."

<sup>1</sup> *Cannady v. Roberts*, 6 Ired. Eq. 422.

<sup>2</sup> *McNeil v. Magee*, 5 Mason, 244.

<sup>3</sup> *Cox v. Smyth, Hardin*, 411.

<sup>4</sup> *Ballance v. Underhill*, 4 Ill. 453.

<sup>5</sup> *Morse on Arbitration and Award*, 574; *Lamar v. Nicholson*, 7 Port. 158; *Mobile Bay Road Co. v. Yemil*, 29

Ala. 325; *Davis v. Forabee*, 34 Ala. 107; *Crook v. Chambers*, 40 Ala. 239; *Carsley v. Lindsay*, 14 Cal. 390; *Thorpe v. Starr*, 17 Ill. 199; *Whitis v. Culver*, 25 Iowa, 30; *Sargent v. Hampden*, 32 Me. 78; *Shriver v. State*, 9 Gill & J. 1; *Farrington v. Hamblin*, 12 Wend. 212; *Hollenback v. Fleming*, 6 Hill, 303; *Merritt v. Thompson*, 27 N. Y. 225; *Williams v. Craig*, 1 Dall. 313; *Duer v. Boyd*, 1 Serg. & R. 203.

<sup>6</sup> *Kelly v. Morse*, 3 Neb. 224.

<sup>7</sup> *Phelps v. Goodman*, 14 Mass. 252.

rected.<sup>1</sup> And interest on the amount of an award cannot be included in the judgment.<sup>2</sup> It is held in New York that, under the statutes relating to judgments upon awards, either of the parties may resort to the court named in the submission, to set aside the award, or to give judgment upon it; but this does not deprive them of their other remedies in chancery or at common-law, although they have agreed, by the submission under the statute, that a summary judgment be entered.<sup>3</sup> It is only when the submission and award are in conformity with the statute that courts can acquire jurisdiction over awards of arbitrators and enter judgment upon them.<sup>4</sup> If the parties to a suit not referable under the statute expressly consent, by a written agreement, that a rule of reference be entered, and that a judgment may be entered on the report of the referees, such judgment so entered is as valid as if entered on a verdict.<sup>5</sup> Judgment on the award is not granted as of course; and the party aggrieved by the award may defend himself against the motion for judgment, even though he neglected to apply in time to have the award vacated.<sup>6</sup> A demurrer is not admissible to an application for judgment. The only mode of contesting it is by an answer alleging some of the grounds of objection to the award mentioned in the statute.<sup>7</sup> An affidavit to prevent an award from becoming a judgment must contain a statement of facts, a setting forth of the circumstances, so that the court can say that if the facts are true, the mistake did occur, and was material. A mere general charge of "fraud, accident, mistake, or illegality" is not sufficient.<sup>8</sup> An award in favor of the plaintiff cures the same defects in the declaration

<sup>1</sup> *Conger v. James*, 2 Swan, 213.

<sup>2</sup> *Kendall v. Power Co.*, 36 Me. 19.

<sup>3</sup> *Burnside v. Whitney*, 21 N. Y. 148; 24 Barb. 632.

<sup>4</sup> *Low v. Nolte*, 15 Ill. 368; *Owens v. Withee*, 3 Tex. 161; *Crane v. Barry*, 47 Ga. 476.

<sup>5</sup> *Yates v. Russell*, 17 Johns. 461.

And see *Gibbs v. Berry*, 13 Ired. 368.

<sup>6</sup> *Shores v. Bowen*, 44 Mo. 396.

<sup>7</sup> *Martin v. Bevan*, 58 Ind. 282.

<sup>8</sup> *Shaifer v. Baker*, 38 Ga. 135.

which would be cured by a verdict.<sup>1</sup> If money only be awarded to be paid as then due, execution issues as in other cases of judgments.<sup>2</sup> If the award be prospective, by ordering money to be paid at some future period, or a specific act to be done, no execution will issue, but the remedy is by attachment, or action on the award; and if a benefit be to accrue or a right be made to depend on the performance of a condition, the party, if the condition be performed, is entitled to the same remedies to enforce the award; but if it be not performed, the benefit or right does not accrue.<sup>3</sup>

**§ 3402. Award may be Set Aside or Corrected in Equity.**—An award may be set aside by a court of equity; and a bill in equity for this purpose is frequently resorted to in the English courts. In the United States, however, if the objections to the award can be taken advantage of in a suit on the award, a court of equity will not interfere, except on some equitable ground, as fraud, accident, or mistake.<sup>4</sup> Equity will set aside an award on these grounds,

<sup>1</sup> *Dickerson v. Hays*, 4 Blackf. 44.

<sup>2</sup> *Commonwealth v. Pejepsout Proprietors*, 7 Mass. 399.

<sup>3</sup> *Com. v. Pejepsout Propors.*, 7 Mass. 399; *Skilling v. Coolidge*, 14 Mass. 43.

<sup>4</sup> *Mickles v. Thayer*, 14 Allen, 114; *Ferson v. Drew*, 19 Wis. 225; *Meloy v. Dougherty*, 16 Wis. 269; *Rand v. Redington*, 13 N. H. 72; 38 Am. Dec. 475; *Muldrow v. Norris*, 2 Cal. 74; 56 Am. Dec. 313; *Tracy v. Herrick*, 25 N. H. 381; *Burroughs v. David*, 7 Iowa, 154; *Howell v. Howell*, 26 Ill. 460; *Hurst v. Hurst*, 2 Wash. C. C. 127; *Flournoy v. Halcomb*, 2 Munf. 34; *Wheatley v. Martin*, 6 Leigh, 62; *Elliot v. Adams*, 8 Blackf. 103; *Tappan v. Heath*, 1 Paige, 293; *Bissel v. Morgan*, 56 Barb. 369; *Brandon v. Forest Co.*, 59 Pa. St. 187; *United States v. Farragut*, 22 Wall. 406; *Emerson v. Udall*, 13 Vt. 477; 37 Am. Dec. 604; per *Redfield, J.*: "Notwithstanding some early cases to the contrary, it is now, I apprehend, well settled that a court of equity will not examine into

the foundation of the judgment of a court of law upon any ground which either was tried or might have been tried in the court of law. The judgment of a court of law is conclusive upon all the world as to all matters within its cognizance. If a party fail there by not presenting his defense, when he should have done it, and but for his own neglect would have done it, he can have no redress in a court of equity; much less can he expect relief in a court of equity when he has had a full trial at law upon the very grounds which he now wishes to urge anew. For a court of equity to grant relief in any such case would be but to sit as a court of errors upon the proceedings of the courts of common law, which would be a very invidious, as well as a very unwarrantable, assumption. Equity has sometimes interfered to grant relief, when a party, by accident or mistake, without his own default, or by the fraud of the opposite party, has failed of an opportunity to present

even where the parties have stipulated not to appeal from the decision of the arbitrators.<sup>1</sup> A judgment upon an award of arbitrators may be impeached for fraud upon an answer or cross-petition to a petition by the administrator of the judgment debtor deceased, seeking an order to sell lands for payment of the judgment.<sup>2</sup>

Equity may inquire into awards made in a court of law, on the ground of fraud discovered after judgment on them.<sup>3</sup> The rules governing courts of equity in awarding new trials in actions at law on the ground of after-discovered evidence apply equally to motions to set aside an award on that ground.<sup>4</sup> Equity may rectify a mistake of arbitrators in omitting the name of the person from an award to whom certain land was to be conveyed, if the proof is clear and explicit as to what was intended by the arbitrators.<sup>5</sup> So equity will correct a mistake in an award,

his defense. So, too, when the ground of defense was exclusively of an equitable character, and such as would not avail the party at law. Beyond this, I know of no good ground upon which a court of equity could interfere to enjoin the party from pursuing a judgment at law. I am aware, however, that there may be found many cases, but not of a very high character for authority, which have gone somewhat beyond this. In the present case there is no pretense that the party did not have full opportunity to urge his defense in the court of law. The case was there fully tried upon its merits before the jury, questions of law reserved, and finally decided in this court. The question how far the matters passed upon by the arbitrators were within the submission, and how far the orator received legal and sufficient notice, were fully cognizable in a court of law. That was the proper tribunal, and the only proper tribunal, in which to urge any such defense. Those questions were there fully heard and determined against the orator. With that decision he must be content: *Bonner v. Liddell*, 5 Eng. Com. L. 20; *Bean v. Farnham*, 6 Pick. 269; *Matter of Cargey and Aitchison*, 16 Eng. Com. L. 80. But partiality or corruption

in the arbitrators, or fraud in the party in obtaining the award, are grounds of defense exclusively of equitable cognizance: *Wills v. Maccarmick*, 2 Wils. 148; *Braddick v. Thompson*, 8 East, 344. In the English practice, I conclude, all arbitrations are made rules of court, and any irregularity in the proceedings is remedied by application to the court to set aside the award. This is more convenient than a resort to chancery, which the party must there do, if he delay until suit brought upon the award: *Swinford v. Burn*, 5 Eng. Com. L. 438." The only mode of obtaining relief against an award, on the ground of fraud or corruption on the part of the arbitrators, is by bill in equity, unless the reference was by order of court in a pending suit, or under the statute, in which case such award may be set aside in a court of law: *Baltimore etc. R. R. Co. v. Polly*, 14 Gratt. 447.

<sup>1</sup> *Muldrow v. Norris*, 2 Cal. 74; 56 Am. Dec. 313. See *McClain v. Boyer*, 84 Pa. St. 417.

<sup>2</sup> *Conway v. Duncan*, 28 Ohio St. 102.

<sup>3</sup> *Waples v. Waples*, 1 Harr. (Del.) 392.

<sup>4</sup> *Adams v. Hubbard*, 25 Gratt. 129.

<sup>5</sup> *Williams v. Warren*, 21 Ill. 541.

where it is mutual, was acquiesced in by all the arbitrators, and where the award as made is not their award, but if corrected, would be the award of all of them.<sup>1</sup> A court of equity will set aside an award obtained by the perjury of a party to the submission;<sup>2</sup> or made under a submission agreed to by an administrator in the mistaken belief that his intestate had been served with protest;<sup>3</sup> or when an item had by mistake been charged twice;<sup>4</sup> or an award appointed under a mutual mistake of both parties, in supposing themselves bound by law to submit the matter in dispute to arbitration.<sup>5</sup> But not only error on the part of the arbitrators, but also injury resulting therefrom to the defeated party, must be shown.<sup>6</sup> An award will not be set aside because the arbitrators have omitted to determine some part of the matters submitted, nor because they have exceeded their powers, unless the error appears to have injured the party who complains.<sup>7</sup> Equity will not relieve one of the parties as to a matter which he forgot to lay before the arbitrators.<sup>8</sup> The court will grant an injunction to restrain an arbitration, if it appears that it is not probable or even possible that the arbitration can end in any result.<sup>9</sup> So an injunction was granted, at the instance of one of the parties to an arbitration, restraining an arbitrator from continuing to act, the court being of opinion that under the circumstances it was not probable that he would faithfully and honestly discharge his duty.<sup>10</sup>

**§ 3403. Or Vacated on Motion.**—An award may also be vacated on motion, where the submission has been

<sup>1</sup> *Eisenmeyer v. Santer*, 77 Ill. 515.

<sup>2</sup> *Craft v. Thompson*, 51 N. H. 536.

<sup>3</sup> *Bright v. Ford*, 11 Heisk. 252.

<sup>4</sup> *Thrasher v. Overby*, 51 Ga. 91.

<sup>5</sup> *Peisch v. Ware*, 4 Cranch, 347.

<sup>6</sup> See *Thompson v. Blanchard*, 2 Iowa, 44; *Tomlinson v. Hammond*, 8 Iowa, 40.

<sup>7</sup> *Davy v. Faw*, 7 Cranch, 171; *Pomroy v. Kibbee*, 2 Root, 92; *Daniels v. Willis*, 7 Minn. 374.

<sup>8</sup> *McJimsey v. Traversa*, 1 Stew. 244; 18 Am. Dec. 43.

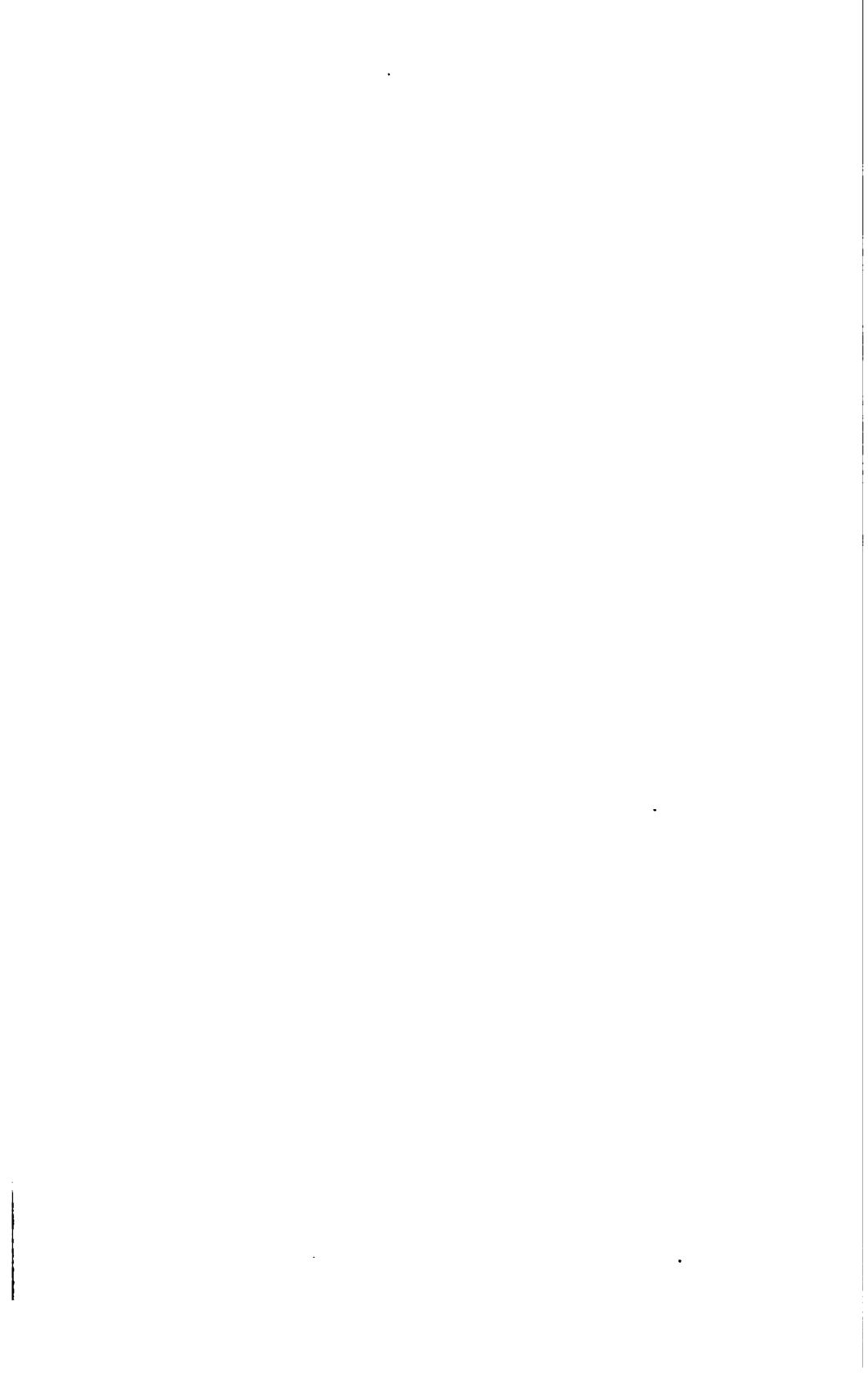
<sup>9</sup> *North London R. R. Co. v. R. R. Co.*, 47 L. T., N. S., 383.

<sup>10</sup> *Beddow v. Beddow*, 26 Week. Rep. 570; 47 L. J. Ch. Div. 588.

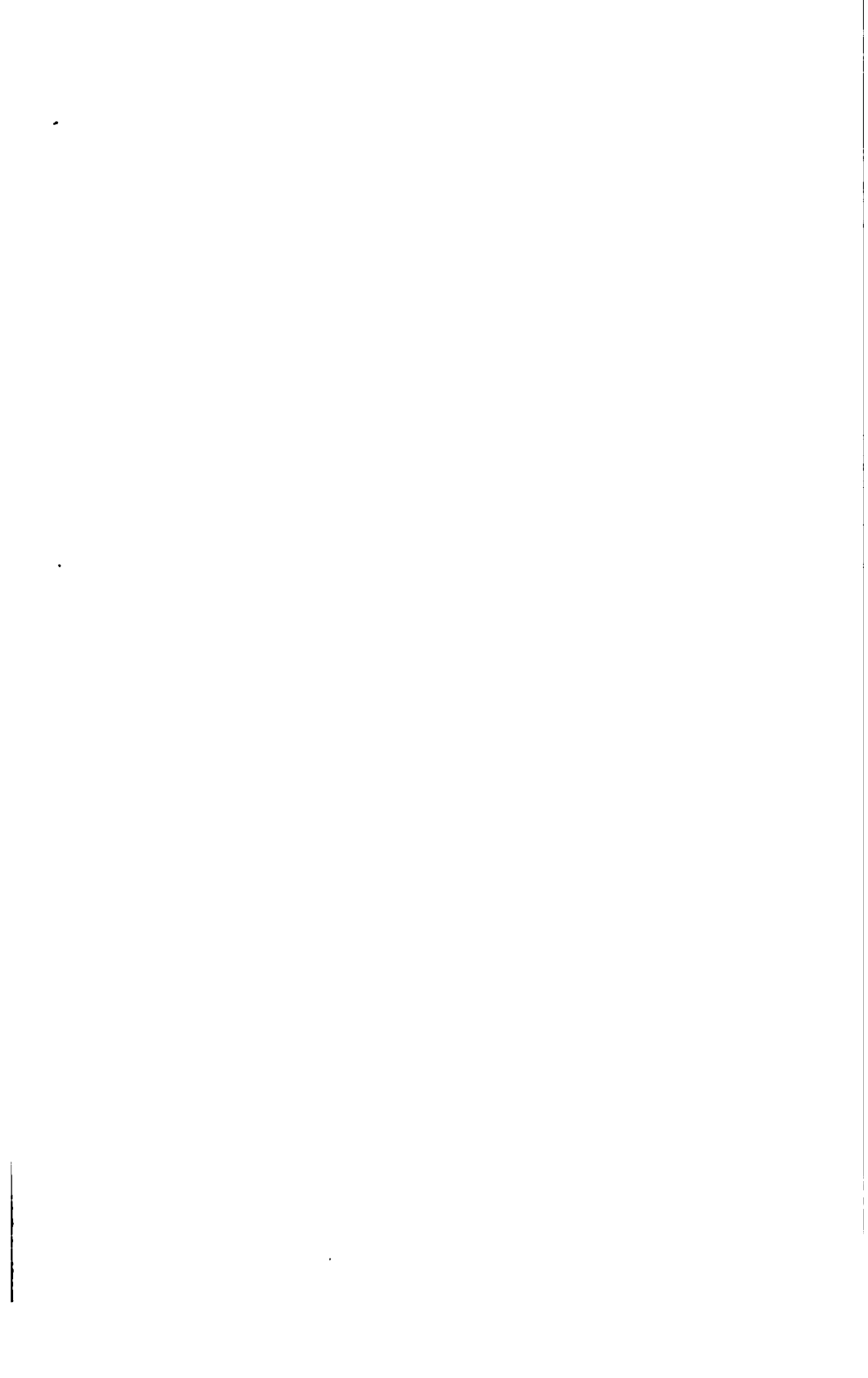
made by rule of court, or it is within the jurisdiction of the court by statute.<sup>1</sup> The same cause which would induce the court to set aside a verdict and grant a new trial will govern in the case of awards; and therefore, if it appear that there has been manifest injustice, or a plain and clear mistake, either in law or fact, the report will be set aside.<sup>2</sup>

<sup>1</sup> *Morse on Arbitration and Award*, *Aubel v. Ealer*, 2 Binn. 582, note; 612; *Muldrow v. Norris*, 2 Cal. 74; 56 *Graham v. Pence*, 6 Rand. 529; *Wiley Am. Dec.* 313. *v. Platter*, 17 Ill. 538.

<sup>2</sup> *Williams v. Craig*, 1 Dall. 313;



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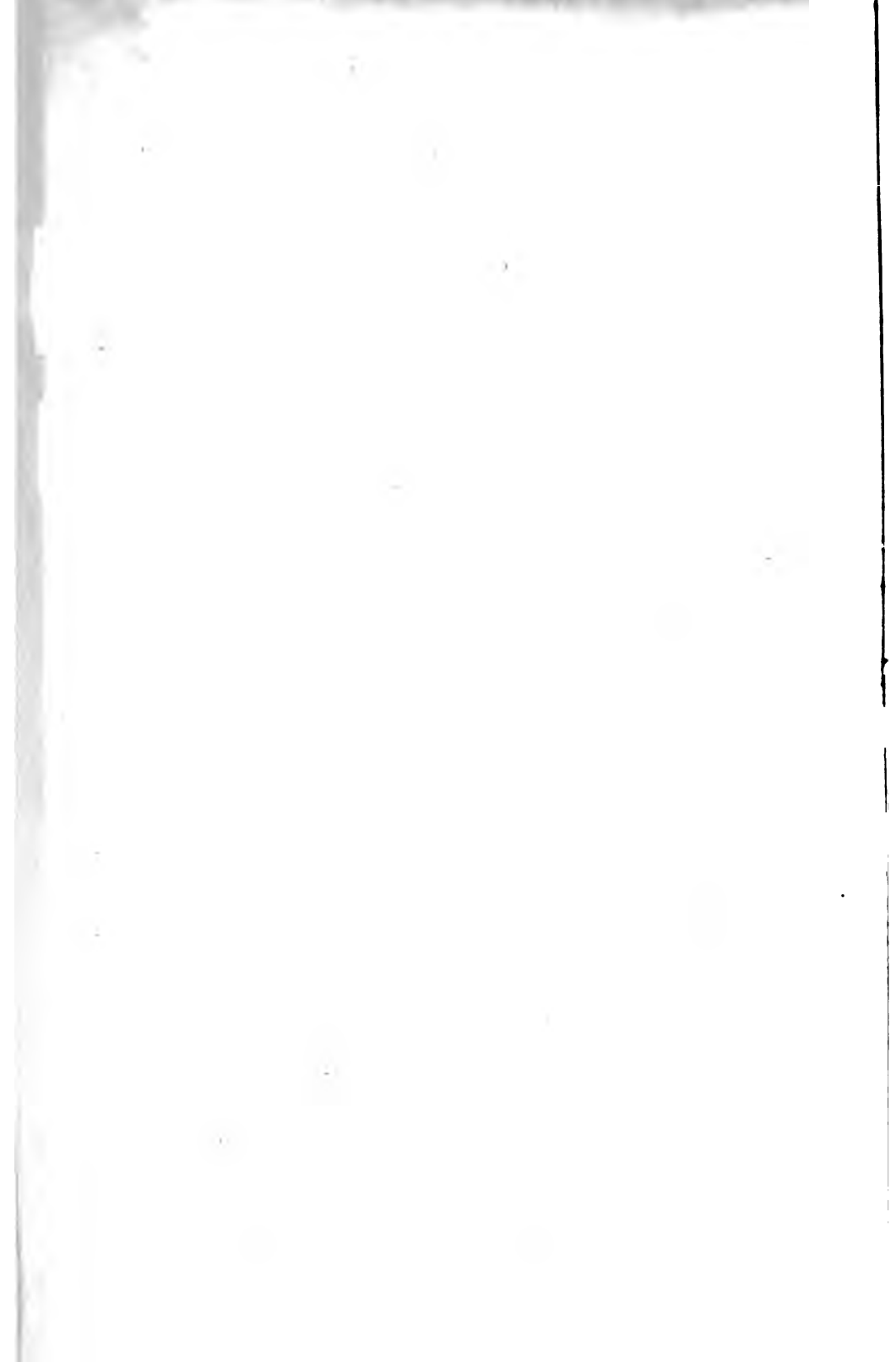
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